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Amos G. Russell,

Official Stenographer.

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January 30, 1913.

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COURT OF GENERAL SESSIONS OF THE PEACE

IN AND FOR THE COUNTY OF NEW YORK

PART FIVE.

47/1913  
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-----X  
THE PEOPLE OF THE STATE OF NEW YORK :

- against -

E L Y G E L L E R :

B e f o r e

HON. THOMAS C. T. CHAIN, J.

And a Jury.

-----X  
New York, Thursday, January 9th, 1913.

THE DEFENDANT IS INDICTED FOR MURDER IN THE FIRST DEGREE.

INDICTMENT FILED NOVEMBER 21st, 1912.

A p p e a r a n c e s :

ISIDOR WASSERVOGEL, Esq., Assistant District Atty.,

For The People.

HON. GEORGE M. CURTIS, and

AGUSTIN DERBY, Esq.,

For the Defendant.

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THE DEFENDANT IS ARRAIGNED AT THE BAR.  
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THE CLERK OF THE COURT: Ely Geller, if you intend  
to challenge an individual juror, you must do so when he  
appears and before he is sworn. Do you waive the further

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giving of this notice ?

THE COURT: Do you want to examine them on the voir dire ?

MR. CURTIS: Yes, sir, but I suppose it is proper to make an objection here, in view of the possible fact - I don't know what the fact is - that this Jury is drawn from the County of New York and the County of the Bronx, and that the Court of General Sessions has no jurisdiction to try this case.

THE COURT: Where is this crime said to have been committed ?

MR. CURTIS: In the City of New York.

MR. WASSERVOGEL: In the County of New York, 2615 Third Avenue.

THE COURT: That is in the Borough of Manhattan ?

MR. WASSERVOGEL: It is in the Bronx.

MR. CURTIS: Then, it applies equally.

THE COURT: Pardon me a moment. I want to understand it. The locality is within the Borough of the Bronx ?

MR. WASSERVOGEL: I think so. I think that is in the Bronx.

THE COURT: Well, Mr. District Attorney, I would respectfully suggest to you, in view of the gravity of that proposition, the propriety of the transference of

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this case to the Supreme Court.

MR. WASSERVOGEL: The Appellate Division has not drawn a Grand Jury for the Bronx. It has not assigned any Justice of the Supreme Court for the Borough of the Bronx, or the County of the Bronx. It is not yet the County of the Bronx, so far as the Courts take notice.

MR. CURTIS: I respectfully submit to the consideration of the Court that, for all jurisdictional purposes, the County of the Bronx has jurisdiction distinct and separate from the County of New York, and your Honor I see observes the point. This indictment is found in the County of New York, and is called for trial in the Court of General Sessions of the Peace of the City and County of New York, and, therefore, if these jurors are drawn wholly or in part from the County of New York, then it seems to us that, under the law, the objection is well taken, so far as this Court is concerned.

MR. WASSERVOGEL: This crime took place on October 13th, long before Election day.

MR. CURTIS: That suggestion, that our objection is retroactive, it seems to me, is not tenable, in view of the decision recently made by the Appellate Division in reference to the new Statute, which gave unusual powers to the Court in review to act in the case, and

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the Court, the Appellate Division, said that that Statute did apply to all existing cases. That was the Statute which permitted the Appellate Division, if your Honor will remember, to go into the case de novo and to try it, as it were, on its merits, and to brush aside all technicalities, brush aside all mere technical objections if, in the judgment of the Court, that was the proper policy to pursue, and, therefore, I think that the last suggestion of the District Attorney does not apply.

THE COURT: I will send for, and after I get it read, the Statute passed by the Legislature purporting to create the County of the Bronx. What chapter is it, Mr. Wasservogel ?

MR. WASSERVOGEL: Your Honor knows, in the McKenna case, this question was passed upon by Judge Seabury here recently, on a motion.

THE COURT: I will send for that Statute. When I have it I will read it. Do you remember the Chapter ?

MR. WASSERVOGEL: Mr. Taylor knows. Get it from Mr. Taylor.

MR. CURTIS: My learned associate suggests what seems to me a very valuable matter, and that is this: that not only was the crime committed in the County of the Bronx, but the jury is drawn, in part, from the

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County of the Bronx.

THE COURT: I will look at that law, and after I have looked at the law, I will look at the decisions bearing upon it, and after I have looked at those I will pass on your objection, either sustain it or deny it.

Judge Curtis, is the situation in this case, so far as it relates to the jurisdiction, the same as the situation presented in the case of the People against Joseph J. McKenna ?

MR. CURTIS: No, sir; we don't admit that.

THE COURT: In what respect does this case differ from that ?

MR. CURTIS: As I understand that, that was brought up on a writ of habeas corpus, wasn't it ?

MR. WASSERVOGEL: No.

MR. CURTIS: Originally ?

MR. WASSERVOGEL: The case was tried before Judge Rosalsky, of this Court.

MR. CURTIS: It was finally tried before him, but wasn't that brought up on a writ of habeas corpus ?

THE COURT: The question there was as to the jurisdiction of the Court of General Sessions. Leaving out of mind the method by which the objection was taken, were the circumstances the same ? In other words, the facts upon which the question of jurisdiction

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would depend ?

MR. CURTIS: Well, I am not able to answer that question properly to your Honor.

THE COURT: Have you examined that, Mr. Derby ?

MR. DERBY: No, I have not, your Honor, but I don't know, in the McKenna case, whether the crime was committed in the County of New York, or the County of the Bronx. Here the crime was committed in another County.

THE COURT: Mr. Wasservogel tells me it is alleged in the McKenna case to have been committed in that part of New York County known as the Borough of the Bronx.

MR. DERBY: If that is so, the cases are then parallel.

MR. CURTIS: It may be in that particular feature, but I think there is a feature in which they are not parallel, and we will, at the proper time, have to make a motion to dismiss the indictment upon the ground the offence was committed in the County of the Bronx, and the indictment is found in the County of New York. I reserve that right. I think that case your Honor has before you is one in which the Counsel was named Klein, and he brought it originally to the attention of the Court in that shape on a writ of habeas corpus. Isn't that the name of Counsel set forth there ?

THE COURT: Yes, Mr. Klein.

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MR. CURTIS: Well, that is the case I had reference to, Emanuel Klein, is my recollection.

THE COURT: Judge Curtis and Mr. Derby, it appears to me that, inasmuch as the question which you raise is in all likelihood apt to be decided one way or the other by the Appellate Division in the McKenna case, that it is desirable, both from the standpoint of The People and the standpoint of the defendant, that this case shall be adjourned until sometime after that decision is handed down.

MR. CURTIS: I understand that the matter has gone up to the Appellate Division, and that the only decision that my learned friend on the other side had reference to is the decision at Special Term, by Justice Seabury, and, consequently -

THE COURT: There is a likelihood, at all events, within the ordinary course of things, it is entirely possible that the Appellate Division may hand down a decision tomorrow, sometime tomorrow afternoon.

MR. DERBY: Has the case been argued, your Honor, in the Appellate Division?

THE COURT: It has been argued in the Appellate Division.

MR. DERBY: Because the defendant has been denied his liberty for sometime.

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THE COURT: I am told that the Appellate Division may quite likely hand down a decision tomorrow. That is to say, in the ordinary course of things, it might come down. Now, that being so, it seems to me that a very proper step to take now would be to adjourn this case until, say, Monday.

MR. DERBY: In the event of the Appellate Division not handing down a decision on Monday ?

THE COURT: Then on Monday we could take a further adjournment.

MR. CURTIS: Of course, it is inconvenient to us, but I think your Honor is quite right in your view. It would be, it seems to me, a waste of labor to go into the trial and then be confronted by a decision which would declare the trial should not be commenced.

THE COURT: The Appellate Division may hold that that Statute is unconstitutional, or they may conceivably hold that no provision of it will go into effect before the first of January, 1914, or, of course, they may take the opposite view; but it would seem desirable that this case should not be tried until that decision is handed down; that is to say, if it does not involve any undue delay. I think, if there is no objection, I will adjourn the trial of this case until Monday.

MR. DERBY: Your Honor, could we have a precedence

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on the calendar on Monday?

THE COURT: Yes, I will put the case down as the first case on Monday.

MR. CURTIS: There is another question that I suggested to your Honor. I don't know whether it had better be presented now, or hereafter. It is equally a jurisdictional question. As I understand, the indictment was laid in New York.

THE COURT: There is nothing to show at the present time that that is not proper.

MR. CURTIS: I understand that, unless my learned friend conceded that the crime was committed in the County of the Bronx.

THE COURT: He would not concede that. He might concede the particular street and number at which the offence took place.

MR. CURTIS: That is merely a matter of formal proof.

MR. WASSERVOGEL: We can take that up when the trial commences on Monday, or whenever it is commenced.

THE COURT: It will be adjourned until Monday.  
The defendant is remanded.

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THE PEOPLE ETC.  
-against-  
ELY GELLER.

New York, Monday, January 27th, 1913.

T R I A L            C O N T I N U E D.

A p p e a r a n c e s :-

(Same as before)

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THE DEFENDANT IS ARRAIGNED AT THE BAR.

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THE CLERK OF THE COURT: Ely Geller, if you desire to challenge an individual juror, you must do so when he appears and before he is sworn. Do you waive the further giving of this notice?

MR. DERBY: We do.

(Counsel then proceeds with the examination of talesmen on the voirdere. Six jurors are duly selected and sworn.)

THE COURT: We will adjourn now. Gentlemen of the jury, you are admonished not to converse among yourselves on any subject connected with this trial, or form or express any opinion thereon, until the same is submitted to you.

(The Court accordingly took a recess until to-morrow, Tuesday, January 28th, 1913, at 10:30 A. M.)

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New York, Tuesday, January 28th, 1913.

TRIAL CONTINUED.

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THE DEFENDANT IS ARRAIGNED AT THE BAR.

-----  
(Six additional jurors are duly selected and sworn.)

THE COURT: Gentlemen of the Jury, you are admonished not to converse among yourselves on any subject connected with this trial, or to form or express any opinion thereon, until the same is submitted to you. If any person comes to any one of you to talk with you about this case, you must refuse to talk with that person, and you must bring the circumstance to the attention of the Court. The defendant is remanded. Court stands adjourned until to-morrow morning at half past ten.

(The Court accordingly took a recess until to-morrow, Wednesday, January 29th, 1913, at ten thirty A. M)

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New York, Wednesday, January 29th, 1913.  
10:30 A. M.

TRIAL CONTINUED.

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THE DEFENDANT IS ARRAIGNED AT THE BAR.

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MR. DERBY Your Honor, we have a few motions to make at this time, now that the jury is impanelled.

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We move to dismiss the indictment, on the ground that the grand jury who found the indictment had no jurisdiction to find an indictment for a crime committed in another county. It is recognized that the grand jury can only indict for a crime committed in the County where they are sitting. This grand jury, we claim, indicted -- sitting in the County of New York, indicted for a crime committed in the county of the Bronx.

We further move to dismiss the indictment, on the ground that, under the provisions of the so-called Bronx County Act, it is provided that after that Act should take effect the Supreme Court should have jurisdiction of all crimes committed in the County of the Bronx. Now, if the Act took effect at the time of its enactment, on April 19th last, it is clear that the Supreme Court had jurisdiction, the Supreme Court grand jury had jurisdiction of this particular crime. If the act took effect, on the other hand, after the referendum vote, nevertheless the Supreme Court grand jury would have jurisdiction, because this indictment was found after the referendum vote in November, 1912. The Act provides that after the Act takes effect the Supreme Court shall have jurisdiction of all crimes committed in the County of the Bronx. This indictment was found by a grand jury of the Court of General sessions, and not by a Supreme Court grand jury. On these grounds, your Honor, we

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move for the dismissal of the indictment.

THE COURT: Were these questions raised in the case of the People against McKenna?

MR. CURTIS: No, sir.

MR. DERBY: The facts were different there. That indictment was found before the referendum vote. It was a question of whether the McKenna indictment was found before the referendum vote. In this case, the indictment was found some weeks after the referendum vote, and after the Bronx County act took effect, if it took effect at all.

THE COURT: The decision of the Appellate Division in the case of the people against McKenna goes to the point, does it not, that the act to which you have referred did not take effect at any time?

MR. DERBY: That was the view of the Appellate Division, by a three to two vote, your Honor.

THE COURT: In other words, assuming that this Court adopts the view expressed by the Appellate Division in the case of the People against McKenna, this Court would be obliged to rule that the Boroughs of Manhattan and the Bronx have at all times been in one County, namely, in the County of New York; isn't that so?

MR. DERBY: The Appellate Division did hold, Your Honor, that the Act was unconstitutional, by a

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three to two vote. The case is now pending in the Court of appeals, and they may very well reverse that decision.

THE COURT: The point of my questions, Mr. Derby, is simply this: If you make a contention in this case which was not made in the case of the people against McKenna, I should consider that it was my duty to as carefully as possible examine into the merits of that contention.

MR. DERBY: Well, the difference between--

THE COURT: Now, it is right that you should know that I have glanced at the decision in the case of the people against McKenna, but I have not read it with a great deal of care, and I saw recently in one of the papers, not a law publication, a statement of a contention made by former District Attorney Jerome in a case I think in the Criminal part of the Supreme Court, raising the point conceivably not made in the McKenna case. I have the matter very imperfectly in mind in that respect, but, roughly speaking, I think that the contention as indicated in the paper I read was that the act of the Legislature must be regarded as operative from the time that, according to its terms, it was to go into effect, until the time that the Court pronounces it to be unconstitutional.

MR. DERBY: Yes, that is my idea of the decision.

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THE COURT: That the decision of the Appellate Division, in other words, was merely a decision invalidating the act as of the date when the decision itself was made, and was not retroactive. Now, that may be, and that is, a very imperfect statement of the contention, but I think that was the contention.

MR. DERBY: I understood that the Appellate Division held that the act was unconstitutional at the time it was enacted.

THE COURT: That is my understanding of it. Is there any dispute about that, Mr. Wasservogel?

MR. WASSERVOGEL: That is my understanding of it.

THE COURT: Now, if there is, if there is dispute about the scope of the decision of the Appellate Division in the case of the people against McKanna, I will send for the opinion in that case, and read it.

MR. WASSERVOGEL: I understand that the Appellate Division declared the Bronx County law unconstitutional.

MR. CURTIS: Yes, ab initio, three of them; two of them upheld the act.

THE COURT: It is a very debatable proposition, Mr. Derby, and it is entirely conceivable that the decision of the Appellate Division may not be affirmed in the Court of Appeals, but it is the appellate tribunal of this Court in all except murder cases. Its opinions are entitled to great weight, and I think that it must

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be regarded, for the purposes of this case, the case having been moved now, as the law of the case; and, so viewing it, without any independent examination of the subject, but upon that authority, your motion will be denied, and you will have proper exceptions.

MR. DERBY: We urge your Honor that your Honor has no jurisdiction to proceed with this trial, on the same ground, on the ground that the crime was committed in a county different from that in which this court is sitting; and, furthermore, on the ground that the jury impanelled in this part of the Court was drawn from the citizens of Two Counties; the jury sworn to try this case is composed of citizens of two counties; and, therefore, this jury has no jurisdiction to hear this case.

THE COURT: If the Court of Appeals should hold that the Bronx County law, so called, was constitutional, valid, then, doubtless any conclusion in this case adverse to the defendant, if such there be, as the result of a trial, would be reversed on appeal. You are given an exception. The application is denied.

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T H E P E O P L E ' S C A S E .

(Mr. Wasservogel opened the case on behalf of the people as follows:-

May it please your Honor and gentlemen of the jury:  
As you have already been informed, the indictment in

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this case charges the defendant, Ely Geller, with the commission of the crime of murder in its first degree.

In the month of October last year, Raphael Schwartzmann and his brother, Abraham Schwartzmann, were the owners of a delicatessen store at No. 2615 Third Avenue, in the Bronx.

This defendant, Geller, was employed by them as a delivery clerk. His salary was twelve dollars a month, and he also received his board and lodging.

On October 12th, he was entitled to half a day off. He wanted the whole day off. Permission to stay away all day was refused him. He thereupon became abusive, and the following morning, October 13th, he was discharged. This was about seven o'clock in the morning.

His employer, Raphael Schwartzmann, one of his employers, rather, offered him five dollars, the amount which Schwartzmann said was due to Geller at that time. The defendant said, "No, I want six dollars; that is what is due me". Schwartzmann would not give him any more than five, so Geller would not take any money at all, and walked out, promising to get square.

He came back about two hours later. At that time, there was a young girl, a customer, in the store. This ~~girl~~ girl will tell you that when the defendant came into the store Schwartzmann went to the cash drawer, took out

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some money, she doesn't know how much, handed it to him, and he took the money and walked out at that time.

He came back once more, at ten o'clock in the morning. At that time, Schwartzmann was alone in his place, Raphael Schwartzmann; no one else was there.

At that time, this defendant came armed with a gun. He demanded from Schwartzmann the difference between the amount which he had already received and the amount which he claimed was due him.

Schwartzmann would not give him any more money. There upon, he took out his gun and blazed away. He shot this man Schwartzmann in the breast at this time, gentlemen, and Schwartzmann was standing behind the counter. Bear that in mind. He was standing behind the counter.

As the result of the first shot, he was still able to walk, and the defendant, immediately after the shot was fired, started to walk out into the street. Schwartzmann, from behind the counter, started to walk after him, intending probably, to follow him into the street. In the entrance of the store, the defendant suddenly turned around and discharged another bullet, fired once more at Schwartzmann. This time he struck him in the head, and this time Schwartzmann dropped in the doorway, right at the entrance there.

The defendant goes out upon the street, throws away his gun, and within two or three minutes thereafter is arrested, and he admitted to the police office who placed him under ar-

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rest that he shot this man, and that the reason that he shot him was because he would not give him as much money as he demanded.

MR. CURTIS: I request respectfully of the Court that all witnesses for the people other than the one actually being examined be excluded from the Court room.

THE COURT: All witnesses on both sides other than such witness as may be under examination will step outside the court room and remain outside until called.

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H A R O L D L. C O E, called as a witness on behalf of the people, being first duly sworn, testified as follows:-

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q What is your name? A Harold L. Coe.

Q What is your address? A 681 Broadway.

Q What is your business? A Expert photographer.

Q And you have been such for how long? A For the past fourteen years.

Q Did you take the four photographs that I now show you (Handing witness four photographs)? A I did.

Q When? A On December-- January 17th, 1913.

Q At the request of the District Attorney's office?

A Yes, sir.

Q And do they show the premises 2615 Third Avenue, in the Bronx? A They do.

Q In the Borough of the Bronx, County of New York?

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A Yes, sir.

MR. WASSERVOGEL: I offer them in evidence.

MR. CURTIS: The outside view we don't object to. To the inside views we do object. It seems that the inside views were taken two months after the occurrence.

THE COURT: These four photographs will be marked as Exhibits for Identification, in the first instance.

MR. WASSERVOGEL: There are two that I will mark in evidence now, with your Honor's permission; there is no objection to those, the outside views?

MR. CURTIS: We are instructed that the inside views were taken two months after the occurrence, and, possibly, changes have occurred since then.

MR. DERBY: We only object because I understand changes were made within a month after the crime was committed.

THE COURT: The two photographs as to which no objection is taken are received in evidence, and will be marked, respectively, people's exhibits Nos. 1 and 2. The other two photographs will be marked as exhibits for Identification.

MR. CURTIS: Those that are marked for identification, I presume, may not be made use of by the District Attorney in illustration to the jury or otherwise?

MR. WASSERVOGEL: The District Attorney has some

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knowledge of the law.

MR. CURTIS: Unless they are admitted into the proof. I have often seen, in trials, and so your Honor has, that exhibits marked for Identification--

THE COURT: Comment, Judge, is entirely unnecessary. Exhibits received in evidence will be used as such by the District Attorney. Exhibits marked for Identification are marked for that purpose and that only.

MR. CURTIS: Very well.

(Photographs representing outside views are marked, respectively, people's exhibit No. 1, and people's exhibit No. 2, of this date)

(Photographs representing inside views of aforesaid premises are marked, respectively, people's exhibit for identification No. 3 and people's exhibit No. 4, for Identification, of this date)

Q These photographs, people's exhibits 1 and 2, show which side of the street, of Third Avenue? A They show the west side of Third Avenue.

Q People's Exhibit No. 1, does that show the delicatessen store at 2615 Third Avenue? A It does.

Q And the Avenue leading to what street? A That is going north.

Q To 140th street? A I believe it is 140th, yes.

Q And the other photograph, people's exhibit No. 2, shows the delicatessen store and the street leading towards--

EXHIBIT  
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A 139th Street, south.

MR. WASSERVOGEL: That is all.

MR. CURTIS: No questions.

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 WALTER H. VOELCKENING, called as a witness on behalf of the people, being first duly sworn, testified as follows:-

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q What is your full name? A Walter H. Voelckening.

Q Where do you live? A 116 Dekatur Street, Brooklyn.

Q What is your business? A Architect.

Q How long ~~xxx~~ have you been such? A Fourteen years.

Q And in those fourteen years have you had occasion to make diagrams? A I have.

Q Frequently? A Very often.

Q And frequently for the District Attorney?

A Yes, sir.

Q Now, at the request of the District Attorney, did you make a street diagram showing premises 2615 Third Avenue?

A I did.

Q Is this the diagram made by you (handing diagram to witness)? A It is, yes, sir.

Q When was it made? A On the 16th day of November, 1912.

Q And is that a correct representation of what it

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portrays? A It is.

MR. WASSERVOGEL: I ask to have it marked for Identification.

(Same marked people's exhibit No. 5, for Identification, of this date)

Q I show you another diagram of the store 2615 Third Avenue, and ask you whether that was made by you (handing same to witness)? A It was.

Q And does that correctly represent the conditions then found by you at that time? A It does, on the 25th day of October, 1912.

MR. WASSERVOGEL: I ask to have it marked for Identification.

(Same marked People's Exhibit No. 6, for Identification, of this date)

Q Are these drawn according to a scale, Mr. Voelckening? A Yes, sir, they are.

Q The street diagram is a scale of one inch equals twelve feet, and the store diagram is three-eighths of an inch to the foot.

MR. WASSERVOGEL: Cross examine.

MR. CURTIS: No cross examination.

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A B R A H A M S C H W A R T Z M A N N, called as a witness on behalf of the people, being first duly sworn, testified as follows:-

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## DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q What is your name? A Abraham Schwartzmann.

Q Where do you live? A 1632 Second Avenue.

Q Now, I want you to talk as loud as you can, will you, please? A Yes, sir.

Q What is your business? A I am a delicatessen clerk at the present time?

THE COURT: You will have to talk a great deal louder than that, Say that over again.

THE WITNESS: I am a delicatessen clerk at the present time.

THE COURT: Now, keep your voice up like that all through your testimony.

Q On October 12th, 1912, what was your business?

A Grocery and delicatessen store.

Q And where was your place of business at that time?

A 2615 Third Avenue.

Q That is in the Borough of the Bronx, County of New York? A Borough of the Bronx.

Q Were you in business alone, or with some one else?

A With my brother, the deceased.

Q What was his name? A Raphael Schwartzmann.

Q Look at this diagram, people's exhibit No. 6 for Identification, and tell me whether it shows the conditions which existed at that time (handing same to witness)

MR. CURTIS: Objected to. He is now about to

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examine in regard to the exhibit marked for Identification.

THE COURT: I understand the question. The objection is overruled. You have an exception.

MR. CURTIS: Your Honor grants us an exception.

Q (Continuing) With respect to the counter and the other things which are in that store?

THE COURT: Now, your answer is "yes", or "no", to that.

A Everything is right here.

MR. CURTIS: No, I suggest that the form of the question is objectionable. Is that a correct view of the store as it was at that time? That is a conclusion.

THE COURT: I think, perhaps--

MR. WASSERVOGEL: Question withdrawn.

Q Was there a counter in that store? A Yes, sir.

Q Was there a shelf?

MR. CURTIS: Now, your Honor, I dislike to interrupt, but this is a capital case.

THE COURT: Judge Curtis, just take your objection, and the Court will rule.

MR. CURTIS: I object to the form of the question.

THE COURT: Objection sustained. Now, your questions are leading.

Q What were the contents of that store?

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THE COURT: Describe them.

Q Describe the store to us and what it contained?

A Bottled goods, canned goods, package goods.

Q Describe the fixtures? A The fixtures, shelvings,  
ice box.

Q Where was the shelving? Which side of the store?

A On the up-town-- both sides.

Q What else was there in the line of fixtures?

A A counter-- two counters.

Q What kind of counters were they? A One was a long  
one; the other was a short one.

Q Where was the long counter? A In the front.

Q What do you mean by the front? A On the up-town  
side.

Q And where was the small counter? A The small coun-  
ter, near the ice box.

Q And where was the ice box? A The ice box was on  
the west side.

Q Was the ice box behind the small counter?

A Behind the counter.

Q Was there a coffee mill there? A Yes, sir.

MR. CURTIS: Objected to.

Q What else was there? A A milk can.

Q Where was the milk can? A The milk can was about  
two feet from the door.

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THE COURT: You can exhaust his recollection, and after you have done that, you may ask him specifically.

Q Anything else? A A box for rolls.

Q Where was that? A It was connected to the long counter, in the front.

Q Do you remember when the diagram was made of the store? A Yes, sir.

Q Were you present at that time? A Yes, sir.

Q I now show you this diagram, people's exhibit No. 6, and ask you whether it correctly shows the conditions which existed at that time? (Handing same to witness)?

MR. CURTIS: Objected to, on the ground it is a conclusion of the witness. Whether it is a correct one or not is a question for the jury.

THE COURT: Objection sustained.

Q Is the counter as shown on this people's exhibit No. 6 in the same position as it was at that time? A Yes sir.

MR. CURTIS: That is another error. That is objected to, on the ground it is a conclusion of the witness. There is a proper way to get those things out.

THE COURT: Mr. Wasservogel, you just examine the witness. Let him give you his description.

MR. WASSERVOGEL: He has already done that, your Honor.

THE COURT: You examine the witness, and you let him give you his description as fully as he can, and

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after you have exhausted his recollection you may direct his attention specifically, by a leading question, to any matter, and if I conclude that his description is sufficient to warrant the admission of this exhibit for identification in evidence, I will receive it.

Q Repeat your description, will you please? Repeat it once more, of the contents of that store?

THE COURT: I don't think that is necessary, unless you want it.

MR. WASSERVOGEL: I don't want it. Your Honor wants it, apparently.

THE COURT: No.

MR. WASSERVOGEL: He has already done that. That is why I asked him that question.

BY THE COURT:

Q Have you now told us all that you can remember regarding the contents of that store? Is there anything that you now recollect regarding the contents of that store as the same was on the 13th day of October, 1912, that you have not told us? A Your Honor, I have told everything the same way it was on October 13th. That is all I can remember.

THE COURT: Now, you may ask him leading questions, regarding particular things.

BY MR. WASSERVOGEL:

Q Were the conditions as they existed, on October 25th, the day when the diagrams were made, the same as they

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existed on October 13th, the day that this occurred?

MR. CURTIS: Objected to.

THE COURT: The objection is overruled.

MR. CURTIS: I take an exception.

THE COURT: "Yes", or "no", to that.

Q Were the conditions the same? A Yes.

Q And I now show you people's exhibit No. 6 for identification, and ask you whether the counter as shown on this exhibit is in the same position as it was in your store on that day, October 13th? A Yes.

MR. CURTIS: The same objection and exception.

Q Is the show case in the same position? A Yes sir.

MR. CURTIS: The same objection and exception.

I understand the Court of Appals has said you must take an objection and exception to each question.

THE COURT: Neither of those questions were necessary to be put. I think your objections to them were technically correct.

MR. WASSERVOGEL: Then, I offer the exhibit in evidence.

THE COURT: Show it to counsel.

MR. CURTIS: I object to it.

THE COURT: The objection is overruled.

MR. CURTIS: Note the exception.

(Same received in evidence and marked people's exhibit No. 6, of this date)

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MR. WASSERVOGEL: I also offer people's exhibit No. 5, marked for Identification, in evidence.

MR. CURTIS: The same objection.

THE COURT: It appears in evidence, does it, that this was made at the same time as the other exhibit, does it?

MR. WASSERVOGEL: No, that was made-- I think there is a date marked there, your Honor.

MR. DERBY: That was made some weeks after the other exhibit.

MR. WASSERVOGEL: May I ask the witness a question?

THE COURT: Yes.

Q Were you present when this other diagram was made, on November 16th, 1912, referring to people's exhibit No. 5, for identification? A No, sir.

Q You were not there at that time? A No, sir.

Q Were you still the owner of the store at that time?

A No.

Q Who owned the store then? A On what date was that?

Q November 16th? A (No answer)

Q When did you move out, or sell out? A No, I was not there at that time.

Q When did you sell out, do you remember? A When was that made?

Q When did you sell out? A On December 26th.

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MR. WASSERVOGEL: All right; the offer is withdrawn.

Q How old was your brother, Raphael Schwartzmann?

A Twenty-three years.

Q How much did he weigh, if you know? A About 140 pounds.

Q How old are you? A Twenty-one.

Q How much do you weigh? A One hundred and thirty-five.

Q Just stand up, please? (Witness stands up)

Q Sit down. You say your brother weighed about 140?

A Yes.

Q Was your brother married? A No, sir.

Q Do you know Ely Geller, the defendant? A Yes sir.

Q How long have you known him? A Twenty days.

Q Twenty days prior to October 13th? A October 13th.

Q Did he ever work for you? A No, not before.

Q Did he ever work for you? A Yes, sir.

Q When, for the first time? A He was engaged on September 23rd, until October 13th, when that happened.

Q What were his duties? A To take out the orders and clean around the store.

Q And his salary was what? A His salary was fifteen dollars a month and board.

Q Fifteen dollars a month? A Fifteen dollars a month.

Q And where was he to live? A He was to live in

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2617 .

Q 2617 Third Avenue? A Third avenue; and we paid for that three dollars, for that room.

Q And did he get his lodging there, board and lodging?

A No, board he had with us, and lodging at 2617.

MR. CURTIS: Are all these details material?

THE COURT: There being no objection, they are received.

Q Did you see the defendant on October 12th, 1912?

A No.

Q Did you see him on the morning of October 13th?

A Yes, sir.

Q At about what time? A About half past six.

Q Who else was present at that time? A My brother.

Q And that was in the store? A Yes, sir.

Q Did you have any conversation with him, or did your brother have any conversation with him in your presence?

A I didn't have any conversation with him until about seven o'clock.

Q Did you then have a conversation with him? A Yes.

Q Now, please tell us what you said, what your brother said, and what he said? A I asked him what is the matter, why he wanted to go away. He said that he wanted to go off early. Then we agreed to give him off.

Q He wanted what? I don't understand you.

THE COURT: You have got to talk so you can be

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heard and understood. Now, say that over. What did he say?

THE WITNESS: I asked him what is the matter, why he wants to go away. He said, when we took him, we agreed to give him half a day off, at twelve o'clock, but he wanted to go off earlier, so my brother refused. He said he can't leave him go on Saturday, being it was a busy day, so he said he would quit, wso that morning I asked him whether he wants to stay, or not.

MR. DERBY: Did all this conversation occur that morning?

MR. WASSERVOGEL: October 13th.

MR. DERBY: What conversation has he just related?

THE COURT: He purports to be telling us a conversation participated in by himself and his brother, the deceased, and this defendant, on the morning of October 13th, 1912, at about seven o'clock.

THE WITNESS: So he said -- so I said "go on and have your breakfast, and we will figure up what is coming to you". He refused. He would not have any breakfast. I said "wh t is coming to you". He said "six dollars". I figured up; it was only five dollars, being we paid three dollars for the room and two dollars he took in advance, so that leaves -- being he worked twenty days, it leaves--

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MR. CURTIS: I object, unless it is conversation with the defendant.

Q Is this what you said to him? A Yes, sir.

Q This being twenty days-- what else did you say?

A "That is eight dollars"--

Q Tell us what you said to him, and don't be nervous?

A I said "what is coming to you". He said "six dollars"; and I figured up it was only five dollars.

Q And what else? A Being we paid three dollars for the room and two dollars he took in advance, that comes to five dollars.

Q Is that what you said to him? A Yes, sir.

Q What did he say? A He said he wanted all the money; he wants six dollars, or nothing at all.

Q Yes; go on? A Then he waked out and lifted up his hand, and said "I will fix you. My hands are strong enough yet".

Q What did your brother say? Did he take part in the conversation? A Nothing, no.

Q And he walked out? A Yes, he walked out.

BY THE COURT:

Q This talk which you have been giving us, which you have been repeating, as you claim, was between yourself and this defendant? A Yes, sir, and my brother was present.

Q And when you say "present", what do you mean?

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A He was standing behind the counter, listening to it.

BY MR. WASSERVOGEL: And where were you standing? Also behind the counter? A Also behind the counter.

Q And where was the defendant standing at that time?

A In front.

Q How far away from you? A About two feet.

Q Did you see the defendant again that day? A No.

Q Did you see your brother again that day? A No.

Q Did you see him after he was taken to the hospital?

A Yes, sir.

Q Were you present at the time the autopsy was performed by the doctor? A Yes, sir.

Q Did you identify your brother to the doctor?

A Yes, sir.

MR. CURTIS: Now, that won't do, did he identify.

THE COURT: When you desire to take an objection, the Court will entertain it.

MR. CURTIS: I object to the character of the question.

MR. WASSERVOGEL: The question is withdrawn.

THE COURT: The question is withdrawn, I understand?

MR. WASSERVOGEL: Yes.

Q Do you say you were present at the time the autopsy was performed? A What is the autopsy?

Q When the doctor cut him up, to see what the trouble

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was, were you there? A No.

Q Were you there when the doctor was there? A I was there with the doctor, to identify the body.

MR. CURTIS: I move to strike that out.

THE COURT: Strike it out.

Q Do you know this gentleman, Doctor Riegelman?

A Yes, sir.

Q Did you see your brother's body at any time when Doctor Riegelman was present? A The Coroner's doctor, yes, sir.

Q Did you recognize your brother's body as that of your brother? A Yes, sir.

MR. CURTIS: That won't do. I object to that.

THE COURT: The objection is overruled.

MR. CURTIS: I take an exception.

Q And did you tell Doctor Riegelman whose body it was?

A Yes, sir.

MR. DERBY: That is objected to.

THE COURT: I will allow the answer to stand.

MR. DERBY: We take an exception.

MR. WASSERVOGEL: Cross examine.

CROSS EXAMINATION BY MR. CURTIS:

Q Were you born in this country? A No, sir.

Q Where? A Russia, Russian Poland.

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Q Was your brother born in this country? A No sir.

Q Where? A Russian Poland.

Q When did you come to this country? A On March 15th, 1909.

Q And did you at once go into business with your brother? A That was the first time.

Q Was it at this place that you have been speaking about? A Yes, sir.

Q And was it the same character of business? A Yes.

Q A delicatessen store? A Delicatessen and grocery.

Q And, of course, in such a store as that, you had, perhaps, several knives in the store that you used in your business? A Several what?

Q Don't you understand my question? A I couldn't hear it.

Q You understood the District Attorney, didn't you?

A Well, I didn't get it.

Q (Question read by stenographer as follows: "And, of course, in such a store as that, you had, perhaps, several knives in the store that you used in your business"?)

A Yes.

Q How many? A Two.

Q Two. Now, did you or your brother watch in the store at the night time? A No.

Q Did you or your brother sleep in the store in the night time? A My brother did.

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Q And when I asked you did you or your brother watch in the store in the night time, you didn't understand the question, did you? A This is a different room. He slept in the room, not in the store.

Q Your brother slept in the store? A Not in the store.

Q In a room adjoining the store? A Yes, sir.

Q Near the store? A Yes, sir.

Q In a room leading into the store? A Yes.

Q He had his bed there? A Yes, sir.

Q And do you know whether or not at night he kept any of these knives in there? A No.

Q You know all about that? A Yes, sir.

Q Did you sleep with him? A Before.

Q Before what? A About two weeks ago.

Q Two weeks ago? A Before October 13th.

Q You slept with him continually, both of you slept there? A Not continually. For a few days.

Q But did you sleep with him every night? A No.

Q In that room? A No.

Q Did you sleep with him that night in the room before October 13th? A I slept there on October 12th.

Q You slept there on October 12th? A Yes, sir.

Q And had you slept there before that time? A No.

Q Had you ever slept there before that time? A Yes.

Q Often? A About a week.

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Q Well, now, his object and your object in sleeping in there was to protect the store, wasn't it? A No.

Q What was it? A Economy.

Q Economy? A Yes, sir.

Q And at the same time to exercise an oversight over the store? A No.

Q But the fact is he did sleep there, your brother?

A Yes, he slept there, because we couldn't find a room so quick. We used to live at the same house where the defendant was living--

Q That is immaterial. Now, outside of this conversation that you say occurred in your presence with your brother on the morning of the 13th of October, 1912, so far as you know did the defendant have any dispute with your brother?

A Yes, he had a dispute on October 12th.

Q October 12th. What was the character of that dispute?

THE COURT: Perhaps you had better ascertain if the witness was present at the time.

Q Were you present at the time? A No.

Q Then, how are you trying to give it?

MR. WASSERVOGEL: He is giving it because he was asked.

THE COURT: Now, this witness does not know the rules of law, and, therefore, I suggested that you find that out.

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MR. CURTIS: Your Honor is quite right.

Q You were not present the day before at the conversation? A No.

Q And the only conversation relative to any dispute between your brother and this defendant occurred on the morning of the 13th, did it? A Yes, sir.

Q Is that correct? A Yes.

Q Now, at what time in the morning was this? A About seven o'clock.

Q And was anybody present except you and your brother at that time? A When we had the argument?

Q Yes. A There was a fellow there.

Q Who was it? A An Italian.

Q What is his name? A He can't understand English. I don't know his name. He lives in the same house.

Q Is he here? A No, sir.

Q Don't you know his name? A No.

BY THE COURT:

Q What floor does he live on? A On the third floor.

BY MR. CURTIS:

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

Q When did you last see him? A About a month ago.

Q And you say he don't understand English? A No.

Q And, therefore, he could not understand what was said between your brother and the defendant? A No.

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Q What was he doing in there? A He was buying something.

Q And how long was he there? A About five minutes.

Q He came in and went out? A Yes.

Q At what time did he come in? A At the same time when the argument was held.

Q And what time was that? A About seven.

Q About seven. And he went out about five minutes after seven? A Yes.

Q And he, of course, did not take any part in that conversation? A No.

Q Now, is there any other person that was present at that time? A No.

Q Now, isn't it true that the defendant requested of your brother to be let off so that he could attend the night school? A No.

Q No? A I took him over myself to night school.

Q And what time did he go to the night school?

A Every Monday, Tuesday, Wednesday and Thursday.

Q He, the defendant, was from Russia? A Yes.

Q He, the defendant, spoke Yiddish, didn't he?

A Yes.

Q And at the time of this occurrence, how long was he in the country? A I don't know exactly.

Q Well, was it a few days, or a few weeks, or a few months, or what? A According to the way he said, he

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was here almost a year, the way he said.

Q Did he tell you that? A Yes; he said he worked in the country some place.

Q When did he tell you that? A When he was engaged. I used to come around there all the time.

Q But that is the only knowledge you have as to the time that he came to this Country? A Yes.

Q He did express a desire to go to the night school?  
A When we took him, we agreed--

Q Now, you must answer my questions. When you took him, he expressed a desire to go to the night school?  
A Yes, sir.

Q And, in accordance with that, you who understood English, took him around to the night school?

A Yes, sir.

Q And the reason of your taking him <sup>around</sup> to the night school was that he himself spoke Yiddish, and you spoke English?

A Yes, sir.

Q That is the truth. Very good. Now, how long was it that he was attending the night school? A Three weeks.

Q Three weeks? A Yes, sir.

Q And didn't he say to your brother that one reason why he wanted to quit his job was -- I understood you to say he stated he wanted to quit his job, did he? A Yes.

Q That was so he could attend the night school?

A No.

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Q He said nothing of that kind? A No.

Q And then the only dispute between you two, so far as you remember, was in regard to the amount you would pay?

A Yes, sir.

Q And you say you figured up that there was five dollars due him? A Yes, sir.

Q And he figured up there was six dollars due him?

A Yes, sir.

Q And that, you claim, was the only cause of difference between you? A Yes, sir.

Q And you also claim that when you left, or, rather, when he left on that occasion, that is, the morning of October 13th, he raised his arm, or hand, and he said, "I will do" what? A He said "I will fix you. My hands are strong enough yet."

Q "I will fix you; my hand is strong enough yet".

Did he say that in English, or Yiddish? A In Yiddish.

Q And was anybody present at the time he said that except you and your brother? A Nobody but me.

Q Nobody but you. Now, you were before the Coroner's inquest, weren't you? A Yes.

Q And you gave testimony there? A Yes, sir.

Q And you was before the Coroner's inquest how soon after October 13th? A I don't remember the date.

Q You don't remember the date. You remember the date of this shooting? A Yes, sir.

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Q What date was that? A On October 13th.

Q You don't know when you were before the Coroner?

A No.

Q How soon after that was it? A About four weeks or a month.

Q You were sworn before the Coroner? A (No answer)

Q You testified under oath, didn't you? A Yes.

Q What?

THE COURT: Now, keep your voice up, and just answer the questions.

Q (Question read by stenographer, as follows: "You testified under oath, didn't you"?)? A Yes, sir.

Q Now, was this question put to you, and did you give the following answer: "Q Did you see anything of the shooting? A No, but I was there before. Q You were not there at the time of the trouble? A No." Were those questions put to you, and were those answers given?

A Yes, sir.

Q And were those correct? A Yes, sir.

Q Is that the truth that you swore to there? A Yes.

Q "You did not see any part of it, in any manner, shape or form at all? A No; I see before." What did you mean by saying before "I see before"? You meant that you were present at this conversation? A Yes, sir.

Q And that is all? A That is all.

Q "You see what before? A Before I had some talk

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with him. I was there before. Q Tell the jury what you know about it? A On the 12th of October, I was

called by my brother on the wire. He told me he had some trouble with his boy, and I came over that night." Then,

it was your brother that told you you had some trouble with the boy -- that he had some trouble with the boy?

A On October 12th.

Q On October 12th? A Yes, sir.

Q And he communicated to you the fact, as I understand it, that he had some trouble with him about his wages, did he?

A No.

Q What was the trouble about? A About going off.

He wanted to go off at eight o'clock in the morning.

Q He wanted to go off at eight o'clock in the morning?

A Yes, sir.

Q And that was all the trouble you had? A Yes sir.

Q Did you, before the Coroner, or did you at any place or time during the proceeding which grew out of the death of your brother, either before the Coroner or -- in your testimony before the Coroner, say a word about his lifting his hand and saying "I will get even with you", or what was the expression? A "I will fix you; my hands are strong enough yet".

Q "I will fix you." Did you ever say a word of that before the coroner? A I don't remember.

Q You don't remember. Now, you mean to tell the jury

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that you do remember that he made use of that expression?

A Yes, sir.

Q And went through that pantomime? A Yes, sir.

Q On October 13th? A Yes, sir.

Q And still you can't remember what you said before the  
Coroner some days later. Now, that there may be no ques-  
tion about it -

THE COURT: He has told you he does not remember that  
he said it before the Coroner.

MR. CURTIS: Sir?

THE COURT: He has already said he does not remember  
saying anything about that when testifying before the  
Coroner.

Q Is that your testimony? A Yes, sir.

Q And you knew, when you were before the Coroner, you  
were called upon to swear to the truth, the whole truth, and  
nothing but the truth? A Yes, sir.

Q And you suppressed that?

MR. WASSERVOGEL: Objected to.

THE COURT: Objection sustained.

MR. CURTIS: We take an exception.

Q You concealed that?

MR. WASSERVOGEL: I object to that question in that  
form.

THE COURT: Objection sustained.

MR. CURTIS: I take an exception.

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Q Now, we will come to this conversation. It is agreed, I believe, between us that you did not see anything of the actual shooting? A No.

Q You was not there? A No.

Q And all that you did see is what you have narrated to the jury? All that you did hear is what you have narrated to the jury as having occurred on the morning of the 13th? A Yes, sir.

Q At that time, did you pay him any money? A I offered him, and he refused.

Q Did you pay him any money?

MR. WASSERVOGEL: I submit, that is an answer. It has been gone over several times.

THE COURT: No. It has not. You will answer it "yes", or "no".

A No.

Q Then, when he left you at that time, so far as your giving him any money is concerned, or so far as your brother giving him any money is concerned, he had none? A No.

BY THE COURT:

Q You didn't hand him any money, and your brother didn't hand him any money in your presence, on the morning of October 13th? "Yes", or "no", now? A No.

BY MR. CURTIS:

Q Now, this was the Sabbath day, wasn't it, Sunday?

A Sunday.

Q And this was the day on which most of the stores, prob-

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ably nine-tenths of the stores, were closed?

MR. WASSERVOGEL: I object, unless he knows.

THE COURT: The Court will take judicial notice of that.

MR. CURTIS: I will put it in this form: Does he know?

Q Do you know that, on the Sabbath day, on Sunday, October 13th, that most, if not all, of the hardware stores or pawn brokers stores were closed?

MR. WASSERVOGEL: That is objected to. It is absolutely immaterial. The question is, was this delicatessen store open.

THE COURT: The objection is overruled. The witness is allowed to answer, "yes", or "no", now. Do you understand the question?

THE WITNESS: NO.

Q (Question read by stenographer, as follows: "Do you know that on the Sabbath Day, on Sunday, October 13th, that most, if not all, of the hardware stores or pawn brokers stores were closed?")? A Yes, sir.

Q Now, what time did he leave you and your brother that morning, when you were present? A About half past seven.

Q At half past seven? You seem to be accurate as to time. Did you consult your watch, or clock? Did you look at your watch, or clock, to see what time it was? A We had a watch hanging right in front of the register.

Q And you consulted the watch so you could know the time.

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Then he left you and your brother. There was no physical trouble at that time? A No.

Q There was no attempt on your brother's part to molest him physically, and there was no attempt on his part to assault your brother, was there? A No.

Q And all that was said between the two you have given to the jury? A Yes, sir.

Q And that is the last that you saw of the defendant on that morning? A Yes, sir.

Q Now, I want to see if I quote you correctly, because I don't wish to misquote you. You say that there was a question about the amount due; you figured five dollars, he figured six dollars. Now - answer A Yes.

Q Was there anything else said besides that? A No.

Q At that time? Was there? A No.

Q And that is all? Don't shake your head. Your head don't go on the record.

MR. WASSERVOGEL: Don't argue with him.

MR. CURTIS: I will not take my directions from you, Mr. Wasservogel.

THE COURT: Answer "yes", or "no".

Q (Question read by stenographer, as follows: "Was there anything else said besides that at that time?")?

THE COURT: Counsel means, was anything said except about this dispute as to money.

THE WITNESS: No.

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Q Now, he had been how long with you? A Twenty days.

Q And, so far as his conduct up to that time was concerned, as your servant, he had discharged his duty, hadn't he? A Yes.

Q He was required, as I understand your testimony, to take out orders to the people? A Yes, sir.

Q That is, to the people around about who had given orders for articles in your delicatessen store? A Yes, sir.

Q Now, as I understand you to tell the jury, you say that when this interview terminated you offered him five dollars, and he refused? A Yes, sir.

Q And, therefore, he did not take the five dollars? A Yes.

Q He did not take it? A No.

Q I direct your attention, if you please, to your testimony as taken before the Coroner's Jury, that is to be found, Mr. Wasservogel, on page 12.

MR. WASSERVOGEL: I have it.

"The witness", that is you, did you say this "when he came in and took the money we offered him he went off. That is all I know about it." Did you swear to that? Now, look at me.

MR. WASSERVOGEL: Now, I submit there is nothing which is inconsistent in that.

MR. CURTIS: Well, that is a matter of argument.

MR. WASSERVOGEL: He should not argue with the witness.

MR. CURTIS: No, you are arguing about it.

THE COURT: I will allow your question. The wit-

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ness may answer it.

A No.

Q That is untrue, is it? A (No answer)

BY THE COURT:

Q The question is, did you say that when you were a witness before the Coroner, and your answer will be either "yes", or "no", or you don't remember. A I don't remember.

BY MR. CURTIS:

Q "Q He did take the money? A Yes. Q How much did he take? A Five dollars. Q Who do you mean by he? A Ely Geller". Were those questions put to you, and were the answers that I have read the answers that you gave before the Coroner? A I don't remember.

Q You don't remember. Do you remember distinctly the conversation that took place in which this discussion was had with your brother, and still you don't remember what you said under oath before the Coroner later than that? A No, I don't remember.

Q Was this question put to you, and did you give the answer which I will read: "Q Did you ever see Ely Geller?" that is, the defendant, "in your brother's place after you saw him take the money and walk off? A No." A No.

Q What do you mean to say? Did you swear to that before the Coroner? When you say "No," do you mean to say you did not swear to that? A I don't remember.

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Q Now, be kind enough to reflect. I ask you this: Did you say this in answer to the question as follows, before

the Coroner: "Q Did you ever see Ely Geller in your brother's place after you saw him take the money and walk

off? A No." Did you swear to that before the Coroner?

A I can't remember.

Q If you did swear to that before the Coroner, was it untrue?

MR. WASSERVOGEL: The witness has already stated he can't remember whether he gave such testimony or not. I object.

THE COURT: All you have got to do is to object. Objection sustained.

MR. CURTIS: Will your Honor kindly note an exception?

THE COURT: Yes.

MR. CURTIS: That is all.

BY THE COURT:

Q You have said to-day, in substance, that certain money was offered by your brother on the morning of October 13th, in your presence, to this defendant? A Yes, sir.

Q Did you see the money with your own eyes? A I haded it myself.

Q You offered it? A I offered it, yes, sir.

Q And from where did you get it? A From the register.

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Q In other words, you went to the register, and you took some money out? A Yes, sir.

Q Do you remember whether it was-- in what form the money was? A I think it was a five dollar bill.

Q Is that your best recollection? A Yes, sir.

Q And do you recall what you did with the five dollar bill? A Yes, sir. I took it back. He refused to take it.

Q When you say you took it back, what do you mean?

A I put it down, and he wouldn't take it; he refused to take it.

Q Then what did you do with it? A Well, I took it back. I took it.

Q You took it in your hand? A Yes, sir.

Q And after you had it in your hand, what did you do with it? A I kept it.

Q Where? A In my hand.

Q What did you do with it after you had it in your hand?

A Then I put it back in the register.

THE COURT: You may interrogate him further, if you want to.

MR. CURTIS: I think that is all for the present.

RE DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q You never saw any money paid to this man at all, did you, which he took? A No.

Q Did you ever speak English with him? A No.

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Q At any time? A No.

Q Did you ever hear him speak English? A No.

Q That you remember? A No.

Q You never heard him speak English, did you?

A No.

Q And how long did he say to you that he had been in New York? A He said about a year.

Q Now, Mr. Curtis asked you whether you knew that all of the pawn brokers shops and hardware stores were closed on Sunday, October 13th. You did not go around to pawn brokers shops all over the City to see whether they were open, or closed, did you? A No.

Q And you did not go around to all the hardware stores, to see whether they were closed? A No.

Q And you don't know of your own knowledge whether they were open, or closed? A No.

MR. WASSERVOGEL: That is all.

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S T E V E N A. C H I L I A N, called as a witness on behalf of the people, being first duly affirmed, testified as follows:-

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q What is your full name? A Steven A. Chilian.

Q Where do you live? A Lincoln Hospital.

Q What is your profession? A Physician.

Q How long have you been such? A Two years.

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Q You are an ambulance surgeon connected with the Lincoln Hospital? A Yes, sir.

Q And were you such on October 13th, 1912? A I was.

Q And were you connected ~~with~~ at that time with the Lincoln Hospital? A Yes.

Q And did you have occasion to go to premises 2615 Third Avenue on that day? A I did.

Q Pursuant to a call? A I did.

Q And did you see a man--

THE COURT: Now, talk a great deal louder, so everybody hears you.

Q Who did you find there? A I found a man lying on the floor, with--

THE COURT: You are talking in too low a tone.

Talk so everybody hears you.

A (Continuing) I found a man lying on the floor, with two bullet wounds in his body.

Q Can you tell us, by looking at this photograph, people's exhibit No. 2, which part of the floor he was lying on? This is the delicatessen store (handing people's exhibit No. 2 to witness)? A I can't tell the floor, ~~the~~ because it is not shown there.

Q The whole floor is not shown? A The whole floor is not shown.

Q Can you tell us his condition at that time?

THE COURT: Why not show him the floor plan?

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MR. WASSERVOGEL: Question withdrawn.

Q Can you tell us by looking--

MR. CURTIS: We, unfortunately, don't hear the testimony.

Q Can you tell us, by looking at people's exhibit No. 6, which part of the floor he was lying in when you saw him? (handing people's exhibit No. 6 to witness). This is the hall, and here is the store, and here are the counters (indicating on people's exhibit No. 6) Now, can you tell us where he was when you saw him, if you remember?

A He was lying on the left hand side of the showcase, as far as I remember.

THE COURT: Do you hear him, Judge Curtis?

MR. CURTIS: "As far as I remember", I heard those words.

THE WITNESS: He was lying on the left side of the showcase, on the floor, as far as I can remember.

Q Which part of the floor? How near the front, if you remember? A It must have been about four feet from the door.

BY THE COURT:

Q That is, four feet from the door leading into the delicatessen store from the street; is that so? A Yes sir.

BY MR. WASSERVOGEL:

Q And what was his condition at that time? A He was bleeding profusely from a wound located in the back of the

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right ear, and also from a wound above the shoulder bone.

BY THE COURT:

Q A wound where? Where was that last one?

A Above the clavicle

BY MR. CURTIS:

Q What did you say? The clavicle? A The clavicle.

BY MR. WASSERVOGEL:

Q And what did you do with him? A I made an effort to stop the bleeding, which I did not succeed in, and I at last made an effort and applied bandages. The wound apparently was going very deep in the chest and in the brain.

MR. CURTIS: A little louder.

THE COURT: Doctor, is it impossible for you to talk in a tone somewhat louder, so the jury can hear you, and also counsel?

THE WITNESS: I put him in the ambulance, and hustled him to the hospital as quick as I could.

Q Were you present when he died? A I was.

Q How long after you had him in the hospital did he die? A He lived about two minutes. I had him on the operating table.

MR. WASSERVOGEL: Cross examine.

CROSS EXAMINATION BY MR. CURTIS:

Q What time did you arrive there?

THE COURT: Referring to the store?

MR. CURTIS: Yes, referring to the store, where

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you found the wounded person?

A This was on Sunday morning. I can't remember the exact hour.

Q Can you approximate it? A It must have been somewhere near ten o'clock in the morning.

Q Now, when you saw this party still living, was it not almost directly across the doorway, or very near it?

A He was lying parallel to the doorway, with the long axis of his body.

Q How far was the door across which his body was lying in the way that you have spoken of? A From the counter, I should judge it must have been four or five feet.

Q Was this store of small dimensions, or was it a large store? A Of small dimensions.

Q And what were its dimensions, if you can estimate them, how long, and how wide? A Perhaps five by seven feet.

Q Five by seven; seven in length and five in width?

A Yes, sir.

Q Was it as small as that? A I don't know how large the door was. It was a single door.

Q Of course, you had never seen this person who was wounded before? A No.

Q And he had two wounds, one in the clavicle-- that necessarily was not fatal? A The wound had --

Q Answer my question. The wound in the clavicle

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itself was not necessarily fatal? A I believe it was fatal.

Q You believe it was fatal? A Yes, sir.

Q Why? A Because a subsequent examination showed it penetrated the lung.

Q It penetrated the lung? A Yes, sir.

Q And the other one was where? In the temple?

A It was back of the ear, posterior of the ear.

Q Which ear? A Right ear.

Q Back of the right ear? A It was back of the canal of the ~~xxx~~ ear.

Q Was that necessarily fatal? A It was.

Q Did you perform the autopsy on this body? A The Cormner's physician and I performed the autopsy.

Q You assisted in the autopsy? A I did.

Q Of course, you don't know which of these wounds was inflicted first? A I don't.

Q The one behind the ear possibly might have been inflicted in a struggle for the pistol?

MR. WASSERVOGEL: I object.

THE COURT: Objection sustained.

MR. CURTIS: Exception.

Q At what point about the ear did the ~~xxx~~ ball enter, the ball that you say entered below the ear, what point?

A The ball apparently had entered right inside the ear, right here, (Indicating) posterior to the canal.

Q You are very experienced in gunshot wounds, their

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nature and character, are you not? A (No answer)

Q How long have you been a surgeon? A Two years.

Q How long have you been accustomed to make autopsies, or to assist at autopsies? A Three years.

Q Now, I put this question. You need not answer it. I will take a ruling on it. This wound in the ear, or about the ear, or near the ear, could not that have been inflicted in a struggle for the possession of the pistol, the ball of which inflicted the wound? A I don't know.

MR. WASSERVOGEL: Objected to.

THE COURT: I will sustain the objection. It does not appear to be proper cross examination, and it is questionable whether the witness is sufficiently qualified.

MR. CURTIS: Your Honor will note our exception. No more.

MR. WASSERVOGEL: Just one question.

RE DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q Will you please tell us, when you found this body on the floor, what was the position of the head with respect to the door through which you go into the store? A His feet were pointing to the door, and his head was back of the store.

Q Was he lying on anything at that time? A There was a block of wood under his head.

Q And at that time his feet were near the front?

A Near the door.

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MR. WASSERVOGEL: That is all.

J O H N R E I G E L M A N, called as a witness on behalf of the people, being first duly sworn, testified as follows:-

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q What is your name? A John Reigelman.

Q You are one of the Coroner's physicians of the Borough of the Bronx, are you not? A I am.

Q And you have been such for how long? A F<sup>if</sup>teen years.

Q How long have you been a physician and surgeon, Doctor?

A Eighteen years.

Q And during the past fifteen years you have had occasion to make autopsies frequently? A I have.

Q How many would you say, roughly speaking? A Four or five thousand.

Q Did you make an autopsy on the body of one Raphael Schwartzmann? A I did.

Q When.

MR. D ERBY: I object to that, and ask to have it stricken out. T<sup>h</sup>ere is no proof this doctor knows Raphael Schwartzmann.

MR. CURTIS: T<sup>h</sup>ere is no proof that it was the body of the deceased.

MR. WASSERVOGEL: Question withdrawn.

MR. CURTIS: It is not sufficient to identify it. I ask to have it stricken from the record, the question and answer.

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THE COURT: It is stricken from the record, and the jury are instructed to disregard it.

Q Did you ever see the body of a deceased person at the Lincoln hospital at a time when Abraham Schwartzmann, a witness who testified here in this case, was present? A I did.

MR. CURTIS: That won't do.

THE COURT: You take an objection to it, I suppose, in that form?

MR. CURTIS: Yes, I take an objection to the form and substance. That is no way to prove it.

THE COURT: The objection is overruled.

MR. CURTIS: Overruled.

THE COURT: Yes, the Court thinks the question is proper.

MR. DERBY: Exception.

MR. CURTIS: Will your Honor permit me to suggest, the case of the people against McIlvaney, 121 N. Y., where a similar question to that was put to an expert, a mental alienist, or an alienist, had he heard the testimony of so and so in Court, had he heard all the testimony on that subject, and so forth, and the Court of Appeals said it was incompetent, and they gave a new trial on that ground. You may send for that case at any time. I know it pretty well. I argued it myself. 121 New York.

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THE COURT: That decision appears to the Court inapplicable to the question now before the Court. The <sup>objection</sup> objection is adhered to.

MR. CURTIS: I take an exception.

Q Did you perform an autopsy on the body ~~of~~ that you saw at that time; when Abraham Schwartzmann was present?

A I did.

Q Did you see the last witness on the stand, Doctor Chilian? A I did.

Q Did he assist you when you performed that autopsy?

MR. CURTIS: Objected to.

Q Was he present?

MR. CURTIS: Those leading questions should not be put.

Q Was he present at the time?

THE COURT: You may ask who was present at the time. Who was there when that autopsy was performed?

MR. CURTIS: That is proper.

THE WITNESS: In going to the morgue of the Lincoln hospital, I took two young men with me who stated that they were Albert Schwartzmann, of 102 Eighty-first street--

MR. CURTIS: Objected to.

THE COURT: Strike that out.

MR. CURTIS: And the witness is no doubt reading from a paper.

THE COURT: Put that in your pocket, wither in your

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pocket, or up.

THE WITNESS: Those are notes made at the time by myself, your Honor.

MR. CURTIS: I move to strike that out.

THE COURT: Strike it out, and the jury will disregard it.

Q You were simply asked who was present.

BY THE COURT:

Q Do you recollect who was there at the time you made the autopsy? Your answer to that is "yes", or "no", or you don't remember? A I do remember.

Q Who was there? A Two brothers-- two men by the name of Schwartzmann, who claimed to be brothers of the deceased.

MR. CURTIS: I move to strike that out.

THE COURT: Strike out "claimed to be brothers of the deceased", and the jury will disregard it.

MR. WASSERVOGEL: May I go on?

MR. CURTIS: I move to strike out the last statement of the Doctor, "who claimed to be brothers of the deceased".

THE COURT: It is out already. It was stricken out by the Court of the Court's own motion. Now, if you contend that there is anybody in this Court house who was present, you may ask the Doctor.

MR. WASSERVOGEL: That is what I want to get at.

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BY THE COURT:

Q Do you think, if you saw the persons who were there then now, you could identify them? A I could.

BY MR. WASSERVOGEL:

Q Do you recognize the two men standing at the rail (Indicating Abraham Schwartzmann and Doctor Chilian)?

A I do.

Q Were they present at that time? A They were both present. I might make a statement. Abraham Schwartzmann was not there during the autopsy. He was there when I first viewed the body.

Q Was the body identified to you by this man Schwartzmann?

MR. CURTIS: Objected to.

THE COURT: Objection sustained.

Q Was the name of the deceased given to you by any person? A It was.

MR. CURTIS: Objected to.

MR. DERBY: That is pure hearsay.

MR. CURTIS: I shall except th that.

THE COURT: I will strike it out, and the jury will disregard it.

Q Will you state what you did? A I examined the body superficially, and then I performed an autopsy upon it.

Q And what conditions did you find? A I found the man

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had a number of bruises upon his face; his lower lip was cut; he had a bruise on the bridge of his nose; he had another bruise at the root of the neck, and he had some bruises on the side of his face, the right side. In addition to that, he had a pistol shot in the right ear, just posterior to the external auditory meatus, just behind the hole of the ear. In fact, I had to wipe the blood away to see it, it was so close to it.

BY THE COURT:

Q That is, the right ear? A The right ear.

Another bullet wound immediately above the center of the right clavicle; that is, the collar bone, where I place my finger (Indicating)

BY MR. WASSERVOGEL:

Q Is that the point of entrance? A That is the point of entrance. I opened the head, and traced the course of the bullet in the head through the ~~xx~~ cerebral tissues, to the base of the right temporal bone, across the posterior--

Q You will have to use plain English? A Across the posterior fasticle of the base of the skull, through the brain substance, and it was lodged in the posterior fascia on the right side, where I removed it,-- on the left side, at least

Q Was there anything else that you did? A I traced the course of the second bullet. The second bullet went through the second rib, downwards, backwards, and to the left, and it was lodged in the body of the ninth dorsal

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vertebrae. In other words--

MR. DERBY: The doctor characterized the bullet as the second bullet.

BY THE COURT:

Q You mean the second one, the course of which you traced? A Yes, sir.

Q After you traced the course of one, you then traced the course of the other, and the one that you traced in the second instance you are now talking about? A I used it in that sense. That went downward, backward and to the left. It its course, it went through the lung, There was a very extensive hemorrhage in the right chest. I removed both bullets, which I have now in my possession.

BY MR. WASSERVOGEL:

Q Q Let me have them, please? A (Witness hands two leaden bullets to Mr. Wasservogel.) This is the bullet from the head (Indicating) This is the bullet from the chest (Indicating)

MR. WASSERVOGEL: I offer them both in evidence.

(Received in evidence, and marked respectively, people's exhibit No. 7, and people's exhibit No. 8, of this date)

Q Is there anything else you did, Doctor, that you have not told us? A What I got inquiring who the dead man was.

Q Was the body upon which this autopsy performed,

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Doctor, the same body that you saw in the presence of Abraham Schwartzmann, the young man who was at the rail a moment ago? A It was.

MR. CURTIS: I don't hear the question.

(Question read by the stenographer as follows:

"Was the body upon which this autopsy was performed, Doctor, the same body that you saw in the presence of Abraham Schwartzmann, the young man who was at the rail a moment ago"?)

MR. CURTIS: That is objected to.

MR. WASSERVOGEL: Cross examine.

BY THE COURT :

Q Did you at any time see more than one body in the presence of the young man whose name was Abraham Schwartzmann?

A I did not.

MR. WASSERVOGEL: Cross examine.

MR. CURTIS: I don't think we care to examine.

MR. WASSERVOGEL: That is all, Doctor.

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Q B R A H A M S C H W A R T Z M A N N, being recalled, testified as follows:-

BY MR. CURTIS:

Q Young gentleman, I omitted to ask you a question, and it is this: When you were before the Coroner, was this question put to you, and was the answer which I shall read the one you gave: "I was there that morning, and asked the

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boy what is the matter, and he said he wants to quit the job, so I said to him, 'go ahead and eat breakfast'. He said 'never mind the breakfast'. I said, 'what is coming to you' he said, 'six dollars', and I figured it up; it was five dollars; I offered him five dollars, and he refused and went out mad. Afterwards he came in". Did you testify to that before the Coroner? A I testified--

Q Did you testify--

THE COURT: He is answering you.

A I testified to all of it except the last clause, that he came back.

THE COURT: You say you did not say that?

Q You deny that you testified to that, "afterwards he came in"? A (No answer)

BY THE COURT:

Q You say you did not say that before the coroner; is that so? Talk up? A I don't remember saying that.

BY MR. WASSERVOGEL:

Q You did not see him come in after that, did you? A No.

Q And you remember Doctor Reigelman, the gentleman standing over there (Indicating)? A Yes, sir.

Q I think you told us on your direct examination that you saw a body while he was present?

MR. CURTIS: He has been over that.

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THE COURT: I will allow it.

A My brother's.

Q You saw the body of a dead person while Doctor Reigelman was present? A Yes.

Q Did you recognize that body? A Yes, sir.

MR. DERBY: Objected to, on the ground it is improper re direct.

THE COURT: well, it is not redirect, but, in the discretion of the Court, it is allowed, and you will be given full opportunity to examine on it.

MR. CURTIS: And it is objected to in form.

THE COURT: It is allowed.

MR. CURTIS: We take an exception.

Q Whose body was it? A My brother's, Raphael Schwartzmann.

MR. WASSERVOGEL: That is all.

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J O H N R E I G E L M A N, recalled.

BY MR. WASSERVOGEL:

Q You were going to explain, Doctor, when I interrupted you, what you meant by cerebral and those other latin terms? A The course of the bullet, in other words, went from the right side of the head, to the left, and somewhat posteriorly, lacerating the brain. Of course, he had an extensive hemorrhage in the head, ~~xx~~ as well as the destruction of brain tissue.

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Q Was the course upward? A With the body standing, it was up, somewhat downward, and to the left.

BY THE COURT:

Q Referring now to the wound in the head, that was somewhat downward? A Downward, and toward the left.- Assuming the body to be standing at the time, the wound in the body was more directly downward, and also to the left, assuming the body to be standing. The cause of death was -

MR. CURTIS: Objected to.

THE COURT: Objection sustained.

MR. CURTIS: I submit, the Doctor should not volunteer evidence.

THE COURT: Your objection is sustained. The Doctor has not volunteered before. Proceed.

BY MR. WASSERVOGEL:

Q From the pathological conditions found by you, Doctor, can you state, with reasonable certainty, what, in your opinion, was the cause of death?

MR. CURTIS: I object to that. The Doctor has already given his evidence.

THE COURT: I will allow it.

MR. CURTIS: I take an exception.

A I can.

Q Please do so? A He died from laceration of the brain, cerebral hemorrhage, hemorrhage of the chest, secondary to pistol shot wounds.

Q Caused by? A Caused by pistol shot wounds.

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MR. WASSERVOGEL: That is all.

L I L L I A N S A G O R, called as a witness, being first examined by the Court, testified as follows:

BY THE COURT:

Q What is your name? A Lillian Sagor.

Q Where do you live? A 2677 Third Avenue.

Q How old are you? A Fifteen and one-half.

Q When were you fifteen? A In May.

(The witness is duly sworn.)

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q Where do you live? A 2677 Third Avenue.

Q Try and talk loud, as loud as you can.

THE COURT: Don't be at all afraid. This room is a large room, and you want to talk loudly enough so that everybody hears you. Will you do that?

THE WITNESS: Yes, sir.

THE COURT: Go ahead.

THE WITNESS: 2677 Third Avenue.

THE COURT: You will have to say that over again. I don't think they hear you.

THE WITNESS: 2677 Third Avenue.

Q How far is that from 2615 Third Avenue? A Almost three blocks.

Q Do you know who kept the store at 2615 Third Avenue,

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in October of last year? A Yes, sir.

Q Who was it? A Schwartz.

Q You knew him as Schwartz? A Yes, sir.

Q What kind of a store was it? A Delicatessen store and grocery store.

Q Were you in that store at any time on the 13th of October of last year? A Yes, sir.

Q At about what time? A Ten o'clock in the morning.

Q You were there at about ten? A Yes, sir.

Q And who was in the store when you came in? A Schwartz and another lady.

Q And a lady was in there? A Yes, sir.

Q And where was Schwartz standing at that time? A Behind the counter.

Q When you say Schwartz -

THE COURT: When she says Schwartz, does she mean Schwartzmann?

MR. WASSERVOGEL: She knows him as Schwartz.

BY THE COURT:

Q You mean the man who kept the delicatessen store? A Yes.

Q You called him Schwartz? A Yes, sir.

BY MR. WASSERVOGEL:

Q The man you saw in that store, was it the young man you saw on the witness stand to day, or some other man? A Some other man.

Q The brother? A Yes, sir.

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Q You don't know his first name? A I think it was Nathan, but I am not sure.,

Q You don't know his first name? A No, sir.

Q How long did you remain in the store? A About twenty minutes.

Q You were in the store? A Yes, sir.

Q Did anybody come in? A Yes, sir.

Q Who came in? A Geller.

Q Who do you mean by Geller? A The clerk of the store.

Q Did you ever see him there before? A Yes, sir.

Q When he came in, what was said or done by anybody?

A Schwartz went to the register and put some money up on the counter, and Geller took it, and he walked out and said "Good bye".

Q That was all? A Yes, sir.

Q Nothing else was said? A No.

Q You don't know how much money was handed to him, do you?

A No, sir.

MR. WASSERVOGEL: That is all.

CROSS-EXAMINATION BY MR. CURTIS:

Q Where do you live, do you say? A 2677 Third Avenue.

Q Had you ever known Geller before? A Yes, sir.

Q Where did you know him? A From the grocery store.

Q You had met him in that grocery store? A Yes, sir.

Q Do you remember what day in the week this was? A Sunday

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morning.

Q And how late did you say it was? A Ten o'clock.

Q And who did you say was in that store beside you when Geller came in? A Another woman.

Q Do you know what her name was? A Okun.

Q Oatman. Have you seen her here today? A Yes, sir.

Q She was there at that time? A Yes, sir.

Q What did you go there for? A I went to get some things.

Q You went to get some delicatessen articles and groceries?

A Yes, sir.

Q And had you been accustomed to trade there? A Yes, sir.

Q And that is the way in which you got acquainted with Mr. Schwartz, as you call him? A Yes, sir.

Q And you only knew him by that name? A Yes, sir.

Q While you were there there was no trouble, no physical conflict, or shooting, or anything of that kind? A No, sir.

Q So far as you saw, the whole thing was amicable and friendly, was it? A Yes, sir.

Q How do you fix the time? A Ten o'clock.

Q How do you fix the time?

BY THE COURT:

Q In other words, what makes you say it was ten, instead of saying that it was half past nine, or eight? How do you fix the time? A Because that is the time I usually went there on Sunday mornings.

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BY MR. CURTIS:

Q And is that the only way you know it was ten o'clock?

A Well, I know by the clock.

Q Did you notice the clock at the time? A Yes, sir.

Q And this money that was taken out of the register, as you say, was it in bills? A In silver.

Q In silver. Sure about that? A Yes, sir.

Q And not in bills? A Not in bills.

Q It was not a five-dollar bill? A No, sir.

Q And was that all the persons that were there, this lady, named Oldfield, and yourself? A Yes, sir.

Q And did she go out about the time you did? A No, sir, she went out before I did.

Q She went out before this money was paid? A Yes, sir.

Q And did you see the silver counted? A No, sir, because the counter was higher.

Q You didn't see the silver, then? A No, sir.

Q You only saw Mr. Schwartzmann's hand pass something to Geller? A I heard the way he put the money down.

Q And that is all? A That was all.

Q Did you go right home? A Yes, sir.

Q And do you remember what time it was you got home?

A About ten after 10:00.

Q Did you look at the clock? A No, sir.

Q Won't you kindly tell me how it is that you fix hours and minutes without consulting a clock? A Because I was there

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only about ten minutes before -

BY MR. WASSERVOGEL:

Q Before what? A I was there ten minutes after Geller came in.

BY MR. CURTIS:

Q Ten minutes? A Yes, sir.

Q Excuse me. You made a purchase there? A Yes, sir.

Q And what was it? A I don't remember.

Q Don't remember it? A No, sir. I paid him the bill, too, while I was there.

Q You paid him? A Yes, sir.

Q You live home with your mother? A Yes, sir.

Q And does your mother know Schwartzmann? A Yes, sir.

Q And knows his brother? A Yes, sir.

Q Is she intimate with them? I mean to say, does she see them frequently, or did she see them frequently? A No, sir.

Q How long had she dealt with them? A Since they have opened the store.

Q They have brothers and sisters? A Yes, sir.

Q You didn't go before the Coroner, did you? A No, sir.

Q You knew when Mr. Schwartz, as you call him, was killed, didn't you? A Yes, sir.

Q Did you tell anybody at that time that you knew about it?  
A No, sir.

Q Did anybody tell you that it was important to prove that you saw some money passed? A No, sir.

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Q How came you to be a witness here? A I don't know.

Q You don't know? A No.

Q You didn't tell anybody? A No, sir.

Q Is your mother here? A Yes, sir.

Q Where? In the courtroom? A Outside.

Q Your mother was not there? A No, sir.

Q And you don't know how you came to be a witness? A I -

BY MR. WASSERVOGEL:

Q I what? A I think I know. My mother went to the grocery store when Schwartz' brother opened up again, and she spoke to him, and she said I was there the time I paid him, because I told her I was there.

BY MR. CURTIS:

Q Were you there when she told that? A No, sir.

MR. CURTIS: I move to strike that out.

MR. WASSERVOGEL: He wanted to know how she came to be a witness.

MR. CURTIS: I move to strike out what her mother said in her absence.

THE COURT: I will tell you, under the circumstances, the Court might allow it to stand, with a great deal of propriety, but I will strike it out, because you asked her to give the best explanation she could of how she happened to be brought here, and she is giving you that explanation, but I will strike it out.

Q Do you remember when Mr. Schwartzmann opened up again,

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his brother, do you remember the date? A No, sir.

Q But you remember the date of this occurrence when you were in the store? A Yes, sir.

Q Have you repeated this story to anybody? A Yes, sir.

Q To whom? A My mother.

Q Anybody else? A No, sir.

Q Did your mother take you anywhere to make any statement?

A No, sir.

Q Nowhere? A No, sir.

Q Did your mother call your attention to the fact that it was October 13th that you was there? A No, sir, but I remember the date myself.

Q And you don't remember the date when Schwartzmann reopened? A No, sir.

Q Wasn't it sometime after that he reopened? A Yes, sir, but I don't remember how long afterwards.

Q Did you ever see Schwartzmann at your mother's house?

A In the store, yes, sir.

Q I say, did you ever see him at your mother's house? A Yes.

Q And was your father present? A Yes, sir.

Q And the family were present? A Yes, sir.

Q How often was he there? A Whenever he passed by.

Q He was quite an intimate friend, wasn't he? A Not very.

Q Did he pass there frequently? A No, sir.

Q But, whenever he did, he called? A I don't know whenever he did, but most of the time he stopped in, and he stayed a

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little while.

Q When did you first speak about this, young lady? A The same day I found out about the accident.

Q Who told you about the accident? A My brother.

Q And did your brother suggest that you had been down to the store that morning? A No, sir, but -

Q You told your brother -

BY MR. WASSERVOGEL:

Q But what? Let her answer. A But he knew I was there, and he came up and told us.

BY MR. CURTIS:

Q Told you, and was that the first time you spoke of it?

A Yes, sir.

Q Who did you speak about it to? A My mother.

Q Your mother. But all the time that you was there there was never any difficulty between the two men?

MR. WASSERVOGEL: She has answered that.

THE COURT: I will allow it.

MR. CURTIS: I will take the law from your Honor, and not from the District Attorney.

THE COURT: I have allowed it.

A There was no quarrel between the two men.

Q No, not at that time. Wasn't anything said between them at the time the silver passed? A No, sir.

Q Not a word, A No, sir.

Q And you did not see the silver? A No, sir.

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Q And, of course, you did not count the silver? A No, sir.

Q And you say you recognized it to be silver by the noise it made on the counter? A Yes, sir.

Q And was it the noise of more than one piece? A Yes, sir.

Q How many pieces, do you think?

MR. WASSERVOGEL: I object to what she thinks on the subject. If she knows, it is quite different. The girl has not seen the silver, does not know whether it was in silver, or not, but she heard the sound of silver as it was put on the counter. Now, that is as far as she can go, I submit.

MR. CURTIS: I press the question.

THE COURT: I will hear her in full.

Q (Question read by Stenographer, as follows: "How many pieces, do you think?")? A I think about four.

Q And are your sense so acutely trained that you can tell the denomination of a piece of silver by the noise it makes? A No.

MR. WASSERVOGEL: I object.

MR. CURTIS: I press it.

THE COURT: I will let the answer stand.

Q Did you hear anybody suggest that this was silver? A No.

Q After you had told - were you at no other place except in your mother's house since this occurrence? Weren't you taken to some place to make a statement? A No, sir.

Q Who was present when you first made a statement about this? A Only my mother.

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Q Only your mother? A Yes, sir.

Q You did not make it to your brother, then? A No, sir.

Q And you made it to your mother, and when was this? A  
After the accident occurred.

Q And before the Coroner's Inquest?

MR. WASSERVOGEL: She has not said she knows when the  
Coroner's Inquest was held. I object to the question.

THE COURT: Objection overruled.

BY THE COURT:

Q Do you know what is meant by Coroner's Inquest? "Yes",  
or "no"? A No.

MR. CURTIS: We will get the date as nearly as we can.

BY MR. CURTIS:

Q Was it before November 7th, 1912?

THE COURT: That you told your mother?

A Yes, sir.

Q Now, with that to refresh your recollection, do you  
think you are able to tell us when it was you told your mother?

A The same day, October 13th.

Q You told her the same day? A Yes, sir.

Q So that, your mother, whom you say was an acquaintance  
of the deceased, and also of his surviving brother, never brought  
you before the Coroner?

MR. WASSERVOGEL: I object to that.

THE COURT: Objection sustained.

MR. CURTIS: I take an exception.

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A Never.

THE COURT: Well, let the answer stand. You have got it

Q And, so far as you know, supposing the Coroner's Inquest to have taken place on November 7th, 1912, your mother did not acquaint anybody, so far as you know, in your presence, with the fact that you had been there that morning? A No, sir.

Q Did any officer come up to your home? A No, sir.

Q Or did Schwartzmann come up to your home? A No, sir.

Q Didn't call there then? A No, sir.

BY THE COURT:

Q Do you see in the courtroom now the person whom you called Geller? A Yes, sir.

Q Whereabouts? A Shall I point him out?

Q Yes. A Right there (pointing to defendant).

MR. WASSERVOGEL: Come down and point him out.

(Witness goes down to table reserved to counsel for defense and points to the defendant).

BY MR. CURTIS:

Q Young lady, how long have you known Mr. Geller? A Since he has been working there.

Q And do you remember how long that was? A About twenty days.

Q About twenty days. How did you get that so accurately? Did you get that from Schwartzmann? Did he tell you that? A No.

Q Was you there when he was engaged? A No, sir.

MR. CURTIS: That is all.

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BY THE COURT:

Q Did you see Geller come into the store that morning?  
Did you see him open the door? A Yes, sir.

Q What was the first thing that you saw him do? What  
did he do first? A He walked up to the counter like a customer.

Q Was that up to the same counter at which you were standing?  
A Yes, sir, next to me.

Q And at that moment, what was the man whom you called  
Schwartz doing? A He was waiting on a customer.

Q Was he waiting on you? A Yes, sir.

Q You were the customer that was being waited on? A Yes.

Q And when you say he was waiting on you, what do you  
mean? A I asked him for a certain thing, and he went to get it  
for me.

Q And to what part of the store, if you remember, did  
Schwartz go to get the thing that you had asked for? A Just in  
the back.

Q Did Schwartz come back with that thing? A Yes, sir.  
As soon as he saw Geller. He came to the register and opened  
it, and took out the money.

Q Before he brought you what you had ordered? A No, he  
came right with the thing I had ordered.

Q And when he came with the thing that you had ordered,  
what did he do with that thing? A He put it on the counter,  
and he opened the register.

Q Now, did you hear, from the time that Geller came into

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the store, until the time when, as you say, Schwartz opened the register, any words spoken by Geller? A Not a word.

Q Did you hear any words spoken by the man whom you called Schwartz to Geller? A No, sir.

Q Did you hear any words spoken by Schwartz to Geller up to the time that Geller passed out of the door of the store? A No, sir.

Q Or by Geller to Schwartz? A Yes, sir.

Q Did you hear Geller say anything to Schwartz? A Yes, sir.

Q Was that said before, or after, you heard the silver?

A Just as he was going to open the door, he said, "good bye".

Q You heard - who did you hear say "good bye"? A Geller.

Q What word did he speak, did Geller speak? A English.

Q He spoke in English? A Yes, sir.

Q And who did he speak to? A Schwartz.

Q And what did Geller say? A "Good bye", and he walked out.

Q Didn't say anything else? A That was all.

THE COURT: Do you want to examine her any further?

MR. CURTIS: No, sir.

MR. WASSERVOGEL: That is all.

MR. CURTIS: Oh, can I ask the young lady one question?

THE COURT: Yes. Come back.

BY MR. CURTIS:

Q Young lady, do you speak Yiddish? A Yes, sir.

Q That is a dialect of the Hebrew? A Yes, sir.

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MR. WASSERVOGEL: Conceded.

Q You say the Geller spoke English? A English.

MR. CURTIS: That is all.

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S A V I N O J I O G C H I N O, called as a witness on behalf of the People, being first duly sworn, and examined through the official interpreter, Diadato Villamena, testified as follows:

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q What is your name? A Savino Jioacchino.

Q What is your business? A Coal man.

Q And your place of business is where? A 2617 Third Avenue.

Q In the basement of that building? A Yes sir.

Q Is that basement shown on this photograph, People's Exhibit #1 (Handing same to witness)? A Yes, here (Witness points on diagram).

Q And does this photograph also show your picture in front of the place? A Yes sir.

MR. CURTIS: That was taken when?

MR. WASSERVOGEL: On January 29th.

MR. CURTIS: Of this year?

MR. WASSERVOGEL: Yes. No, I beg your pardon.

This was taken on January 17th.

Q Was your place of business in the same building, in the same cellar, on October 13th of last year? A Yes sir.

Q Do you know where the delicatessen store is in that block? A Yes sir.

Q And do you know the man who owned that store on October 13th of last year? Did you know him? A Yes sir. I

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delivered ice to him.

Q Did you ever see the defendant at the bar? A Yes sir

Q Where did you see him? A He was working there in the store.

Q Did you see Rafael Schwartzmann on the day of the shooting? A Who is that Rafael Schwartzmann?

Q The man who was shot? A Yes sir.

MR. CURTIS: I object to that form of question, he can ask if he knew Rafael Schwartzmann.

THE COURT: Ask him if he saw the man who he says was the proprietor of the store.

MR. CURTIS: Well, that is better.

THE WITNESS: In the morning I saw him.

Q Tell us all you heard and that you saw that morning with respect to the shooting? A I went over to deliver some coal to one of my customers. In coming back, passing in front of this store here, I heard the report of a pistol. I turned around, and I saw a man with a pistol in his hand, pointing this way (Witness indicating by raising up his right hand and pointing). I saw then the man with the pistol in his hands come out on the sidewalk, and the boss of the store go after him, and when he got near the door the man that fired the first shot turned back, fired the second shot, and I saw the man then fall down.

BY THE COURT:

Q Who fell down? A The man that owns the store.

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BY MR. WASSERVOGEL:

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Q Where was it that you had just delivered coal? A In the same building where this thing occurred, on the top floor.

Q That is in the building #2615 Third Avenue? Is that the building (Showing People's Exhibit #1 to witness)? A Yes sir.

Q And the entrance to that building is right next to the entrance to the delicatessen store, A Yes sir.

MR CURTIS: That is rather leading, if your Honor pleases.

MR. WASSERVOGEL: Well, is there any dispute about it?

MR. CURTIS: Well, I don't know. You should not suggest answers to the witness.

THE COURT: Well, objection sustained.

Q How far were you from the delicatessen store when you heard the first shot? A I was right in front of the store when I heard the first shot.

Q Did you look into the store after hearing the first shot? A Why, sure, certainly.

Q And when you looked into the store, what did you see? A I saw a man with a pistol in his hand.

Q Did you recognize the man who had the pistol in his hand? A Yes, I know him.

Q And do you see him in Court now? A That one there

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(Pointing to defendant).

Q Before the second shot was fired, can you tell us where the proprietor of the store was? A He was inside of the counter, near the cash register.

Q What do you mean by inside the counter? Behind the counter, or in front of the counter? A He was behind the counter.

Q And in which direction was the man with the gun going? A When he was inside?

Q Yes? A The proprietor of the store was---

Q No, the man with the gun? A He was inside the store, but outside of the counter, in front of the counter.

Q And did you see the man with the gun go out of the store? A Sure, I saw it.

MR. CURTIS: I submit the proper way to examine the witness is to ask him what he saw and heard. The questions of the District Attorney are very suggestive of an answer, and we should not, it seems to me, be subjected to that style of examination.

THE COURT: Well---

Q After you saw the man with the gun going towards the door, towards the street, what did you see the proprietor do, if anything? A He went after him.

Q What do you mean by "He went after him". Did he come out from behind the counter?

MR. CURTIS: Now, if your Honor please, if that

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proper, on direct examination "What do you mean by a certain answer"? Do you mean so and so? I object to it.

THE COURT: There is no use arguing it, Judge Curtis. The objection is sustained to the last part of the question.

MR. CURTIS: I think counsel ought to pursue

MR. WASSERVOGEL: Now, Judge Curtis, let the Court run this Court. Don't you interfere. We have had enough of it.

MR. CURTIS: I don't think it is right, and when I-

MR. WASSERVOGEL: Has your Honor ruled on this matter. I think your Honor has.

THE COURT: From this time on, after a question has been put by Mr. Wasservogel, before the witness answers, if you have any objection to make, you may make your objection and the court will rule.

MR. CURTIS: That will occupy so much time; I don't want to do that.

THE COURT: That is the course to pursue, from this time on. Now, the last clause in that question is objectionable. The question may be reframed by asking the first part.

Q (Question read by Stenographer, as follows: "What do you mean by he went after him?")?

MR. WASSERVOGEL: I press that question.

THE COURT: That I will allow.

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A He came out, by coming around from behind the counter, and he went near the door, and then this defendant fired the second shot. Then I saw the proprietor of the store fall down.

Q And where did he fall? A Right at the door.

Q And did you see what the defendant did if anything, at that time? A I saw this defendant throw the pistol in the street. I saw some blood there, and I got scared and I went down in my basement. after a little while I came out, and I saw this defendant in the custody of the officers.

CROSS EXAMINATION BY MR. DERBY:

Q Have you testified before to these facts? A Sure.

Q Before whom?

THE COURT: (To the Interpreter) Now, you have not translated the question as put by the Assistant District Attorney, and you must be careful to make your translations correct. He was not asked whether he had ever said anything about these things before. He was asked whether he had testified regarding them before. Ask him that.

THE WITNESS: When? When I come the first time here?

THE COURT: You may explain to him, Mr. Derby, by your question, what you mean.

Q Did the police officer who arrested the defendant take

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your address at that time? A No sir. After that, they come to me.

Q The policeman came to you afterwards? A Yes sir.

Q How long after the shooting? A About a week after.

Q Did he tell you that you would be required to testify?

A Yes sir.

Q Were you notified on November 7th to attend the Coroner Court? A I received a subpoena, but I do not know if it was here, or where, but I come here, I couldn't remember the date.

Q Well, on November 7th, did you go to the Coroner's Court, up in the Bronx? A I didn't went to no Court. I only came down here, down to the Tombs.

THE COURT: He probably means that he appeared before for the Grand Jury.

Q How far were you from the delicatessen store when you heard the first shot? A I was on the sidewalk. It must be the distance from here to there (indicating from where witness is sitting).

Q About how many feet away? A I do not know how many feet I was. I was on the sidewalk. They were inside of the store.

BY THE COURT:

Q How many feet were you from the door of the store, meaning the delicatessen store, at the time you heard the first shot fired? A You could mark this distance, from where I am now to the gate here (Indicating).

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MR. DERBY: About eight or ten feet.

THE SECOND JUROR: I judge about eight feet.

MR. WASSERVOGEL: About eight feet.

BY MR. DERBY:

Q Were you standing in front of the store, or in front of some other store, when you heard the first shot? A I was right in front of this delicatessen store when I heard the ~~stake~~ shot, and I turned around and looked in.

Q How long did you stand looking in? A About half a second.

Q Did you see all the things that you have told us about during that half a second? A I saw the first shot, and then, after the first shot, they come out back, and I saw the second shot fired, and there elapsed about half a second.

Q Was the door of the store open? A Yes sir.

BY THE COURT:

Q Was it open at the time that you heard the first shot? A Yes sir.

THE COURT: We will take a recess now. Gentlemen of the jury you are admonished not to converse among yourselves on any subject connected with this trial, or to form or express any opinion thereon, until the same is submitted to you. The Court takes a recess until 2 o'clock.

(The Court accordingly took a recess until 2 P. M.)

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AFTER RECESS.

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SAVINO JOACCHINO, resumes the stand.

CROSS EXAMINATION CONTINUED BY MR. DERBY:

Q Will you look at People's Exhibit #1, A photograph of the premises where this shooting occurred, (Handing same to witness). Please indicate where the delicatessen store belonging to the deceased was? A This is the store (Indicating on People's Exhibit #1).

THE COURT: Would you like to have him make a mark there?

MR. DERBY: I don't think it is necessary, but I would like the witness to make a mark where he was standing at the time he saw these events that he has related as having happened inside the store.

THE COURT: At the time he heard the first shot?

Q At the time you heard the first shot, where were you standing? Will you make a mark, please. A Is this the door next to the delicatessen store (Indicating on People's Exhibit #1)?

Q Please indicate by a pencil mark where you were standing when you heard the first shot? A (Witness marks on diagram, People's Exhibit #1).

THE COURT: Now, for the purposes of the record, Mr. Derby, you might state it. He has made a mark where?

MR. DERBY: Just about the centre of the front of

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the delicatessen store.

MR. WASSERVOGEL: That is about the centre of the sidewalk?

MR. DERBY: Centre of the sidewalk in front of the delicatessen store.

MR. WASSERVOGEL: Between the curb and the house line.

Q Did you continue to stand in that spot after you heard the first shot? A Yes sir.

Q Are you sure that the door was open? A Yes sir.

Q Did you see what happened inside the store while looking in through the door? A Yes sir.

Q Or through the window? A (No answer).

BY THE COURT:

Q Did you look through the window, or did you look through the open door? A I looked through the open door, and you could see ~~HER~~ even through the glass.

BY MR. DERBY:

Q Now, when you first looked into the store, where was the deceased, Schwartzmann standing? A He was behind the counter.

Q In the back part of the store? A No, right in the middle of the store, where the cash register is.

Q And where was the defendant standing, Geller? A facing the other man.

BY THE COURT:

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Q On which side of the counter was the defendant? A He was outside of the counter, Mr

BY MR. DERBY:

Q Did the defendant, Geller, move from that position?

A Yes sir, he started to come out.

Q Started to come towards the door? A Yes sir.

Q And you saw that Schwartzmann followed him? A Yes sir.

Q You went into your basement before Geller came out of the door, did you not? A No, I went down in the basement after he fired the second shot.

Q Did you see him come out of the store on to the street? A Yes sir.

Q Did he pass close to you? A No sir, because when he come out I stepped in one side.

Q And you went down in your basement? A No, I remained there.

Q Remained standing on the sidewalk? A Yes sir.

Q Now, is it not a fact, that when the policeman came in front of the store with the defendant Geller, that you stepped up and said "What is the matter, what's the matter".

THE COURT: (To the interpreter) Your translation was not correct because you put in "Step up from the basement". You want to leave that out.

THE WITNESS: What should I ask the policeman all that for, when I saw that occurred.

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MR. DERBY: I ask to have the answer stricken out and a "yes" or "no" answer given.

THE COURT: Strike it out. Did you say it?

THE WITNESS: No sir.

Q You did business with Schwartzmann previous to this shooting? A I delivered him ice, and he paid me for it.

Q Do you still do business with his brother? A No sir, he has got one business, and I have got another kind of business.

Q Do you sell him coal? A Yes sir, and ice and wood.

Q To whom did you first tell about this shooting, about having seen this shooting? A When I received the subpoena, I come down here, and I then I told the Court.

Q Who was the first person that you told? A This gentleman here, through another Italian Interpreter who asked me the questions like you do now.

THE COURT: Referring to Mr. Wasservogel.

MR. WASSERVOGEL: Correct.

Q Didn't you tell the police officer before you ever told Mr. Wasservogel? A No sir.

Q Did you tell Schwartzmann's brother? A Yes sir, the policeman came down to see me, and he asked me something about it, but I couldn't explain to him. He asked my name, and he went away?

Q And how long was that after the shooting? A A week after.

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MR. DERBY: No further questions.

MR. WASSERVOGEL: Just one question.

RE-DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q Do you sell ice and coal to Schwartzmann's brother now? A No sir.

Q You did at that time, you mean? A Yes sir.

Q After you heard the second shot, where did you go? A I went down in my basement.

Q And did I understand you to day, on your direct examination, that you then came out of your basement? A Yes.

Q And was it then that the policeman had the defendant in custody? A Yes sir.

MR. WASSERVOGEL: That is all.

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W I L L I A M K I E N A S T, called as a witness on behalf of the People, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q What is your name? A William Kienast.

Q Where do you live? A 407 East 153rd Street.

Q You are a member of New York City's Fire Department?

A Yes sir.

Q And have been for how long? A Two years and six months.

Q Were you in the neighborhood of 2615 Third Avenue on the 13th of October, last year? A Yes sir.

Q At about what time? A About 10:15.

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Q Was there anything that attracted your attention to those premises? A Yes sir, two pistol shots.

Q And how far from 2619 Third Avenue were you when you heard the pistol shots? A Well, I should judge about 60 feet or so.

Q In which direction? A North.

BY THE COURT:

Q Were you on the same side of Third Avenue as that number? A Yes sir.

BY MR. WASSERVOGEL:

Q Were you near 139th Street, coming from there? A No, coming from 141st Street.

Q Oh, coming from 141st Street, and when you heard these shots, what, if anything, did you do? A I ran down to the vicinity where I thought the shots came from, and I seen the officer had run across the street a little bit before me, and I seen him take hold of this defendant, and I didn't bother much then, but I went into the store, and I seen the man laying in the store.

Q The man who was shot? A Yes sir.

Q And will you tell us the position in which you found him at that time? A He was laying over on the side, on the right side, partly in.

Q Partly what?

BY THE COURT:

Q Whereabouts in the store was he? A He was laying

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right near the front door, I should judge, back about seven or eight feet from the door.

BY MR. WASSERVOGEL:

Q And what, if anything, did you do? A Well, I took him and turned him over, and there was a bag containing rice there; I laid that on the floor, and laid his head on it, and I ran to the back, extreme end of the store, to a sort of little living rooms, a sink, and I took a pan of water and a towel, and I tried to stop the flow of blood.

BY THE COURT:

Q When you first saw the man on the floor, in what direction was his head? A His head was laying back towards the rear of the store.

Q And with respect to the uptown or downtown wall of the store, what direction was his head. A His head was laying towards the back of the store, to the easterly direction---to the west, at least, your Honor.

Q And his feet? A His feet were laying east.

MR. CURTIS: I didn't hear the latter.

THE WITNESS: Were laying east.

MR CURTIS: Were they outside the door, or inside?

THE WITNESS: No sir, inside.

BY MR. WASSERVOGEL:

Q And you say you placed his head on this bag of rice? A Bag of rice.

BY THE COURT:

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Q How were his hands? A He was laying in cramped up position; he was all bundled up when I got him, so I didn't really take notice of where his hands were. I just picked him up and straightened him around, and laid his head on the rice, and then I went in the room and ~~xxx~~ tried to stop the blood.

BY MR. WASSERVOGEL:

Q Were you present when an ambulance came and took him away? A Yes sir.

Q You saw him placed in the ambulance? A Yes sir.

Q Do you know whether he was conscious or not, when you saw him on the ground? A He was unconscious.

BY THE COURT:

Q Was there any person in the store besides yourself when you stepped in there, anybody else besides the person on the floor? A No sir; quite a few people started to collect right there and crowd into the door way, but I didn't really take much notice of them. I thought more of assisting the man, after I had seen the officer.

BY MR. WASSERVOGEL:

Q Can you tell us what the condition of the store was at that time. A To my knowledge I didn't notice anything out of the ordinary.

Q Was it in order, or otherwise? A No, as far as I could ascertain at a rough look there was no disorder.

MR. WASSERVOGEL: Cross examine.

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## CROSS EXAMINATION BY MR. DERBY:

Q About what time of day was it when you heard that shot

A Well, I should judge about 10:15, or something like that; I am not sure.

Q Was it nearer ten or ten fifteen? A Well, it was nearer ten fifteen.

Q Did you hear both shots? A Yes sir.

BY THE COURT:

Q How much time was there between the first and the second? A Well, I should think there was about a minute or so.

BY MR. DERBY:

Q When you came up to the store, did you see the last witness, the Italian---what is his name?

THE COURT: He may stand up and come forward.

(Witness Savino Jioacchino stands at bar of court)

A No, I didn't take notice whether he was there at all.

Q Did you see any one in front of the store, or near the store? A There was quite a crowd of people collected there while I was trying to assist the man.

Q When you got to the store, did you see anybody? Did you identify anybody? A I didn't identify anybody. There was people there, but none of them seemed to--

Q Did you find the deceased lying in the doorway? A In the doorway.

Q Was the door open? A Yes sir.

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Q Was part of his body outside? A No.

Q Outside the store? A No.

Q Were his feet over the threshold? A No sir.

Q How big a store was that? Could you give the dimensions, roughly? A The front was about eighteen foot, I guess, by about forty feet. That is just a rough estimate.

BY MR. CURTIS:

Q Forty feet, did you say? A Yes sir.

Q 18 by 40? A About; that is just an approximate guess.

BY MR. DERBY:

Q How far was the counter from the door? A I didn't take notice of the counter or anything.

BY THE COURT:

Q As far as you know, had you ever been in that store before? A No, I have never been in the store, but I have passed there for the last two years twice a day.

Q Did you start to run as soon as you heard the first shot? A No.

Q What were you in the act of doing at the moment that you did hear the first shot? A I was confused where the shot come from.

Q What were you in the act of doing at the moment when you heard the first shot? A I was walking back to quarters, returning to my quarters for my breakfast.

Q And where were your quarters? A 125th Street between

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Lexington and Park Avenues.

Q And you were coming from what place? A From home my address.

Q And your address was between what streets? A 407 East 153rd Street.

Q So that you were coming from 153rd Street down towards 125th Street? A Yes sir.

Q And you were walking on the sidewalk, on Third Avenue?  
A Yes sir.

Q Going down town? A Yes sir.

Q And you had got to what point when you heard the first shot?  
A Between 140th and 41st Street.

Q How far did you walk from the time that you heard the first shot until the time that you heard the second shot? A Well, I don't believe I walked at all. I was confused, and I stood there.

Q You stopped? A I stopped, yes sir.

Q How long was it according to your best estimate, between the time when you heard the first shot and the time when you heard the second shot? A I should say about a minute, or possibly a little more.

BY MR. DERBY:

Q When you first heard the shots, when you first looked towards the store, did you see the Italian standing in front of it. A No, I didn't take notice of the Italian.

MR. DERBY : That is all.

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BESSIE OKUN, called as a witness on behalf of the people, being first duly sworn, and examined through the official interpreter, Edward J. Rosenthal, testified as follows:

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q What is your name? A Bessie Okun.

Q Where do you live? A 2609 Third Avenue.

Q Where did you live, Mrs. Okun, in October of last years? A 2609 Third Avenue. I have been living there for ten years.

Q Your husband has a store there, has he? A Yes sir.

Q What kind of store is it? A Shoe store.

Q Is this the store shown on this picture, People's Exhibit #2 in evidence, (Handing witness People's Exhibit #2)?

A If you could show me--- Yes, this is the store.

Q Did you know the proprietor of the delicatessen store next door, #2615? A Yes.

Q And did you also know the defendant? A I saw him during the time that he was working there.

Q Do you remember the day of the shooting? A Yes, on a Sunday.

Q And where were you at the time of the shooting? A I was walking down the stairs in my apartment to the kitchen.

Q And after you heard the shots, what did you do if anything? A My kitchen is in the basement, and I ran up to my store, to find out what happened.

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Q Did you see the defendant? A When?

BY THE COURT:

Q When you came up from your kitchen, in the basement?

"Yes" or "no"? A I saw him when the policeman held him by the hand.

BY MR. WASSERVOGEL:

Q And how far was he at that time from the delicatessen store? A He was nearer to the street than to the store, on the sidewalk.

Q And while the defendant was in the custody of the police officer, did you say anything to the defendant? "Yes" or "no"? A Yes.

Q Now, what did you say, and what, if anything, did he say? A I asked him who did it, who did it, and he answered "He didn't want to give me the dollar and he went to the devil.

MR. WASSERVOGEL: No, you did not get that right; you didn't get that right at all.

THE INTERPRETER: Let me hear it again.

MR. WASSERVOGEL: All right.

THE INTERPRETER: "He did not want to give the dollar; he goes to the devil".

MR. WASSERVOGEL: No; I beg your pardon.

THE INTERPRETER: Well, I can't help that.

MR. DERBY: What the official interpreter says,

MR. WASSERVOGEL: I understand the language. Let

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us get it right.

THE INTERPRETER: "He did not want to give the dollar; he goes to the devil". That is the only translation I can give.

THE COURT: Now, Madam, just say that again so that I hear you.

THE INTERPRETER: "He did not want to give the dollar; he goes to the devil".

MR. WASSERVOGEL: First, she said in somewhat different form.

MR. DERBY: I object to that statement and move to strike it out.

MR. WASSERVOGEL: Mr. Rosenthal knows she made two different statements.

THE INTERPRETER: Mr. Rosenthal does not know, Mr. Wasservogel.

THE COURT: Proceed, now.

Q What was done after that, if you recall? A I don't know then what happened.

Q The defendant was taken away by the police officer, was he? A Yes.

MR. WASSERVOGEL: Cross examine.

CROSS EXAMINATION BY MR. DERBY:

Q Do you know the little girl, Lilly Sagor, who testified this morning? A Yes sir.

Q Did you visit the delicatessen store of Schwartzmann

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before the shooting, on the morning of October 13th? A Yes.

BY THE COURT:

Q How long was it between the time that you went out of that delicatessen store on that morning, and the moment when, as you say, you saw an officer have hold of the defendant? A I cannot remember exactly, because I was busy.

BY MR. DERBY:

Q Now, will you give me again the ~~answer~~ exact words, please, that the defendant used to you when he was under arrest? A He said "He didn't want to give the dollar; he goes to the devil".

Q You didn't see the shots fired, did you? A No.

MR. DERBY: That is all.

BY THE COURT:

Q Had you seen the defendant before that morning? That is to say, had you seen him on the morning on which you saw him in the hands of the police before you saw him in the hands of the police? A No, I did not.

Q Did you see him at any time while you were in the delicatessen store on that morning? A No, I did not.

Q When you were in the delicatessen store that morning who were in that store? A Schwartz.

Q Who else if any one? A A couple of customers, but I don't know them.

Q Men, or women? A Women.

Q Did you see Lillian Sagor in the delicatessen store

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when you were in there that morning? "Yes" or "no"? A I  
was leaving the store when she entered the store.

Q Do you know the names of the other women whom you saw  
in that store? A No, I do not know.

THE COURT: That is all.

BY MR. DERBY:

Q What time did you go to the delicatessen store?

A About 10 o'clock.

Q What time did you leave it? A I took what I wanted,  
and I left, about 5 minutes.

MR. DERBY: That is all.

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W I L L I A M T. N O R T H R U P, called as a witness on be  
half of the people, being first duly sworn, testified  
as follows:

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q What is your full name? A William P. Northrup.

Q Where do you live? A Grand Avenue, Frogg's Neck.

Q You are a member of the Municipal Police Force, are  
you not? A Yes sir.

Q And how long have you been so employed? A Ten years  
and four months.

Q Where was your post or patrol on the morning of the  
13th of October, last year. A Well, one portion of it was  
on Alexander Avenue, from 39th to 43rd, another was from  
38th to 42nd on Third Avenue.

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138 + 147 ml JJ

Q And does that include the store #2615 Third Avenue?

A Yes sir.

Q That is on the east side of the Avenue, isn't it?

A The west side.

Q Were you in that store at all, or in the neighborhood of that store, that morning? A Yes sir.

Q At about what time? A Well, I had passed there twice previous to ten o'clock.

Q At or about ten o'clock were you in that neighborhood?

A About five minutes to ten I passed it.

Q And after that were you again in the neighborhood?

A Yes sir.

Q At about what time, as near as you can recall? A Well, this was about a quarter after ten.

Q What, if anything, attracted your attention to the store at that time? A The sound of a pistol shot.

Q How many? A One.

Q And what did you do? A I looked in the direction I heard the pistol shot, which was to my left, in the rear,  
about a hundred feet.

Q Did you hear anything else? A No sir.

Q What did you do? A I noticed a crowd down in front of this address, which is 2615 Third Avenue, and at the same time I saw a man leaving that crowd, going north. ||

Q How many shots did you hear altogether? A One shot.

Q You heard one shot? A Yes sir.

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Q How far away were you at that time? A A little over a hundred feet, maybe one hundred and fifty.

Q And you say you did what? A I went back--when I heard the pistol shot, I started from the rear to the left; I turned around, and I seen this crowd; at the same time I seen this one man leave the crowd.

Q Which man do you mean? A The defendant.

Q The defendant, Eli Geller.

MR. CURTIS: He saw him what.

MR. WASSERVOGEL: Leaving the crowd.

Q Which direction did he go in? A He went north on the west side of the Avenue.

Q Did you at that time go into the store? A No sir.

Q Did you talk with the defendant then? Did you go near him? A No sir.

Q Did you at any time go near him? A When I ap-  
proached him, at 140th Street.

Q He had already gone to 140th Street before you got t close to him? A Yes sir.

Q And then did you talk to him? A I asked him who fired that shot.

Q What did he say? A He said "I did"; I placed him under arrest, and started to 2615 Third Avenue, where the crowd had collected. At the same time, I saw a pistol lying in the gutter.

Q You saw a pistol lying in the gutter, about how

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far from the store? A About twenty five feet.

Q And is this the pistol that you saw (Handing pistol to witness)? A Yes sir.

Q Did you have any other talk with the defendant?

A When the pistol was handed to me, I asked him if it was his, and he said it was. Then I took him back in front of 2615 Third Avenue/ where the deceased was lying, and asked him if he did that. He said "I did". I asked him "Why, he shot him"? He said he had owed him a certain sum of money, which was \$6, and he refused to pay him only \$4; so the defendant wouldn't take that, so he told the deceased if he did not he would shoot him, the deceased; so the defendant said, told him to go ahead and shoot, which he said he did do.

Q Did you then take the defendant to the station house? A Yes sir.

Q At the station house, did you have any other talk with him? A I asked him where he got the pistol. He said he bought it off a man.

THE TENTH JUROR: Mr. District Attorney, May I interrupt?

MR. WASSRVOGEL: Yes.

THE TENTH JUROR: Was he talking in English?

Q In what language was he talking? A English language.

Q How did he talk? Plain English.

MR. CURTIS: Objected to.

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Q How did he talk? A It was broken English, but I could understand him.

Q What, if anything else was said about the gun? A Well, he wanted me to give him the gun back again. He said "Let me have it". That was at the station house. And I refused to do so.

MR. CURTIS: I don't hear that.

Q Keep your voice up, please? A I refused to do so.

MR. WASSERVOGEL: I offer the gun in evidence.

MR. CURTIS: Objected to on the ground there is no legal proof that is the weapon with which the homicide was committed.

MR. WASSERVOGEL: An admission by the defendant that that was the gun.

THE COURT: Objection overruled. I will receive it.

MR. CURTIS: I take an exception.

(Received in evidence and marked People's Exhibit #9 of this date).

Q Did you examine the revolver at that time? A I did.

Q And that condition did you find the chambers? A I found two empty shells.

Q Are these the two empty shells (Handing two empty shells to witness)? A (After examining shells) Yes sir.

MR. WASSERVOGEL: They are offered in evidence.

MR. DERBY: We object to the empty shells.

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MR. CURTIS: Objected to on the ground there is<sup>115</sup>  
no legal proof these are the shells which belonged to  
this gun. They may have belonged to a thousand other  
guns just like it.

MR. WASSERVOGEL: I will connect it.

Q When you took the shells out of the gun what, if  
anything, did you do with them? A I marked the shells,  
and marked the gun at the same time, and I kept the gun in  
my possession, until it was turned over to the property  
clerk at headquarters.

Q And you brought it back to the property clerk at  
headquarters? A Yes sir.

MR. WASSERVOGEL: Now, if your Honor pleases, ~~we~~  
if they want us to produce the property clerk down here,  
I will do that, if they insist on it.

MR. DERBY: We insist on nothing. We object to  
the shells.

MR. WASSERVOGEL: You don't dispute these were in  
the possession of the property clerk?

MR. DERBY: We do nothing. Our objection is on  
the record.

MR. WASSERVOGEL: I don't want to be met with  
any technical objections upon a point of that kind. If  
they insist upon the property clerk being brought here,  
we will bring him here.

MR. DERBY: We don't insist on anything. The pis-  
tol and the bullets are already in evidence.

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MR. WASSERVOGEL: The shells are not in evidence; the pistol is. The officer recognizes that pistol as the one.

THE COURT: The Court is satisfied, Mr. Wasservogel that the evidence sustained the admission of the pistol in evidence. If you want to have these bullets go in, I think the proof will warrant their admission.

MR. WASSERVOGEL: I offer them in evidence.

MR. DERBY: Objected to.

THE COURT: I will receive it.

MR. DERBY: We take an exception.

(Received in evidence and marked People's Exhibit #10 of this date)

Q Were you present at the time of the autopsy? A Yes.

Q And did you see the body of the man who was shot, at the hospital, at that time? A Yes sir.

Q Do you know who else was there upon that occasion?

A I know his two brothers were there.

Q And who else? A And the doctor, the Coroner's Physician.

MR. WASSERVOGEL: That is all.

CROSS EXAMINATION BY MR. DERBY:

Q When you first saw the defendant officer, was he running or walking? A He was walking.

Q In what direction? A Walking ~~with~~ north.

Q How far from the scene of this delicatessen store

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was he? A Well, he was about forty feet when I first saw him.

Q You brought him back to the store? A After arresting him at 140th Street, yes, about thirty feet further on.

Q You have related a conversation that you had with him in the English language, you say? A Yes sir.

Q Did you make a memorandum of what the defendant said to you and what you said to him at the time? A No sir.

Q You did not ever put it down in writing? A No sir.

Q Was your recollection of that conversation as good at the time you testified at the Coroner's Court as it is today? A I think so.

Q I call your attention to certain testimony you gave in the Coroner's Court--

MR. WASSERVOGEL: Ask him whether he gave it?

Q Let me call your attention to certain ~~xxx~~ questions and answers: "Q How long after you placed the defendant under arrest did you say anything to him? A Well, I said it must have been about a minute. Q What did you say? A I asked him if he fired that shot. Q You said it, of course, in English? A Yes sir. Q Did he reply in English? A Yes sir. Q Are you sure of that? A Yes sir. Q Did he speak English to you? A Yes sir. Q What were his exact words? A The exact words were, ~~and~~ 'I did it'. Q 'I did it'? A Yes sir. Q Is that all he said? A Yes sir. Q 'I did it'? A Yes sir." Is that correct, that that was

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all the defendant said? A. At that time?

Q. Did you make those answers to those question in the Coroner's Court? A. If I did---if it is there, I said so.

Q. Were those answers that I have just read to you correct? A. I think so, if I remember right.

Q. Were you telling the truth when you said that that was all the defendant said to you? A. That is what I was trying to do, yes sir.

Q. You now relate a number of other things that the defendant said to you? A. I have related more in the Coroner's Court than those questions.

BY MR. WASSERVOGEL:

Q. What is that? A. I say, I have related more in the Coroner's Court than those questions were asked.

BY THE COURT:

Q. In other words, you say, when you were before the Coroner, you said things which were not contained in the answers to which your attention has been called? A. Yes sir.

BY MR. DERBY:

Q. What did you mean when you made the answer "Yes sir" to the question "Is that all he said?"? A. I don't recollect that part of it.

Q. You don't recollect saying such a thing at the time? A. No sir.

Q. Did you ever tell the Coroner ~~anything~~, in any part of your testimony, that the defendant had told you that he

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deceased, that if the deceased did not pay him the money, he was going to shoot him? A Yes sir.

Q Did you so testify in the Coroner's Court? A Yes sir.

Q Are you sure? A Positive.

Q I show you your testimony in the Coroner's Court, and I ask you to pick out for me the testimony you gave in the Coroner's Court to the effect that the defendant told the deceased that, if the deceased did not pay him, he would shoot him? (Handing Coroner's Minutes to witness)

A Well, there might be a mistake of one word or so.

Q Will you look through your testimony--

THE COURT: Will it be conceded by the people that this is a correct copy of the minutes?

MR. WASSERVOGEL: Yes, there is no question about that at all. We can save a lot of time here.

(Witness examines minutes handed to him by Mr. Derby.)

Q Have you read your testimony through, officer? A Yes sir.

Q Will you point out that testimony to me (Stenographer reads question as follows: "I show you your testimony in the Coroner's Court and ask you to pick out for me the testimony you gave in the Coroner's Court to the effect that the defendant told the deceased, that, if the deceased did not pay him he would shoot him.") Can you find that, officer? A

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I don't see it here.

Q Do you think the Coroner's stenographer perhaps forgot to write it down?

MR. WASSERVOGEL: That is objected to. The minutes speak for themselves.

THE COURT: Objection sustained.

Q You confess after reading the whole of your testimony, that you are unable to find that?

MR. WASSERVOGEL: I object to the use of the word "confess".

Q Do you state, after reading your testimony through, that you can find the testimony that I call for? A I can't find it here, no sir.

Q And yet you swear that you gave such testimony to the Coroner's Court? A I think before I came to that, I was excused from the chair.

Q You think now you did not testify? A When I read this over, I think I was excused when I came to a part of it.

Q So you speak Yiddish? A No sir.

Q Do you contend that the defendant said all you have related on the witness stand to you in English? A Yes sir.

Q Which do you wish us to accept as the true version of what the defendant said to you, the testimony as you gave it in the Coroner's Court, or what you said here to-day?

MR. WASSERVOGEL: I object to that form of question.

THE COURT: The objection is sustained?

MR. SERBY: I take an exception.

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Q Did you tell the truth, the whole truth and nothing but the truth in the Coroner's Court, officer? A As I said before, It is not all in there. That is, I was excused from the chair before I came to that part of it.

Q Don't you think the testimony that you gave a few weeks after this shooting is more reliable than the testimony you are giving to-day? A I don't think so.

Q You think your recollection is just as clear to-day as it was then? A It seems to me so, yes sir.

MR. DERBY: That is all.

RE-DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q You looked at minutes a short while ago? A Yes sir.

Q See whether this question was not put to you in the Coroner's Court and this answer given by you: "Q Officer, kindly tell the jury what you know about this case? " Now, see whether you did not give this answer "I was patrolling north on Third Avenue near 141st Street, at 10:15 October 13th, when I heard a pistol shot, and just then a car was passing south. As the car passed, I looked back to where I heard the shot, and I seen a small crowd collected, and the defendant here was the only party I seen walking away from where the car was." Did you say that part? A Yes sir.

Q "So I approached him, and both met about 140th Street, and at the same time I seen a 32 calibre pistol right near the gutter, so I approached this man, ~~XXXX~~ and seized him". Did you say that? A Yes sir.

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Q "And took him back and picked up the pistol which he admitted was his." Did you say that? A A citizen picked it up and handed it to me.

Q "And took him back to the scene of the crime." Did you say that, officer? A Yes sir.

Q That is, before the Coroner, "Where there was a man lying in the hallway with two shots in the shoulder and the right ear." A Yes sir.

Q "I asked the prisoner if he did the shooting, and he said yes". Did you say that? A Yes sir.

Q "That he owed him six dollars and was only willing to pay him four". Did you say that in the Coroner's Court? A Yes sir.

Q "And that this fellow" referring to the defendant, "would not take the four; he wanted to be paid in full." Did you say that in the Coroner's Court? A Yes sir.

Q And when he would not pay him in full, that is the reason he shot him". Did you say that? A Yes sir.

Q "Then I took him to the station house". You did not notice that, when Mr. Derby handed it to you? You were a little bit nervous, probably? A Yes.

RE-CROSS EXAMINATION BY MR. DERBY:

Q Didn't you notice that, officer, when I handed the testimony to you? A No sir.

Q Is there anything about the defendant saying he threatened to shoot if he did not pay him? A When he would

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not pay the amount, he would shoot him.

Q. In what Mr. Wasservogel read, is there one syllable about him making threat to the deceased to kill if he did not pay him?

MR. WASSERVOGEL: Objected to. The testimony speaks for itself.

MR. DERBY: It certainly does. That is all.

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T H E P E O P L E R E S T.  
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MR. DERBY: Your Honor at this time, we renew all the motions we made at the opening of the case. I don't want to go over them again--the motions for the dismissal of the indictment; and at this time we make a further motion to dismiss the indictment, or direct a verdict of ~~the~~ acquittal on the ground the people have failed to establish a case.

THE COURT: I deny your motion Mr. Derby, and you have an exception.

MR. DERBY: Exception.

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T H E D E F E N D A N T ' S C A S E .

Mr. Derby then opened the case to the jury on behalf of the defendant as follows:

Now, gentlemen of the jury, in this case the defendant will himself take the stand, al though,

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under the law, he is not compelled to give testimony, and although the law provides that his failure to testify shall not be used against him.

He is going to take the witness stand and tell you the story of how this shooting occurred.

The defendant is a young man, about twenty years old. He comes from Russia. He had a very good education other on the side. He is a young boy of intelligence, well brought up and before he came to this country was working as a clerk in a lawyer's office in Russia.

At the time of this shooting he had been in the United States for less than six months, and had a very superficial knowledge of the English language. He knew practically no English at all.

He worked at several places in New York before he went to the deceased, and I suppose on or about September 23rd, as the witnesses have testified, he went to work for the deceased, Schwartzmann; and it was arranged at that time, or shortly after the defendant went to work for Schwartzmann that the defendant was to be permitted to get away from the delicatessen store at 7:30 in the evening, so he could go to night school, ---he was ambitious to learn English and to complete his education.

On the night or the day before this shooting, that is on Saturday October 12th, the defendant told Schwartz-

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mann that he was not getting off at 7:30, as it had been promised that he should, in order to attend school and that he, the defendant, could not stay at work until 10 o'clock at night, as the deceased wished him to do, and that, therefore, he would have terminate his employment and get a job elsewhere, and that he wanted to be paid off.

The deceased, Schwartzmann, told him that if he left that evening there would be nobody to deliver the orders on Sunday morning, and told the defendant to come back and deliver the orders in the morning and then they would settle up, and the defendant could leave.

The defendant came back about six o'clock on Sunday morning, October 13th, and got the parcels to take to the varicus customers and deliver them, and got back to the store about 8 o'clock.

He then asked Schwartzmann to pay him off, and Schwartzmann wanted to know how much money was due him. The defendant said \$6.

He was working for \$12 a month, and in addition, \$3 was paid for his board and lodging.

He had worked 20 days; that is two thirds of a month, two third of thirty days, and he was entitled to two thirds of \$12, that is, \$8. He had been paid \$2, and he told the deceased there remained \$6 coming to him.

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Schwartzmann said that was all he would pay, and he said "If you want any more than that from me, you can sue me".

The defendant said "Where is your conscience?" And Schwartzmann says "Well, in this country, nobody has any conscience. You can sue me".

The defendant refused to accept the four dollars, and he went out and took an elevated train down town to where his aunt lived, somewhere on the East side, some where in the neighborhood of Grand Street, I believe, or Madison Street, I believe it is. It took him, I suppose, the larger part of an hour to get down town and he went up into his aunt's home, and saw the little boy playing around. His aunt was still in bed, just woke up. The defendant wanted her advice as to what he should do to get the proper amount coming to him, but when he found his aunt still in bed he decided to go out and he went out to a little restaurant on Grand Street and had a small meal; and then he determined not to bother his aunt with the troubles, but to go back uptown, and, if he couldn't get any more, to accept the \$4, and let it go at that.

He went back up town, and got to the store about ten o'clock. He found Schwartzmann there and went in and said, if I remember rightly, that he would take the \$4 and Schwartzmann said that, as he had not accepted

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it before, he would get nothing, and the defendant, this boy, said that he would stay in the store until he got his money.

The deceased, Schwartzmann, there upon went into the back of the store, and returned with a gun, returned with a pistol, and started to make an assault upon the defendant, and the defendant, whom, you will see, if you observe him on the stand, is a very powerful young man, tremendously strong arms and chest, grabbed the arm of Schwartzmann and took the pistol away from him. Schwartzmann retreated behind the counter, went near where the cash register was, and the defendant thought that he was going to open the register and pay him the money. He did not do that, and the defendant learned over the counter and said to pay him this money.

Schwartzmann then made a sudden grab for the pistol, and in the struggle over the pistol the first shot was fired, and Schwartzmann was hit.

The defendant didnot know at the time that Schwartzmann had been hit, or seriously hurt, and the defendant started towards the door, and when he turned around to look back before he went out, he found that Schwartzmann was following him, and he believed that Schwartzmann was armed with one of the cheese knives that they use in the delicatessen stores and he fired a second ~~shot~~ time, as he says; to frighten Schwartzmann, and the

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second shot was fatal, and Schwartzmann dropped.

If Schwartzmann was pursuing the defendant, as testified to by the people's own witnesses, if he was in pursuit, if he was after this man with a loaded gun, it will be argued to you quite properly, that if Schwartzmann was coming after the man with a loaded gun, he must have had only one purpose in his mind. Schwartzmann was not going after him for any innocent purpose.

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E L Y G E L L E R, the defendant herein, called as a witness in his own behalf, being first duly sworn, and examined through the official interpreter, Edward J. Rosenthal, testified as follows:

MR: WASSERVOGEL: May I ask, your Honor--- This defendant, I understand, speaks Yiddish. May I ask that he be instructed to speak in that language?

MR. DERBY: I don't see that the defendant is particular compelled to speak in any language. He wants to speak in Russian.

THE COURT: I will determine it, in a moment.  
Ash him where he was born?

THE WITNESS: (Through the Interpreter) Grodno.

BY THE COURT:

Q What part of Russia is that? A The western part.

Q What is the language that is spoken there? A Yiddish and Russian.

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Q What was the language spoken in your own home by yourself and other members of your family? A At home, with father and mother, we spoke Yiddish, and with brothers and sisters, Russian, and with the friends, we spoke Russian.

Q And in the school that you went to what language was spoken? A Russian.

THE COURT: Well, he may be more familiar with Yiddish--

MR. WASSERVOGEL: May I say a word, before your Honor closes?

THE COURT: Yes.

BY MR. WASSERVOGEL:

Q And the questions that have been put to you by the Court have been interpreted to you in the Yiddish Language, and your answers have been given in that language?

MR. DERBY: I object to Mr. Wasservogel examining him now.

MR. WASSERVOGEL: I am testing him.

MR. DERBY: I object to your testing.

THE COURT: It is a fact that questions have been put to him in Yiddish, and the answers made in Yiddish, But I consider it is possible that he may speak the Russian language somewhat better than he speaks the other language and that is a possibility, he is allowed to give his testimony in the Russian language.

DIRECT EXAMINATION BY MR. DARBY:

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Q What is your name? A Elias. Ely in Russian is the Biblical name for Elias.

Q What is your last name? A Geller.

Q You say you were born in Grodno, Western Rissia?

A Yes, in the City of Grodno, in the Western part of Russia.

Q How old are you, A 22 years.

Q Are your parents alive? A Yes, father and mother are alive.

Q And have you any brothers and sisters? A Yes.

Q Was all your life in Russia spent in Grodno? A Yes, all my life.

Q Were you educated there? A Yes.

Q How long did you go to school? A At first I went to a Hebrew School, and then in 1903, I entered a Russian School.

Q How many years were you in school? A Three years, from 1903 until 1906.

Q Previous to 1903, you were in school, too, were you not? A At first, I went to a Hebrew School, and then I had a teacher to prepare me for the school which I entered afterwards.

Q How old were you when you entered school? A 16 years, going on 17.

Q You did not go to the University, did you? A No.

Q Did you learn any trade in Russia? A No.

Q How were you employed before you came to this country?

A I was working for a private lawyer.

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THE INTERPRETER: A private lawyer is one who is not regularly admitted, partly admitted.

Q Now, when did you start for this country? A I left home in January of last year, 1912.

Q Did you sail to New York? A Yes.

Q Have you relatives in this country? A The name of the steamer is President Lincoln.

Q Have you got relatives in this country? A I have one uncle, in Mt. Vernon. I have also an aunt.

Q Where does she live? A In Grand Street.

Q Now, when you arrived in this country, where did you go first? A To my uncles.

Q And did you, soon after that, get employment? A Yes, after a week and a half.

Q Where did you go to work then?

MR. WASSERVOGEL: Can't we come right down to the facts in this case?

THE COURT: No, I will allow it.

MR. WASSERVOGEL: All right.

A I found a position through the papers for a man by the name of Shinkofsky, 638 Kelly Street.

Q And what business was he engaged in? A He had a store, a fruit and fish store.

Q How long did you work for him? A About five months.

Q And then where did you go? A Then I fell sick, and I went back to my uncles.

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Q In Mt. Vernon? A Yes sir.

Q Did you get another job after that? A After I got well, I went with my uncle to look for a position and I got one with a man by the name of Schwartz, through the papers.

Q Schwartzmann? A Schwartz.

Q Do you mean Schwartzmann, the deceased? A They were brothers, as I read it in the papers.

Q When did you go to Schwartzmann? A On the 23rd. The 22nd was a Sunday, and I started on the 23rd, Monday.

Q Of what? A Of October.

Q No, September, yo u must mean?

MR. WASSERVOGEL: He means September.

Q What was your pay with Schwartzmann? A \$12 a month and Board.

Q How much was to be paid for your board? A As far as I know, I ate at his table, and he paid \$3 a month for my room.

Q And where was your room situated? A In the same house, on the third floor or on the fourth floor.

Q You mean, in the same house as that in which the delicatessen store was situated? A Yes sir.

Q When you were employed by Schwartzmann, was there anything said about school? A Yes; this was the main point with me.

Q What was said between you and Schwartzmann about that?

A The agreement was that I should start to work at five or six

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o'clock in the morning, and work until seven or half past seven in the evening.

Q Were you always to get off at 7:30? A Yes, that I should be enabled to attend school, therefore, I was to get off every day at seven or half past seven o'clock.

Q Now, did you enter school? A Yes, I did.

Q How long before Schwartzmann was shot did you enter school? A I registered two weeks before that, and I started to go to the school-- One week after I registered I started to go to the school. That means that one week before he was shot I went to school.

Q Was the evening school in the Bronx? A Yes sir.

Q I show you a card. Do you recognize that (Handing card to witness)? A Yes sir; this was given to me there.

Q At the school, you mean? A Yes sir.

MR. DERBY: I offer it in evidence.

MR. WASSERVOGEL: No objection.

THE COURT: Received.

(Received in evidence and marked Defendant's Exhibit A, of this date)

THE COURT: Do you want to read it to the jury?

MR. DERBY: No, I will just let them see it (Hands Defendant's Exhibit A to jury.)

Q Now, during the week after you entered the school, were you able to get there every evening? A Only once during the week. I came too late.

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Q Did you have any talk with Schwartzmann about school during that week? A I spoke to him about the school. He spoke to me, and I told him I liked the school ~~very much~~ very much, and that the teacher was very good.

Q Was anything said on Saturday, October 12th, between you and Schwartzmann about school? A Not in the evening, but in the morning, at 10 o'clock.

Q At ten o'clock on October 12th, Saturday, is that correct? A Yes sir.

Q Now, please repeat that conversation.

MR. WASSERVOGEL: Which one?

MR. DERBY: The conversation between this defendant and the deceased, on the morning of October 12th, 1912.

A Saturday generally was my day of rest. Before I went away he told me "I cannot stay alone in the store. I cannot afford to let you go away in the evening at 7 or 7:30. 9 o'clock, or 10 o'clock, is the earliest that I can allow you to go away from the store."

Q Well, what else was said? A I told him "I can't agree to that." In the morning, I could come at any hour as early as he wants me to come, but in the evening I cannot stay in the store until 9 o'clock, not because I am capricious but because I want to go to school, and I would not be able to go to school going away at nine o'clock.

Q Did he say anything else? A And he said he could

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not agree to that, and I said "I can't help it; we will have to part, separate".

Q Go on? A Then I said "You can pay me as much as is coming to me, and I will leave you". He said he could not remain alone in the business now, as he had orders to be carried to customers on the next morning, on Sunday morning; that I should come Sunday morning; and in the meantime he would look around for somebody else. I agreed to that, and left.

Q Now, what were your duties at the store? A To carry orders to the various customers who had ordered anything, and to put things in order in the store.

Q Where did you sleep on Sunday night, October 12th--- on Saturday night? A In the same house where I always sleep, in the house where the store was.

BY THE COURT:

Q On what floor? A I think on either the third or the fourth floor.

Q In whose apartments A I know the lady but I don't know what her name is.

BY MR. DERBY:

Q Do you see this lady standing here at the rail? A Yes.

Q That is Mrs. Goldberg Do you recognize her? (Indicating Sophie Goldberg)? A Yes sir, I lived in her apartment.

Q What time did you get to the store on Sunday morning?

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A About half past six o'clock.

Q Was Schwartzmann there when you arrived? A Yes, both brothers were there.

Q Did you have any conversation with either one of them? A Yes, he asked me whether I had changed my opinion, perhaps.

Q Which one asked you that? A The older brother.

Q The one who is dead? A Yes. I said that I would be willing to remain and to work there under the original conditions.

Q Was anything else said before you went out? A Not at that time.

Q Was anything said about paying you? A Yes sir.

Q Tell me what that was? A After I had carried out the orders to the customers he asked me how much money was coming to me.

Q You went out and delivered the orders, did you? A Yes.

Q What time did you get back to the store? A I think it must have been seven o'clock, or later.

Q Who was there when you got back? A Both brothers were there.

Q Now, what happened? A The older brother asked me how much was coming to me and I told him "That is very simple figuring." I had worked twenty days. \$12 a month means 40 cents a day, and twenty days multiplied by 40 cents would make ~~a dollar~~ \$8. \$2. I had received before, One

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dollar I had received the week before, and one dollar I had received on the Saturday before I left. So I told him that \$6 were coming to me. He said he would give me only \$4. I asked him why. At first, he said that he had some expenses for printing in the newspapers, looking for an employe so I told him, "This doesn't mean anything; I am willing to remain working for you under the conditions ~~you~~ made when I came here."

Q Go on? A He said he also paid \$3 for the place where I was sleeping, so I said that I had slept there enough times for that money, and if you want to deduct something for that you may deduct something for it, but not \$2. So he said, if I wanted to take \$4 all right, and if not he would not give me any more, and I told him I would not accept \$4, because I cannot understand why he should make \$4 out of \$6; so he said I should do whatever I pleased, and I left.

Q One minute. Did he say anything about what you should do to get the balance of the \$6? A He said "If you don't like it, you may go to court".

Q Was anything else said that you can remember? A No, it seems to me nothing else.

Q Did you receive any money there at that time? A No, nothing at all, not a cent.

Q Now, what time did you leave the store? A I don't know exactly. I think it must have been about 8 o'clock, or perhaps a little later.

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Q And where did you go when you left the delicatessen store? A Then I went to my Aunt.

Q How did you go down town? A With the train.

Q And what station did you get the train at? A The station at 143rd Street.

Q Where did you get off? A Grand Street.

Q And then you went to your aunt's home? A Yes sir.

Q What is her name? A Mrs. Simon.

BY THE COURT:

Q What number in Grand Street did she live? A 17 and 19 two numbers.

Q And that was between what streets, if you know? A These numbers are on attorney Street. She lives at number 17 and 19 Attorney Street.

Q Not Grand Street? A Not in Grand Street.

BY MR. DERBY:

Q Attorney Street? A Attorney Street.

BY THE COURT:

Q And you had to walk from the Grand Street elevated railway station on the Third Avenue line to the number on Attorney Street that you have given, is that so? A Yes, I had to walk.

BY MR. DERBY:

Q Now, this occurred on a Sunday morning, did it not? A Yes, Sunday morning.

Q And what is the day of the week you and your people, your relatives, keep as Holy Day or as Sabbath? A Sunday.

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MR. CURTIS: Saturday is their Sabbath, Sunday is the Sabbath of the Gentiles.

MR. WASSERVOGEL: That is conceded.

Q What time did you reach your aunt's home? A Half past eight o'clock, I think.

Q Did you find your aunt at home? A She slept? She was asleep.

Q Did you see anybody in the rooms? A Yes, a boy, he was also still lying in bed.

BY THE COURT:

Q What is his name? A This I don't know; I don't remember. He is a more distant relative of mine, he is the son of the daughter of my aunt.

BY MR. DERBY:

Q You had seen the boy before? You knew him, did you not? A Yes, I knew him.

Q Was your aunt sleeping in the room in which you entered?

MR. WASSERVOGEL: Is it material? I object.

MR. DERBY: Yes, it is very material, or I wouldn't ask it Mr. Wasservogel.

THE COURT: I will allow it all.

MR. WASSERVOGEL: All right.

A No, in the next room.

Q Did you speak to her before you left? A No.

Q What was your purpose in going to your aunt's home?

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MR. WASSERVOGEL: I object to that.

THE COURT: That is objectionable.

MR. DERBY: The District Attorney is allowed to show motive on his side, why shouldn't we show purpose?

MR. WASSERVOGEL: Motive for crime is one thing. This is something entirely different.

THE COURT: I don't think that is competent.

MR. CURTIS: Your Honor will note our exception.

Q How long were you at your Aunt's home? A Several minutes.

Q Didn't you say anything to her before you left?

A Oh, I didn't tell her anything, because she was asleep.

Q Did you say "Good morning" to her? Did she wake up before you left?

MR. WASSERVOGEL: Objected to as immaterial.

MR. DERBY: This went hurt you.

MR. WASSERVOGEL: You should not waste time.

THE COURT: I will allow it.

A I said "Good morning" when I came in, but the boy answered my greeting.

Q So that you left your Aunt's home without being able to tell her that which you came down town to tell her? A That is right.

Q From your Aunt's home where did you go? A From the house of my aunt, I decided to go straight back to the house of my boss, where I was working.

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BY THE COURT:

Q On your way down from the place where you were employed to the home of your aunt, did you stop at any place? A I continued going down town, without stopping on the way.

Q And when you got on the cars at Grand Street did you stop anywhere between the station and your Aunt's house? A I only stopped in front of a photographer's, to look at the photographs.

Q Did you go inside of any store? A Not at that time.

Q Did you meet any one that you knew? A No.

BY MR. DERBY:

Q Did you have any money with you? A I had a dollar and some cents.

Q All the money you had received the month before that was the sum of \$2 from Schwartzmann, wasn't it ~~was~~? A Altogether, \$2.

Q In going back to the delicatessen store, what was your intention? A I had the intention to go back to the delicatessen store and ask my boss to give me \$5, ~~and~~ at least, so as not to have any more dealings.

Q Did you have a pistol with you when you went back to Schwartzmann's? A Until that time I had never seen a revolver in America.

Q Up to what time? A Until the time, I haven't seen any revolver, except what I have seen here.

BY THE COURT:

Q Did you have a revolver on your person at the time you

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left the delicatessen store to go to the elevated station on your way down to your Aunt's house, Now, "Yes" or "No"? A No.

Q Did you stop anywhere between the delicatessen store and the elevated railroad station up town and get a revolver?

A No.

Q Or did you stop anywhere between the station on Grand Street and your Aunt's house and get a revolver? A No.

Q Did anybody give you a revolver, or did you get one while you were in your Aunt's house? A No.

BY MR. DERBY:

Q Did you have a revolver in your possession when you went to Schwartzmann's delicatessen store, about 10 o'clock?

A No.

Q When you entered Schwartzmann's store, on your return, who was there? A Only the boss.

Q Did you see the little girl, Lilly Sagor, who testified this morning, there? A No, she was not there at all.

Q Was anybody there except your boss? A Nobody, absolutely nobody.

Q What happened?

THE COURT: I think we will reserve this for the morning.

MR. CURTIS: Of course I don't wish to put my convenience of appointments in the scale; but I thought if we could finish the most of this evidence to night, I could keep that appointment, in the United States Court,

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but I don't wish, of course, to intrench on your Honor's generosity or the patience of the jury.

THE COURT: The main reason for an early adjournment in a murder case, in a case where the charge is murder, is that it ~~is~~ gives the Stenographer, after the adjournment of Court, an opportunity to write out the minutes, and they are of great service in the summation of the case by counsel on both sides, the Court generally lending its copy to the Defendant's Counsel, and that is something you might not be able to have in the event that I adjourn court later.

MR. CURTIS: My only object is the one I tell your Honor, and I understand that case will be kept open for me until 2 o'clock tomorrow.

MR. WASSERVOGEL: We couldn't finish by 2 o'clock tomorrow, anyway, with the summation, and everything else, and, I understand your Honor has an appointment tomorrow.

THE COURT: Now, unfortunately, gentlemen, because I consider it unfortunate, I have an imperative engagement which I shall be obliged to keep tomorrow afternoon and therefore, the summation in this case, in all probability, will have to take place some time on Friday. I regret that that is the case, but it unfortunately is unavoidable.

MR. CURTIS: Well, I will abide by your Honor's ruling, of course, and I know your Honor would help me

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out if you could.

THE COURT: The situation is exactly as I have told you. Now, I can sit without any inconvenience to myself for another hour, if that is more agreeable to you gentlemen, only tomorrow, at half past 12, I shall be obliged to adjourn court.

MR. CURTIS: If your Honor will kindly sit until this witness is through.

MR. WASSERVOGEL: I have got to leave by half past four.

MR. DERBY: I can finish <sup>5</sup>the direct.

MR. WASSERVOGEL: As long as the case cannot be finished altogether, until Friday, I don't see what will be gained by the extra time.

THE COURT: I want to convenience you gentlemen.

MR. WASSERVOGEL: One of the jurors says he has an appointment after 4 o'clock.

MR. CURTIS: That ends it. Your convenience before mine.

THE COURT: Gentlemen of the jury, you are admonished not to converse among yourselves on any subject connected with this trial, or form or express any opinion thereon, until the same is submitted to you. The Court stands adjourned until tomorrow morning at half past ten.

(The Court accordingly took a recess until tomorrow, Thursday, January 30th, 1913 at 10:30 A. M.)

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THE PEOPLE, ETC.  
VS.  
ELY GELLER.

New York, Thursday, January 30, 1913,  
10:30 a.m.

( T R I A L     C O N T I N U E S )

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THE DEFENDANT IS ARRAIGNED AT THE BAR  
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E L Y   G E L L E R, the defendant, resumes the stand.

DIRECT EXAMINATION CONTINUED BY MR. DERBY:

Q    About what time was it when you got back to the store from downtown?    A    I don't know exactly. I think it was about ten o'clock.

Q    Now, when you went in, who did you find there?    A    When I entered the store, nobody was there except the proprietor.

Q    Did you have any conversation with him?    A    Yes, when I entered I told him, "What are you going to do?    Are you going to pay me?".

Q    Relate the whole conversation as accurately as you remember it?    A    And then he said, "What, did you come again here?"    I told him that I don't want my relatives or friends to have anything to do with courts and lawyers; I would rather take five dollars, instead of six, and have the whole matter settled. So he said "Now you come and you are satisfied to take less. Before, you wouldn't take any less; before, you wouldn't take four, now you want five."    Then he said that now he wouldn't give me anything, and I said I wouldn't leave the store until he would pay me; so he said "If you don't want to go away,

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you will fly away, right away, right away"; and then he went to the back part of the store. After a minute he came back -

Q What do you mean by the back part of the store? Is there another room there? A There was another room, only without a door.

THE COURT: If agreeable to you, Mr. Derby, in that connection, you might show the witness the diagram, and he might indicate. If you see fit to show him the diagram which is the floor plan, you may do so, and he may indicate the part that he means. Just as you like, gentlemen.

Q Please look at People's Exhibit No. 6, the diagram. There is the sidewalk and door of the premises (indicating on People's Exhibit No. 6). A Is this the door (indicating on People's Exhibit No. 6)?

Q That is the door. Point out the room into which Schwartzmann went?

THE COURT: Pardon me. You better first ascertain that he understand the diagram. He may not understand it.

THE INTERPRETER: "No, he does not understand it.

Q Do you understand the diagram? This is the counter (indicating on diagram)? A (Witness indicates the room right behind the other counter) Here.

Q Put a small mark there, a cross? A There is a room after the store, and after that room is a kitchen.

Q Which room did he go into? A He went into the room which is just adjoining the store.

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Q The room that you have marked with a cross? A I don't exactly understand this diagram, but it is the room next to the store.

Q Go on and tell what happened after that? A He came out of the room with a revolver in his hand, and said "Will you get out, or I will shoot you", and I said "I didn't come here to rob you. I only came here to ask for my earnings." "But, I tell you", he said, "if you should get out, or else I will kill you like a dog." Then I got frightened, and I got hold of his right hand, in which he held the revolver, and got the revolver out of him, and jumped away.

Q What happened after that? A This was near the corner.

Q In the corner of what? A Where the ice-box is standing. From this corner he went to the register.

Q You mean the cash register? A The cash register.

Q Did he go behind the counter? A Yes, behind the counter not in the room, but in the store.

Q Go on. A I thought that he was going to the register in order to take out money and pay me, and I followed along on the other side of the counter to the place where the register was; so he said, "What do you want now?", and I said, "take your revolver, and give me my money, five dollars. If not six, give me five", and I said, "Now, the revolver is now in my hands; you can't frighten me now." I held the revolver in my right hand. At this moment, he got hold of my right hand, and got hold of that revolver which was in my hands, and in that second

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there was an explosion, a shot was fired.

Q. Go on? A. I was dazed.

Q. Did you intend to shoot off the revolver? A. No, I didn't even know whether anybody was struck or not. I only saw that, right after that, he got hold of a knife. Near him two large knives were lying on the counter.

Q. What were those knives you saw in the store? A. To cut fish or sausages, or this red fish, salmon, smoked fish.

Q. You did not know at that time that Schwartzmann had been shot? A. I did not know, because I saw that he was running away, and the door was closed.

Q. Well, now, after the shot went off, what did you do?

BY THE COURT:

Q. Now, pardon me a moment. You say you saw that he was running away, and the door was closed. What do you mean by running away? A. He was standing right opposite me, and after that shot he grabbed the knife and ran along the counter in the direction of the door, to the door.

Q. And when you say the door, what door do you mean? A. I mean that door which leads out into the street.

Q. As he was running along, was he running behind the counter or on the outside of the counter? A. From behind the counter.

BY MR. DERBY:

Q. What did you do after you heard the shot? A. When I saw him grabbing the knife and coming at me, I thought I would not be able to get away from him before he reached me, so I took the

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revolver and fired the shot in the direction of the corner, not seeing him.

Q At the time the second shot was fired, where were you standing? A When the second shot was fired, I didn't stand in any place, but I was running towards the door, at the same time opening the door, to get out.

Q Were you in the doorway at the time the second shot was fired? A No, I was about a step or a step and a half from the door, in the store.

Q At the time the second shot was fired, did you believe that you were in danger of your life from a knife that you saw in the possession of Schwartzmann? A Yes, I was afraid, and that is the reason why I fired the shot. I fired the shot thinking that with the shot I will stop him from coming at me.

Q What was your intention in firing the shot? Did you aim at Schwartzmann? A No, I fired the shot without aiming at anybody, because at that time I didn't see anybody in front of me.

Q What was your purpose in firing the shot? A My aim was that he should get frightened from the shot and remain at the spot where he was, and not follow me.

BY THE COURT:

Q From the moment that you first got the pistol in your hand, as you say, until the time that you fired the second shot, was the pistol at all times in your hand? A All the time in my hand.

BY MR. DERBY:

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Q You have previously testified, have you not, that Schwartzmann, while standing on the other side of the counter, had he put his hand on the pistol?

MR. WASSERVOGEL: We have had that. I object to his leading.

THE COURT: I think there is no dispute about that.

MR. WASSERVOGEL: There is a dispute.

THE COURT: I mean -

MR. CURTIS: There was a struggle for the possession of the pistol.

THE COURT: The witness used an expression a few moments ago from which an inference might be drawn that he, the defendant, put the pistol down somewhere, and I merely asked him in order to make it plainer on the record. I understand him to say that there was a struggle for the possession of the pistol.

Q At the time these shots were fired, what was the condition of your mind? Were you excited? A After the first shot, the first explosion I heard, I didn't know where I was.

Q After firing the second shot, what did you do? A I ran out of the store, and threw the revolver into the street, with anger, and nobody was near the store at that time.

Q Did you see the Italian? A And that Italian was not there at all.

Q Now, to go back for one minute. What was the room used for, the room into which Schwartzmann went before he came out

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with the revolver? A To store goods there.

Q After throwing the revolver in the street, what did you do? A Then I looked around in the direction of all sides, to see whether a policeman was near.

Q Do you speak English? A In the store, I could say a few words, as far as the names for the various articles is concerned.

Q But beyond that you had no knowledge of English? A No.

Q After you had thrown the pistol away, did you run, or walk, along the street? A No, I did not run, but I walked.

Q In what direction? A I can't indicate in what direction. I walked up the sidewalk.

BY THE COURT:

Q Did you walk uptown, or downtown? A I can't answer that question exactly. I only can say that, coming out of the store, I went left, to the left side.

MR. WASSERVOGEL: Is "uptown" a Russian word, Mr.

Rosenthal?

THE INTERPRETER: I asked him first whether he knew the meaning of "uptown" and "downtown"; at first I said the northern and southern part of the City, and afterwards he said he did know the meaning of "uptown" and "downtown". Then I used it in the Russian language.

BY MR. DERBY:

Q Was all your conversation with Schwartzmann in the store during that morning carried on in Yiddish, or Russian?

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A Yiddish.

Q What happened up to the time of your arrest? A While I walked along, I saw on the other sidewalk a policeman was walking, and I directed my steps towards him, and I and the policeman we met in the middle of the street.

Q What did you do with the policeman? A He came up to me and ~~ask~~ took me by the arm and led me back to the store.

Q Had you seen Schwartzmann fall before you left the store?

A No, I did not see him.

Q What did you say to the policeman? A I was about to tell - I wanted to tell the policeman that a disturbance had happened there, because I couldn't tell him that anybody was killed; I didn't know it myself. But I saw that the policeman was not a Hebrew. Sometimes I know that policemen are Hebrews, and can talk the Hebrew language, but when I saw he was not a Hebrew, I couldn't tell him; I could not explain.

Q Did you say anything to him in English? A No, nothing.

Q Did he ask you whose pistol it was, and did you say that it was your's? A He didn't ask me anything, and I didn't answer him anything.

Q Did he ask you who did it, and did you say "I did it"?

A No, I couldn't even say that.

Q Did he ask you why you shot him, and did you say that he had owed you a sum of money? A I didn't say anything of the kind.

Q Did you tell him the sum of money was six dollars, and

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he refused to pay more than four, referring to Schwartzmann, that Mr. Schwartzmann refused to pay more than four? A No, I did not tell him that.

Q Did you tell him that you had told the deceased if he did not pay you you would shoot him? A I didn't say anything of the kind, because I am not a professional murderer, or anything of that kind.

Q Did you tell the policeman that Schwartzmann told you to go ahead and shoot? A Nothing of the kind.

Q And did you tell him then that you did go ahead and shoot? A No, I didn't say that. I say now, the second time I did shoot him.

Q Now, when you went out of the store early in the morning, leaving Schwartzmann and his brother, did you hold up your hand and say "I will fix you; my hands are strong enough yet"? A No, I didn't say that, and I didn't do it.

Q After your arrest did you have a conversation with the witness Bessie Okun, who testified yesterday? A Yes, after the policeman had led me back to the store, she came up and said "Why did all this happen"? And I answered her "all this happened, perhaps, only on account of one dollar".

Q Did you say to her, "He did not want to give me the dollar, and he went to the Devil"? A No, I didn't say that. I didn't use such words.

THE COURT: The Interpreter calls my attention to what he says is an error in the Stenographic minutes. The Interpreter says that the word "went", where it occurs in the

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phrase to which the witness' attention was called, should be "goes"

MR. CURTIS: That is right. He did say "goes", and I am very strongly of the impression -

THE COURT: Pardon me, now; is there any dispute about that?

MR. WASSERVOGEL: In one place the Interpreter has it "he did not want to give me a dollar, and he went to the devil"; in another place he has it "he did not want to give me a dollar; he goes to the devil." Either one will suit the prosecution.

MR. DERBY: I don't see that it makes any difference.

THE COURT: Do you want that changed?

MR. CURTIS: I only want it changed to what is right. Whatever is right I want.

THE COURT: Then, where the word "went" occurs, the word "goes", will be substituted.

Q Did you say to Bessie Okun "he did not want to give me the dollar, and he goes to the devil"? A No, I don't remember having used any such words.

MR. DERBY: That is all.

CROSS-EXAMINATION BY MR. WASSERVOGEL:

Q You told us yesterday afternoon that you went to school in Russia for three years; is that correct? A Yes, sir three years

Q And the language which you spoke at home to your father and mother was the Yiddish language? A Yes, sir, Yiddish.

Q In school, the only language which you were taught was the Russian language? A Russian language.

Q That was the only language which you were taught there, is it not? A The only language.

Q And you learned to read in write in Russian? A Certainly.

Q Will you write your name in the Russian language (handing blank sheet of paper to witness), in Russian? A (Witness writes on paper.

MR. WASSERVOGEL: May this be marked in evidence?

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MR. CURTIS: We have no objection.

THE COURT: Received.

(Received in evidence and marked People's Exhibit No.  
11, of this date.)

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Q And after you arrived in this country with your friends, you would speak in what language? A Yiddish.

Q And how long after your arrival in this country did you start going to nightschool? A About five months after my arrival here, also.

Q And what school did you go to then? A It seems to me it is No. 43, High School, Evening.

Q How long did you attend that school? I will put it that way? A One week.

Q Is that all? A Only one week. I registered there before that time, but I actually went to school only one week.

Q Do you remember when you appeared before the Coroner, on the 7th of November of last year?

MR. CURTIS: If your Honor pleases, as to what took place before the Coroner, I simply want to save a point, and it is this -

MR. WASSERVOGEL: I am not asking him what took place there.

MR. CURTIS: I beg your pardon -

MR. WASSERVOGEL: I object to his arguing on an objection which is improper.

MR. CURTIS: I am not arguing. I am stating a point.

THE COURT: Do you object to the question as put?

MR. CURTIS: I am stating a point, and it is this: I object to anything that took place before the Coroner, because the record shows that this person was not examined.

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b- MR. WASSERVOGEL: He doesn't know what I intend to prove.

MR. CURTIS: I wish you would not interrupt me.

MR. WASSERVOGEL: But what is the use of wasting time?

THE COURT: Pardon me, Mr. Wasservogel; I will listen to Judge Curtis, uninterruptedly. Now, proceed.

MR. CURTIS: I object to asking any question with reference to what took place before the Coroner of this witness, because the record shows that he was not examined there, and, further more, that he can't be bound by anything that took place before the Coroner, unless it was in the nature of an admission, something of that nature.

MR. WASSERVOGEL: That is conceded.

MR. CURTIS: That is my point. I make very few objections, and I want them, if not listened to with respect by the counsel, I respectfully suggest they be considered by the Court.

THE COURT: The objection does not appear to relate to the question that is before the Court. So far as the question is concerned, the question is allowed. The witness may answer it. Now, your answer is either "yes", or "no", or you don't remember.

MR. CURTIS: Very well.

A I don't remember.

Q Do you remember appearing before the Coroner at any time?

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MR. DERBY: The word "appear" is ambiguous. I object. He did not appear. An inquest was held.

THE COURT: You object to the question. Objection sustained.

Q Were you before the Coroner at any time?

MR. DERBY: I object on the same ground.

THE COURT: I will sustain the objection. You may ask him whether he was present in the Coroner's Court at the time there was an inquest in this case.

Q Were you at any time present in the Coroner's court in this case? A I was never there.

Q Is this your signature (handing paper to witness) A Yes, that is my signature.

MR. WASSERVOGEL: I offer this signature of the defendant in evidence.

THE WITNESS: When I was in court.

MR. CURTIS: That is objected to, on the ground this does not appear on its face - that it does not appear on the face of this paper that he appeared before the Coroner or the Coroner's court. It seems to be an examination by some subordinate in the clerk's office.

THE COURT: He is merely asked whether that is his signature.

MR. CURTIS: And he offers this in evidence.

THE COURT: The signature alone is offered. Now,

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is there objection to the admission of the signature, the defendant having said that he wrote it?

MR. CURTIS: Brother Derby thinks we will withdraw the objection.

THE COURT: There being no objection, the signature is received in evidence.

(Received in evidence and marked People's Exhibit No. 12, of this date.)

MR. WASSERVOGEL: Now, may I show the jury the signature made by the defendant in Russian and the signature made on this paper?

THE COURT: Covering up everything on the paper, so that the jury will see the signature alone.

MR. WASSERVOGEL: Well, we can tear that off, if necessary.

MR. CURTIS: No, I will trust the jury not to read the other. We may offer the other part ourselves.

MR. WASSERVOGEL: Well, do you want to offer it?

MR. CURTIS: Oh, no, I will save that.

MR. WASSERVOGEL: I will cover it over.

THE COURT: Proceed. Gentlemen, just look at the two signatures.

(Mr. Wasservogel shows People's Exhibit No. 11 and People's Exhibit No. 12 to jury.)

Q Now, this night school that you went to, when you en-

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roled there, Schwartzmann was with you, was he not? A Yes.

THE COURT: You had better identify which one. There are two brothers.

MR. WASSERVOGEL: The Schwartzmann who testified here.

MR. CURTIS: He testified, if your Honor please, that Mr. Schwartzmann took the witness chair because he could not talk English.

THE COURT: Please do not interrupt, Mr. Curtis.

MR. CURTIS: I don't interrupt.

THE COURT: Yes, that is an interruption.

MR. CURTIS: Your Honor will note an exception.

THE COURT: It is an interruption and an improper one.

MR. CURTIS: Your Honor will note an exception.

Q And your attendance at night school was for how many nights a week? A It seems four.

Q Well, there was no school on Saturday night, was there?

A As far as I can remember, there was no school on Saturday.

Q And there was no school on Sundays? A No, not on Sunday.

Q October 12th was a Saturday, wasn't it? A Yes.

Q And October 13th was a Sunday? A Yes.

Q Now, what time did you go to work on October 12th, Saturday, October 12th? A In the morning, about five o'clock.

Q And you remained there until about what time? A About ten o'clock in the forenoon.

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Q And did you go away then? A Yes, he gave me a day at that time, and I went away.

Q And did you return the same day, A I came back to the house, not to the store to work, but to my room, to go to bed.

Q Did you go back to the store at all that Saturday? A No.

Q Was it at ten o'clock in the morning that you had the discussion about the night school? A Yes, that was ten o'clock in the morning, about; I can't tell exactly to the minute.

Q You always worked Saturday nights, didn't you? A Saturday nights I never worked.

Q Saturday night is the busiest time in grocery and delicatessen stores, is it not? A I don't know about that, but we had an agreement that on Saturday ~~night~~ I should work until nine o'clock, and Saturday should be the day of rest.

BY THE COURT:

Q And when you say nine o'clock, you mean nine in the morning? A In the morning.

BY MR. WASSERVOGEL:

Q And was it at about ten o'clock on Saturday, October 12th, that you asked for this money and that he refused to give it to you? A Yes, that was the first time that I asked, and he refused to pay, and when he also asked me to come back on Sunday morning.

Q Well, did you go out angry? A No, I was not angry at all at that time.

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Q At that time, had the amount which was due you been discussed? A No, nothing about that.

Q And on Saturday night, October 12th, you slept in the room which was assigned to you by your employer? A Where I always slept, yes.

Q You didn't go downtown to your aunt in Attorney Street on Saturday at all, did you? A No.

Q And you returned on Sunday morning, October 13th, at about seven o'clock; is that right? A Returned where?

Q At the store, to the store? A From the room where I slept I went to the store in the same house.

Q And that was at about what time? A I don't know exactly the time.

Q Well, about when? Was it about seven o'clock?

A About six, or later.

BY THE COURT:

Q At the time that you reached the store on Sunday morning had you already had your breakfast, A No, I had never any breakfast before I had done my work in the morning.

BY MR.. WASSERVOGEL:

Q Well, did you do any work that morning? A Yes, I carried the orders to the customers; I poured out the mil into bottles, and the brother who was a witness here, he even helped me, and I carried the orders away to the customers.

BY THE COURT:

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Q When you got down to the store that morning, did you find it open, or did you open it? A It seems to me that I had to knock at the door.

BY MR. WASSERVOGEL:

Q And after you delivered these orders in the morning, did you then go upstairs to get your breakfast? A No, I generally had my breakfast in the store, but that morning I had no breakfast at all.

Q When was it that you first had a discussion about the amount which was due you that day? A After I had done my work and after I had carried the orders to the customers.

Q And it was then that you said that you were going away?  
A This was already on Saturday.

Q Well, Sunday morning, you came back, and then you told him you were going away, didn't you? A I didn't say that.

Q Well, did you tell him on Sunday morning you were going to continue to work for him? A I said that, on the former conditions, I would remain working there.

Q When they refused to accede to your conditions, did you say you were going to leave? A This was already on Saturday that I said that, if not under former conditions, then we will have to separate.

BY THE COURT:

Q Did you say anything on Sunday, in your first conversation in the store, about leaving? That is to say, about leaving your work? A No, I didn't say anything.

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BY MR. WASSERVOGEL:

Q When was it that you had your talk about the amount which was due you? A This was on Sunday morning, after I had done my work.

Q And then you did tell him you are going away now, didn't you? A No, I didn't say that.

Q Were you coming back to continue your work the next day, or the same day? A Why, there was already an understanding on Saturday that we were to separate.

Q You did not repeat anything of that? A No, I didn't repeat.

Q And they offered you how much at that time? A They asked me at first how much money was coming to me.

Q And they finally offered you how much? A Four dollars.

Q And this you would not take? A I didn't take it.

Q And you walked out of the store? A Yes.

Q And you were mad, weren't you? A I was not mad.

Q You were feeling very - had very pleasant thoughts of your employer at that moment, didn't you? A I was quiet.

Q What time was this? A I think it must have been about eight o'clock, perhaps a little before, or after.

Q And then it was that you say you went downtown to Attorney Street, and came back again? A Yes, after some time I came back.

Q And you came back at about ten o'clock? A This I don't know exactly, what time it was.

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Q You say you did not see the little girl, Lilly Sagor there? A I didn't see that girl, as I didn't see that Italian.

Q Do you know the little girl? A Yes, sir, I think I saw her before coming to the store.

Q And you have spoken to her, too, haven't you? A No, I didn't speak to her. She speaks English.

Q You can only write English, I suppose?

MR. DERBY: I object. There is absolutely no evidence of that.

MR. WASSERVOGEL: All right. Question withdrawn for the present.

MR. DERBY: The question is asked for the purpose of misleading -

MR. WASSERVOGEL: The question is withdrawn for the present.

Q When you came back to the store, was the door open, the door leading to the street?

THE COURT: You mean at ten o'clock?

MR. WASSERVOGEL: Yes.

THE COURT: Or about ten?

MR. WASSERVOGEL: Yes.

A It was closed.

Q You opened the door, didn't you? A Yes, I opened the door, and then closed it again.

Q And when you entered the door of the store, and after you closed the door, you and Raphael Schwartzmann were alone in

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there? A Alone.

Q Raphael Schwartzmann was a man of about the same build as his brother, Abraham Schwartzmann, was he not? A I believe that the deceased was a little bit even shorter.

(Abraham Schwartzmann comes up to witness stand and stands alongside of Interpreter).

Q Stand up a minute? A (Witness stands up).

Q You may sit down. At that time Raphael Schwartzmann was behind the counter, wasn't he? A He stood near the corner, where the ice-box is.

Q And the ice-box is in the rear part of the store, isn't it? A Yes, in the rear part of the store.

Q And the ice-box is behind the counter also, isn't it? A Yes, behind the counter.

Q And you were in the front part of the store, weren't you, when you came in? A No, I went up to him.

Q You were not behind the counter at any time, were you? A No, not behind the counter at any time.

Q And the first thing you said after you closed the door was "give me the money", or words to that effect? A No, I said "what will be now?"

Q You asked him for money, didn't you? A Yes, I asked, I requested.

Q And he would not give you any money? A No; after the conversation he didn't want to give any.

Q Up to that time, you had not laid hands on him? A No,

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I didn't touch him at all.

Q But he immediately went into the room and back of the store; is that right? A No, at first he warned me and said that he would shoot me, and then he went into the rear part of the store.

Q And you remained in the mainpart of the store while he went into the rear room in back of the store? A Yes, I was standing near the counter.

Q On the outside of the counter? A On the outside.

Q And he was away about a minute or so? A He came out right away, after a second or two.

Q But he went right behind the counter again, didn't he? A No, he didn't go behind the counter. He was just standing at the corner of the counter.

Q That was on the inside, wasn't it? A He was not standing behind the counter, but just <sup>at</sup> the corner of that counter.

BY THE COURT:

Q Was there any counter in front of him, at the point where, as you say, he stopped and stood? A No, not in front of him.

BY MR. WASSERVOGEL:

Q And how far were you standing from him at that particular moment? A About near him.

Q How far from him? A Right close to him, about half a step, or a quarter of a step.

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BY THE COURT:

Q Well, as close as you are now to the stenographer, or even nearer than that?

THE INTERPRETER: Interpreter or stenographer, your Honor?

THE COURT: Stenographer.

A Nearer.

Q As near as you are to the Interpreter? A A little further away.

BY MR. WASSERVOGEL:

Q Was there anything between you and Raphael Schwartzmann at that particular moment? A What do you mean by saying that anything was between us?

BY THE COURT:

Q Any article of furniture? A Nothing.

BY MR. WASSERVOGEL:

Q And in which hand did he have the gun? A In the right hand.

Q And how did he have the gun pointed? A At first it was pointed down, and then he pointed it at me.

Q So that that gun must have been right at your body at that time; is that right? A A little distance away from my body; not right at my body.

Q You are much stronger than he, aren't you?

MR. CURTIS: I object to that.

MR. DERBY: It calls for a matter of opinion.

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THE COURT: Objection sustained.

Q How much do you weigh? A I think about 155.

Q Did you grab hold of his hands? A Yes, sir.

Q With both of your hands? A With my right hand I grabbed his hand in which he held the revolver, and took it away from him, and with the left hand I pushed him away.

Q And you took the revolver from his hands? A Yes.

Q Now, in the struggle to take the revolver from him, the revolver did not go off, did it? A No, no shot.

Q And after you had the revolver in your hands, you remained outside of the counter? A Yes, near the counter, outside.

Q He was behind the counter? A Yes, he was at the table, between the table and the wall. That means inside the counter.

Q Well, the counter or table, as you call it, separated you two men at that time? A No, the table was not between us at that time.

BY THE COURT :

Q We are talking now about the moment after, as you say, you took the revolver away from him and had it in your hand?

A No, the counter was not between us at that time.

BY MR. WASSERVOGEL:

Q He was behind the counter, wasn't he? A As soon as I took the revolver away from him, he went to the register.

BY THE COURT:

Q By the register you mean the cash register, is that

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right? A Yes, sir.

BY MR. WASSERVOGEL:

Q And the cash register was on the counter? A The register was not on the table, but it was fixed to the wall.

Q And the register was behind the counter? A Yes, behind.

Q So, in order to go to the register, he had to go behind the counter, isn't that right? A Yes, sir.

Q So that, at that particular moment, he was standing at the register, behind the counter, whereas you were standing in front of the counter? A Yes, I was then standing on the outside of the counter.

Q And you bent over the counter, didn't you, this way (illustrating)? A No, I was standing straight, erect, only my hand I put on the counter.

Q You were standing straight at the counter, and your hand was there, wasn't it? A Yes.

Q And at this time you say your boss was at the cash register? A He was standing near the register.

Q And he tried to get the gun away from you while you were standing at the counter, this way (illustrating)? A Yes.

Q And then, as he tried to get the gun away from you, you say it was discharged? A Yes, sir, at that moment there was an explosion.

Q And you saw the blood streaming from his breast, didn't you? A Nothing of the kind.

Q You didn't see any blood? A I didn't see any blood

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until I came back with the policeman.

Q After you heard the pistol, did you remain standing there?

A I may have remained there a second, on the spot, not knowing what to do; I don't know.

Q The gun remained in your right hand, did it? A Yes, in my right hand.

Q The store was still closed, wasn't it? A Still closed.

Q You say that you saw him going from behind the counter toward the door with a knife in his hand. Is that what you said? A I only saw him grab the knife and start to run. Then I don't remember any more.

Q And he ran toward the door from behind the counter?

A Yes, towards the door.

Q But you were the nearest to the door, weren't you? A No, he was nearer to the door, because, while I was standing on the spot, not able to move, he ran towards the door, and he was nearer.

Q But you are the one that opened the door, aren't you?

A After the shot, I started to run, and I opened the door.

BY THE COURT:

Q And when you say after the shot, do you mean after the first shot? A After the second shot.

BY MR. WASSERVOGEL:

Q So that, you got to the door before your boss did? A Yes.

Q And you opened the door? A Yes.

BY THE COURT:

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Q Was the door opened or closed, at the time that you fired, as you say, the second shot?

MR. CURTIS: I object, respectfully, to that question in the form that it is put. The witness doesn't say that he fired a second shot. He says the first shot was the result of an explosion, and I respectfully submit that the form in which the question is moulded conveys the wrong impression.

THE COURT: The question is withdrawn.

Q At the time that the revolver was discharged for the second time, was the door opened, or closed? A Closed.

BY MR. WASSERVOGEL:

Q So that, you were still in the store with the door closed when the second shot was fired?

MR. CURTIS: I object to that expression, the form of the question. The witness -

THE COURT: Objection sustained.

MR. CURTIS: It conveys a wrong impression to the jury.

THE COURT: The objection is sustained.

Q So you were still standing in the store with the door closed when a second shot went off?

MR. CURTIS: I beg your Honor 's pardon for my objection - my interruptinn. I object to the form of the question.

THE COURT: And that is overruled, because this question, in the opinion of the Court, is proper.

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MR. CURTIS: Your Honor will note an exception.

A Yes, the door was closed.

Q And you were standing outside of the counter at that time? A Yes, outside.

Q And your boss was standing inside of the counter at that time, wasn't he? A I don't know in what spot he was at that time.

Q You do know that you still had the revolver in your right hand, don't you? A Yes, sir.

Q You did hear this revolver go off?

THE COURT: Now, there is some conversation between the jurors. There will be none.

A Yes, I did.

Q And you fired point blank at this man's head, didn't you? A I didn't see any head at that time.

Q You knew he was in the store? A I knew that he was in the store.

Q And you knew that he was standing right near you there, because you saw the knife in his hand, didn't you? A I didn't aim at him, but I aimed at a place where he was not as yet, so as to frighten him.

Q You saw the man's knife, you saw the knife in his hand, but you didn't see the head?

MR. DERBY: I object to that. That is not what the witness stated. He said he saw the deceased ~~take~~ pick up a knife.

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THE COURT: That objection is sustained. The question does not strike the Court as entirely proper.

Q You said you did see a knife in this man's hand? Did you say that? "Yes", or "no"? A Yes, I saw it at the middle of the table.

Q And you saw the position in which that knife was held? A No, I didn't see the position exactly.

Q How did he hold the knife? Just like this, this way (illustrating)? A I didn't see that. I only saw him bend down in the direction of where the knife was, grab it, and then I didn't see anything any more.

Q You actually saw a knife in his hand; is that what you say? A I didn't see exactly the knife in his hand, but I only saw how he grabbed it.

Q But you didn't see his head? A At that time, I saw his head.

Q And then, after the second shot went off; did you open the door? A I did.

Q You saw your boss fall down on the ground, didn't you? A I did not see, and I could not see.

Q Nothing the matter with your eyes, was there? A I can explain why I could not see.

Q Will you answer the question first? Was there anything the matter with your eyes? A Yes, my eyes were in order.

Q In order? A In good order.

Q And it was broad daylight? A Yes, it was in the day

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time.

Q And, with a bullet in the head and a bullet in his chest, this man did not fall to the ground? A In all probability, he must have fallen after I was out of the door, because, had he fallen before I had opened the door, I would not be able to open the door at all. He was lying just across the door, when I came back.

Q You did open the door, didn't you? A Yes.

Q And you walked out? A Yes, sir.

Q Did you close the door after you? A No; I tore open the door, and ran out.

Q You tore it open, didn't you? A Yes.

Q You were still mad, weren't you?

MR. CURTIS: Objected to.

THE COURT: Objection sustained.

Q You were very angry, weren't you?

MR. CURTIS: Objected to.

THE COURT: Objection overruled.

MR. CURTIS: I take an exception.

A I was not angry, but I was excited, dazed.

Q And you went out on the street, and the first thing you did was to fire the revolver away? A Yes.

Q You had no more use for it, did you?

MR. CURTIS: I object to that.

THE COURT: Oh, I think I will allow it.

MR. CURTIS: Your Honor will note an exception.

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Q And this is the revolver, is it (showing revolver to witness)?

MR. DERBY: Is that a question, or a statement by the District Attorney?

MR. WASSERVOGEL: All my questions are questions.

MR. DERBY: That does not sound like a question.

BY THE COURT:

Q Is that revolver which is now shown to you the revolver, which, as you say, you at one time had in your hand on the morning of October 13th (revolver is handed to witness)?

A I can't remember that; I can't say, because I hadn't noticed that revolver very much.

THE COURT: It will appear on the record that the revolver handed to the witness is People's Exhibit -

MR. WASSERVOGEL: People's Exhibit No. 9, your Honor.

THE COURT: In evidence.

BY MR. WASSERVOGEL:

Q And you say when you got out on the street you were still very much excited; is that right? A Yes.

Q And you walked on up Third Avenue? A Yes.

Q And you had gone until about 140th Street when a police officer came from behind and spoke to you? A No, that was not so at all.

Q Well, a police officer did come up to you and speak to you, didn't he? A No, we met in the middle of the street. He came from the sidewalk, on the opposite side of the street, and I

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went towards him, from the side of the sidewalk, and we met in the middle of the street.

Q Did he come up to you at some time? You met. Have it your own way. A Yes, we met in the middle of the street.

Q And the officer said to you, "Did you do the shooting?" A Maybe he may have asked such questions, but I didn't answer anything.

Q Do you know what the word "I" is, in English? A Now I know.

Q And you know what "I do" means, and "I did", what that means? A The word "I", the meaning of it I know, but "do" or "did" I don't know.

Q At any rate, the officer took you back right in front of the delicatessen store? A Yes, sir.

Q And there is quite a Jewish population that lives up that way, is there not? A Yes, sir.

Q All the storekeepers in the neighborhood are Hebrews, are they not? A Yes, sir, about.

Q And you were surrounded by quite a crowd, weren't you? A Yes, sir.

Q And Mrs Okun was in that crowd, wasn't she? A Yes, sir.

Q You knew Mrs. Okun as the owner of a store next to the delicatessen store, didn't you? A Yes, sir.

Q You knew that she speaks Jewish? A Yes.

MR. CURTIS: I beg your pardon, Mr. District Attorney. Do you mean, by Jewish, Yiddish, or Hebrew?

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MR. WASSERVOGEL: Yiddish.

Q And she spoke to you in Yiddish while you were in the custody of the officer, didn't she? A Yes, sir, she did.

Q And did you say to her at that time "He wouldn't pay me the money; he goes to the devil", or words to that effect?

A No, such words I did not use at all.

THE TENTH JUROR: May I ask at this time whether he can repeat exactly, in Yiddish, what he did say to her?

THE COURT: Is there objection to that?

MR. CURTIS: None whatever.

THE COURT: To the Interpreter) Ask him, in Russian, whether he can repeat, in Yiddish, exactly what he said to this woman?

THE WITNESS: Yes, I can.

MR. WASSERVOGEL: Do so.

(The witness speaks in a foreign tongue).

THE INTERPRETER: "On account of one dollar the whole thing occurred".

MR. WASSERVOGEL: I think that is all.

RE-DIRECT EXAMINATION BY MR. DERBY:

Q Now, when you signed your name to the paper the District Attorney showed you, People's Exhibit No. 12, were you in a courtroom, or somewhere else? A From the Tombs I was taken to a place; it may have been a court, and there was a lawyer named Sachs, and he told me I should sign it, and I signed it.

Q Do you know where that office was you were taken to?

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A I don't know exactly where that was.

MR. DERBY: That is all.

MR. CURTIS: I think we don't wish to ask any other  
questions.

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S O P H I E G O L D B E R G, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:-

DIRECT EXAMINATION BY MR. DERBY:

Q What is your full name? A Sophie Goldberg.

Q Where do you live? A 314 Madison Street.

Q Do you speak English? A Yes, sir.

Q Will you please speak up so we can all hear what you say? In October, 1912, did you live on Third Avenue?

A Yes, sir.

Q At what number? A 2617.

Q 2617? A Yes, sir.

Q Was that the building in which Schwartzmann's delicatessen store was situated? A No, that was the next building.

Q Next door? A Next door.

Q Do you know the defendant, Ely Geller? A Yes sir.

Q Did he board with you at any time? A Yes sir.

Q When did he come to board with you, and how long did he stay with you?

THE COURT: Wasn't it merely rooming, and not boarding?

Q Did he have a room with you? A Yes, sir.

Q When did he come first to that room, and how long did he stay there? A I don't remember what time he came, but

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Sunday or Monday; I couldn't remember the exact time. He was boarding with me about two weeks or more; I don't know exactly.

Q And he left there after about two weeks? A About two weeks and two days.

Q And his room was part of your apartment? A It was a part of the front.

Q A part of the front? A The front. He had a separate room all together.

Q During the time that he lived with you, did you ever see a pistol in his room? A No, sir.

Q You never did? A No, sir.

Q Or on his person? A No. I was cleaning every day the room, and never saw it.

BY THE COURT:

Q And when you say the room, which room do you mean?

A The room he was sleeping in.

BY MR. DERBY:

Q You know other people who knew Geller? A No.

Q Your husband? A No.

Q What? A If my husband knows him?

Q Did you know some other people who knew this young man, Geller? A Well, my husband knows him.

Q Did you know other people who knew him? A No.

MR. DERBY: I don't think she understands.

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MR. WASSERVOGEL: She only knows him two weeks.

THE WITNESS: I never talked to him.

MR. DERBY: I did not call this witness as a character witness, and I think I won't proceed on that line.

Q Did you know anything about Schwartzmann? A No.

Q Did you go into Schwartzmann's store frequently?

A Yes.

MR. DERBY: That is all.

CROSS EXAMINATION BY MR. WASSERVOGEL:

Q The rent for his room was paid by Schwartzmann, wasn't it? A Schwartz paid my husband for it.

Q And when you spoke to the defendant you would speak to him in what language? A Jewish.

Q You did not speak in Russian to him, did you?

A No. I never spoke to him. He come too late, and he went out in the morning too early. I never had a chance to talk to him.

MR. WASSERVOGEL: That is all.

H A R R Y G O L D B E R G, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:-

DIRECT EXAMINATION BY MR. DERBY:

Q What is your name? A Harry Goldberg.

Q Where do you live? A 314 Madison Street.

Q Are you the husband of Mrs. Goldberg, who just testi-

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fied? A Yes, sir.

Q And you lived at 2617 Third Avenue on October 13th, last? A Yes, sir.

Q Mr. Geller lived with you for a while before October 13th, did he not? A Yes, sir.

Q Had a room in your flat? A Yes, sir.

Q Did you ever see a pistol in his possession? A No.

MR. WASSERVOGEL: I don't think that is --

THE COURT: I will allow it.

Q Or in his room? A No.

Q Or anywhere about the premises? A No.

Q You knew Schwartzmann? A Yes, sir.

Q Do you know anything about Schwartzmann?

A I don't know nothing.

BY THE COURT:

Q How many rooms were in that flat? A Four.

Q And in which room did Geller sleep, if you know?

A Front room.

Q Anybody else sleep in that same room with Geller?

A There was an old man sleeping, but he moved out about a week before.

Q A little louder. I don't hear you. Was there any other person sleeping in the room that Geller slept in at the time he slept there? A Yes, an old man, but he moved out a week before Geller moved out.

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Q How long was Geller in that room? How many days?

A I think about fourteen or fifteen.

Q About fourteen or fifteen days. Talk up?

A But I am not sure how many days exactly.

Q What was the name of the old man who slept in that same room during a part of the time that Geller slept in it?

A I kdon't know the name.

Q Where does he live? Where does that man live?

A He moved to a friend in Brooklyn, but I don't know the address. He never came up again.

Q And you don't know hisname? A No, I didn't know even Geller's name.

MR. DERBY: Thank you.

MR. WASSERVOGEL: No questions.

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J O S E P H S H I N K O F S K Y, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:-

DIRECT EXAMINATION BY MR. DERBY:

Q What is your name? A Joseph Shinkofsky.

Q Where do you live? A 595 Prospect Avenue, Bronx.

Q What business are you engaged in? A Fish and fruit and vegetable business.

Q Did the defendant, Ely Geller, ever work for you?

A Yes.

Q When? A He worked for us --

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BY THE COURT:

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Q Not when, but where? A He worked for us in New York, in the Bronx, and in Hunter, New York.

Q What store, what place, what number? A He worked for us in 638 Kelly Street, Bronx, and in Hunter, New York.

BY MR. DERBY:

Q That is, before he went to work for this man Schwartzmann? A Before that.

Q How long did he work for you? A He worked for us about four months in New York and about three months in Hunter.

Q You knew him well? A I knew him well.

Q And other people who knew him? A Other people.

Q Do you know what his reputation was for peace and quiet and for truth and honesty? A Peace and quiet, found him to be a very willing worker, never had to wake him in the morning; he used to be up at the right time in the morning, and never argued when he should go to bed, never went to bed before his work was done.

Q What was his reputation for peace and quiet and not getting into trouble or quarrels? A I never found him to be anything but peaceable. He never had any arguments with anybody, always did what anybody told him.

Q Is he honest? A Honest, yes. One case of honesty is--

MR. WASSERVOGEL: I object.

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MR. DERBY: I would like to have this instance, because it is very valuable.

MR. WASSERVOGEL: I have not objected to the other questions and answers, which were clearly objectionable. I think your Honor has been very tolerant of this witness.

MR. DERBY: This man is on trial for his life.

MR. WASSERVOGEL: I know all about it. Another man was killed.

MR. DERBY: And there is something very valuable as to reputation I want to bring out from the witness.

THE COURT: It does not bear on the traits of character involved in this matter. I will sustain the objection.

MR. DERBY: I take an exception.

Q Will you please relate the case of his personal honesty which you have in mind, which you started to tell us about?

MR. WASSERVOGEL: I think that is objectionable.

THE COURT: Objection sustained.

MR. CURTIS: Your Honor will kindly note an exception.

THE WITNESS: Well--

THE COURT: Now, you are not allowed to answer that, because the court considers it objectionable.

MR. DERBY: That is all.

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## CROSS EXAMINATION BY MR. WASSERVOGEL:

Q You were born in this Country? A Yes.

Q You don't speak Russian? A No.

Q Kelly Street is in the Bronx? A Yes.

Q He worked for you there for about five months?

A Yes, sir. About four months.

Q Did you know, when he entered your employ, how long he had been in the Country? A He entered about a week after he landed.

Q Did you see to it that he could go to school?

A He wanted to go to school, but he was not able to at that time.

Q He didn't go to school while he was with you?

A He did not go to school.

Q You didn't see to that? A I didn't see to that.

Q You never spoke Russian to him? A I never spoke Russian.

## RE DIRECT EXAMINATION BY MR. DERBY:

Q What did you speak to him? Yiddish? A Yiddish.

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HERMAN OESTREISCHER, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:-

## DIRECT EXAMINATION BY MR. DERBY:

Q What is your name? A Herman Oestreischer.

Q Where do you live? A 838 Kelly Street, Bronx.

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Q Do you know the defendant, Ely Geller? A I do.

Q Do you know other people who know him? A I do.

Q Do you know what his reputation is for peace and quiet? A Well, very good, as far as I know him.

Q And his reputation for honesty? A Very good, as far as I have known him.

Q Has your attention ever been called to Geller's knowledge of the English language? A Yes, sir.

Q Or want of knowledge? A Not to want of knowledge.

Q Has he a knowledge of the English language?

A Not that I know of.

Q Have you ever spoken to him in English? A No sir.

Q And, to the best of your information, is he able to speak English? A No, sir, he is not.

Q He is not able? A No, sir, he is not able to speak English.

CROSS EXAMINATION BY MR. WASSERVOGEL:

Q You don't speak Russian, do you? A No, sir.

MR. WASSERVOGEL: That is all.

M O R R I S S K L A R I N S K Y, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:-

DIRECT EXAMINATION BY MR. DERBY:

Q What is your name? A Morris Sklarinsky.

Q Where do you live? A 536 East 135th street.

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Q Do you know the defendant, Ely Geller? A Yes sir.

Q What business are you engaged in? A I talk in Jewish.

(The balance of the testimony of this witness is given through the official interpreter, Edward J. Rosenthal)

Q What business are you engaged in? A Printer.

Q Were you born in this Country? A No.

Q Where were you born? A In Russia.

Q What town? A Grodno.

Q You come from the same town as the defendant?

A Yes, sir.

Q Did you know Geller in Grodno? A Yes, sir.

Q And you have known him since he came to New York?

A Yes, sir.

Q Do you know other people who know him? A Yes.

Q Do you know what his reputation is for peace and quiet? A Yes, sir.

Q What is it? A A very good boy.

Q And for honesty and truth? A Very honest.

Q Truth? A A very orderly boy.

MR. DERBY: That is all.

MR. WASSERVOGEL: That is all. No questions.

MR. DERBY: Your honor, I want to offer in evidence certain testimony taken in the Coroner's court, and I

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believe the District Attorney will concede that these minutes are a correct transcript.

MR. WASSERVOGEL: I have no objection.

THE COURT: Either counsel can read such parts as they deem competent.

MR. DERBY: I am going to read those which I read to the witness.

MR. WASSERVOGEL: Then, I ask that the entire minutes go into evidence.

MR. DERBY: No, I simply want in evidence the parts of the testimony which were read to the witnesses here. All I offer at this ~~time~~ is that testimony to which I called their attention, and that is all there is before your Honor at the present moment to rule on. If the District Attorney wants to offer the rest of the testimony later, that is another question.

THE COURT: I understand there is no point made that the testimony was not as read when the questions were put?

MR. WASSERVOGEL: I have no means of questioning that.

THE COURT: That part is received in evidence, and will be defendant's exhibit, whatever it may be. In other words, I will receive in evidence the questions purporting to be questions put in the Coroner's Court

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which you put to witnesses while on the stand, and the answers which you read as having been given by them, in the Coroner's court, and that will be marked an exhibit in the case.

MR. WASSERVOGEL: I think we can save much time by having the entire testimony of the witness Abraham Schwartzmann taken in the Coroner's court received in evidence.

MR. DERBY: I am making an offer. It seems to me it is not for the District Attorney ~~not~~ to modify my offer. He can do that later.

(Received in evidence and marked Defendant's Exhibit B, of this date)

THE COURT: Gentlemen of the jury, you are admonished not to converse among yourselves on any subject connected with this trial, or to form or to express any opinion thereon, until the same is submitted to you.

You are also cautioned not to visit the premises where this is said to have taken place. If any one should attempt to talk with you about the case, you will bring that circumstance to my attention. I may also say to you, gentlemen, that, conceivably, the session to-morrow I don't know, but conceivably, the session may be somewhat prolonged. You had better make your arrangements accordingly.

MR. CURTIS: May we respectfully call your Honor's

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attention to the fact that we had yesterday some witnesses in attendance who don't seem to be here to-day. We are not precluded from calling them in the morning?

THE COURT: Not at all. You have not rested. Court stands adjourned until to-morrow morning at half past ten.

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(The Court accordingly took a recess until to-morrow, Friday, January 31st, 1913, at 10:30 A. M.)

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THE PEOPLE ETC.  
-against-  
ELY GELIER.

New York, Friday, January 31st, 1913,  
10:30 A. M.

T R I A L            C O N T I N U E D .

(The defendant is arraigned at the bar)

M O S E S            S H A P I R O, takes the stand.

BY THE COURT:

Q    What is your name, my boy?    A    Moe Shapiro.

Q    And where do you live?    A    17 Attorney.

Q    How old are you?    A    Twelve.

Q    You are twelve years old?    A    Yes, sir.

Q    When were you twelve?    A    October.

Q    What day?    A    October 24th.

Q    Do you go to school?    A    Yes, sir.

Q    What school do you go to?    A    34.

Q    And where is that?    A    It is in Broome and  
Willetts.

Q    Who is your teacher there?    A    Miss Holms.

Q    Do you understand that, if you are asked any ques-  
tions on this trial, it is your duty to answer them truthfully?

A    Yes, sir.

Q    And to say nothing that is not true?    A    Yes, sir.

Q    Do you understand that?    A    Yes, sir.

Q    And to tell the whole truth about what you are asked?

A    Yes, sir.

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Q Do you understand that? A Yes, sir.

Q And will you do that? A Yes, sir.

Q You know that a person who does not tell the truth may be punished if he tells what is untrue, and is a witness at the time he is telling it? Do you understand that?

A Yes, sir.

THE COURT: Mr. Wasservogel, I think I will allow the boy to be sworn.

MR. WASSERVOGEL: No objection.

(The witness is duly sworn)

DIRECT EXAMINATION BY MR. DERBY:

Q Where do you live? A 17 Attorney Street.

Q Now, Moses, will you try and talk up as loud as you possibly can, so we can all hear you? Do you live at 17 Attorney street? A Yes, sir.

Q I didn't hear that? A Yes, sir.

Q Who do you live with there? A My grand-mother.

Q What is her name? A Simon.

Q Mrs. Simon? A Yes, sir.

Q Do you know the defendant here, Ely Geller?

A Yes, sir.

Q Did you hear that Ely Geller had been arrested last October? A On a Monday I heard it.

Q You heard on a Monday that he had been arrested?

A Yes, sir.

Q When was the last time you saw him before that?

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A On the day before.

Q On a Sunday? A Yes, sir.

Q Was it on Sunday, October 13th? A I don't know the exact date.

Q You know it was on a Sunday, on the day before--

A I heard he was arrested--

Q The day before you heard he was arrested? A Yes.

Q Where did you see him on that day? A He came in the house.

Q Where? A Where I live.

Q 17 Attorney Street? A Yes, sir.

Q About what time in the morning, or afternoon?

A About nine o'clock.

Q Nine o'clock when? A In the morning.

Q Are you sure about the hour? A About that time.

Q About that time? Did he speak to you? A Yes sir.

Q What did he say?

MR. WASSERVOGEL: That is objected to.

THE COURT: Objection sustained.

MR. DERBY: Exception.

Q Did he speak to your grand-mother, Mrs. Simon?

A No, sir.

Q Was she in the same room you were in? A No, she was in a different room.

Q I didn't hear that? A She was in a different room.

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Q She was in a different room? A Yes, sir.

Q Where were you when he spoke to you? Were you up and dressed? A No, I was laying in bed.

Q And where was Mrs. Simon? A She was in a different room.

Q She was where? A In a different room.

Q Was she up and dressed? A I don't know if she was up, but she was in a different room, in the bed; I don't know if she was up, or sleeping.

THE COURT: You will have to talk louder, my boy.

Q She was in bed? A Yes, sir.

Q And Geller did not speak to her, only to you?

A Yes, sir.

Q How long did he stay there? A About two minutes.

Q Then what did he do? A Then he went away.

Q And you didn't see him again? A No, sir.

MR. DERBY: That is all.

MR. WASSERVOGEL: No questions.

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MR. DERBY: Now, your Honor, I offer in evidence certain portions of the testimony taken in this case in the Coroner's court, which I am going to read to the jury. The only part I offer is the part I will read.

THE COURT: I have received in evidence those portions of the testimony said to have been taken in the

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Coroner's court, consisting of certain questions which you put to witnesses on cross examination, and consisting of certain answers said to have been given by those witnesses in the Coroner's court.

MR. DERBY: I believe it is conceded by the people that these are the correct minutes of the proceedings in the Coroner's Court.

MR. WASSERVOGEL: It is conceded that they are the minutes. I don't know whether they are correct or not.

MR. DERBY: That they are the minutes taken in the Coroner's court, made by the official stenographer.

THE COURT: Were they not marked in evidence?

MR. WASSERVOGEL: They were marked yesterday.

THE COURT: You may read the portions that are marked in evidence.

MR. DERBY: "Abraham Schwartzmann, a witness, called and sworn, testified as follows:-

"I was there that morning, and I asked the boy what is the matter, and he said he wants to quit the job; so I said to him go ahead and eat breakfast. He said never mind the breakfast. I said what is coming to you; he said six, and I figured up it was five dollars; we offered him <sup>the</sup> five dollars and refused."

Then there are three words that are stricken out. I don't know whether I should read them or not, your

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Honor. The witness gave them, but they were stricken out on motion.

THE COURT: Here, at this trial?

(Mr. Darby hands minutes to Court)

MR. DARBY: "We offered him five dollars and he refused. Afterwards he came in. Then he came in and took the money we offered him and he walked off. That is all I know about it.

"By a juror.

"Q He did take the money? A Yes.

"Q How much did he take? A Five dollars.

"Q Who do you mean by he? A Ely Geller.

"By the coroner:-

"Q Is that the man? (Indicating defendant)? A Yes.

"Q Did you speak to your brother before he died?

A No.

"By Mr.

"Q Did you ever see Ely Geller in your brother's place after you saw him take the money and walk off?

A No.

"William T. Northrop, a witness, called and sworn, testified as follows:-

"I was patrolling North on Third Avenue, near 141st Street, 10:15, October 13th, when I heard a pistol shot, and just then a car was passing south; as the car passed,

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"Q What were his exact words? A The exact words were 'I did it'.

"Q 'I did it'? A Yes, sir.

"Q Is that all he said? A Yes, sir.

"Q 'I did it'? A Yes, sir".

Your Honor we have sent for certain additional character witnesses, who have not appeared this morning, so we will be compelled to rest the defense.

MR. WASSERVOGEL: I don't think that is a proper statement-- "we will be compelled to rest the defense". Their witnesses are not here. The people have some rebuttal to introduce, and, if their witnesses come at that time I think your Honor will allow them to take the stand. You are not compelled to rest.

THE COURT: Yes, if your witnesses come at any time during the progress of the trial, you may let me know, and I will see that they are heard.

MR. WASSERVOGEL: I offer in evidence, if your Honor please, all of the testimony given by the witness Abraham Schwartzmann and officer Northrup, in the Coroner's court.

MR. CURTIS: That is objected to.

THE COURT: I will look at the testimony.

MR. DERBY: Any testimony that was called to their attention when they testified as witnesses yesterday, I think will not be objected to. Will it, Judge Curtis?

MR. CURTIS: No, sir, but our friend wants to

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introduce all the testimony.

THE COURT: I will look at the proposed exhibits, and rule after I have seen it. (The Court examines record handed up by Mr. Wasservogel)

MR. DERBY: Anything that Mr. Wasservogel thought important enough to call to the witness's attention yesterday we don't object to.

THE COURT: I am going to look, Mr. Derby, at this proposed exhibit, and I will rule after I have looked at it. (The Court examines the proposed exhibit).

Mr. Wasservogel; if you can point out any portion of this testimony not received in evidence which modifies or explains any part received in evidence, I will consider the reception of that part.

MR. WASSERVOGEL: Well, there was one part, your Honor, that counsel for the defense did not call to the attention of Schwartzmann yesterday, but I notice that Mr. Derby read it this morning. If that is included in his offer, I will not press my offer any further.

MR. DERBY: Certainly, it is included, I read it.

MR. WASSERVOGEL: And also the other part of the testimony that I called to the officer's attention while he was on the stand, referring to the time while he was patrolling on the street; and heard the pistol shot and all that. If that is included in the offer, I won't press the offer any further.

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MR. DERBY: I read it to the jury.

MR. WASSERVOGEL: That is all there is about that.

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R E B U T T A L T E S T I M O N Y .

J O H N M c L O U G H L I N, police officer, attached to the Sixty-first Precinct, called as a witness on behalf of the people, in rebuttal, testified as follows:-

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q What is your name? A John McLoughlin.

Q You are a desk Lieutenant of police, are you?

A Yes, sir.

Q And were you such on the 13th of October, last year?

A I was.

Q A little louder? A I was.

Q Talk as loud as you did on the telephone this morning.

And what station were you at? A Alexander Avenue police station house, Sixty-first Precinct.

Q Were you present behind the desk at the time the defendant Ely Geller, was arraigned? A I was.

Q Did you have a talk with him? A I did.

Q Did you speak to him in -- withdrawn. In what language did you address him?

MR. DERBY: I object, as not proper rebuttal.

THE COURT: I will receive it as bearing upon the

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defendant's knowledge of the English language, a matter gone into on the defense.

MR. DERBY: I take an exception.

Q What language did you speak to him in? A English language.

Q You don't speak any other language, do you? A No.

Q And what language did he answer in? A In English

Q And did you at that time make a record of what he said in the police blotter? A I did.

Q Have you got that police blotter here? A Yes sir.

Q Can you refer to the record which you made?

(Handing book to witness) A There it is (Indicating on book).

Q Lieutenant, can you tell us, without looking at the blotter, what was said by yourself and by him?

MR. CURTIS: That is objected to.

Q (Continuing) In English? A I asked him--

THE COURT: Now, wait a moment.

MR. CURTIS: It is not proper rebuttal, your Honor. It was not called to the defendant's attention on cross examination, and no foundation was laid for it.

THE COURT: I think it is not proper rebuttal, Mr. Wasservogel.

MR. WASSERVOGEL: I am inclined to agree that that is correct, your Honor. I do not want to call the defendant back.

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THE COURT: That ends it, then.

Q But you say he spoke to you in English? A He did.

MR. WASSERVOGEL: That is all.

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ABRAHAM SCHWARTZMANN, being recalled, on behalf of the people, in rebuttal, testified as follows:-

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q Schwartzmann, did you ever see this gun, people's Exhibit No. 9? A No.

MR. CURTIS: That is objected to. That is not rebuttal.

Q Was this gun at any time in any part of the delicatessen store, or the rooms behind the delicatessen store which you had at No. 2615 Third Avenue? A No, sir.

MR. CURTIS: Wait a minute.

THE COURT: Don't you answer a question until I have ruled. You keep perfectly quiet until the objection is taken and the Court has ruled.

Q (Question read by stenographer as follows:- "Was this gun at any time in any part of the delicatessen store or the rooms behind the delicatessen store which you had at No. 2615 Third Avenue?")?

THE COURT: Do you object to that?

MR. DERBY: Yes, objected to.

THE COURT: Sustained.

Q Did you at any time see this gun in the possession

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of your brother?

MR. DERBY: Objected to.

THE COURT: Objection overruled. "Yes", or "no".

THE WITNESS: No.

MR. DERBY: Exception.

MR. WASSERVOGEL: That is all.

MR. DERBY: No questions.

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S A V I N O J I O A C C H I N O, being recalled on behalf of the people in rebuttal, testified, through the official interpreter, Diadato Villamena, as follows:-

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q On the day of the shooting, when you saw, or when you say you saw, the defendant shoot the proprietor of the delicatessen store at No. 2615 Third Avenue, did you see a knife in the hands of the proprietor of the delicatessen store?

MR. DERBY: Objected to as not proper rebuttal.

THE COURT: The objection is overruled.

MR. DERBY: We take an exception.

A No, sir.

MR. WASSERVOGEL: That is all.

THE COURT: Do you want to interrogate him?

MR. DERBY: No, sir.

BY THE COURT:

Q At that time, were you in a position where you

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did see, as a matter of fact, either hand of the proprietor of the delicatessen store? A Yes, sir.

Q What did he have in his hands? A Nothing.

CROSS EXAMINATION BY MR. DERBY:

Q Wasn't Schwartzmann behind the counter at the time you saw him? A Yes, sir.

Q Wasn't that quite a pretty high counter? A It was high, but I could see his face.

Q You could see his face? Weren't you excited at the time? A No, sir.

Q Did you take particular notice of what was in the hands of Schwartzmann? A I saw that he had nothing in his hands.

MR. DERBY: That is all.

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W I L L I A M K I E N A S T, being called on behalf of the people, in rebuttal, testified as follows:-

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q Mr. Kienast, you have already testified that you found the body of Raphael Schwartzmann lying in the doorway is that correct? A Yes.

Q And how far did you say you were from that particular spot when you heard the shots fired? A About one hundred and fifty feet or so.

Q And you ran right over there? A No, I stood for a minute between the first and second shots.

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Q <sup>when</sup> And you found the body was there a knife in either hand?

MR. DERBY: Objected to as not proper rebuttal.

THE COURT: I will allow it.

MR. DERBY: I take an exception.

A No, sir.

Q Did you see a knife anywhere around thereon the floor where he was lying? A No, sir.

Q Did you have occasion to use a knife for any particular purpose? A Yes, sir.

MR. DERBY: Objected to.

Q For what purpose did you need a knife?

THE COURT: I will allow it.

MR. DERBY: I take an exception.

A To cut the apron that he <sup>had</sup> onto him, to open his shirt, where it was tied around his neck.

Q And where did you get that knife? A From some citizen.

MR. WASSERVOGEL: That is all.

CROSS EXAMINATION BY MR. DERBY:

Q Did you make a search of the premises? A No sir.

Q For a knife? A No, sir.

Q Did you look around the floor, or behind the counter?

A I didn't go behind the counter.

Q Didn't you notice there were still some knives on the counter? A I didn't get up and look at the counter.

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THE FOURTH JUROR: May I ask a question?

MR. WASSERVOGEL: Yes.

BY THE FOURTH JUROR:

Q Did you at that time notice any powder marks on his ear, or his shirt front? A No, it was all blood; the blood was squirting out.

Q A burn on his shirt would indicate it was fired at close range?

MR. DERBY: I don't know whether, as an honest expert, a fireman can answer that question.

THE COURT: Do you object?

MR. CURTIS: Yes, we object, because it is improper.

THE COURT: Objection sustained.

BY MR. DERBY:

Q You heard Abraham Schwartzmann testify, did you not, that the deceased, Schwartzmann, kept several knives on his counter? A No, sir.

MR. DERBY: That is all.

BY MR. WASSERVOGEL:

Q Did you see any powder marks on his face at all?

A No, sir; it was all blood; you couldn't see anything.

BY MR. DERBY:

Q If there had been powder marks on the coat, they would have been covered by the blood at the time you got there, would they not?

MR. WASSERVOGEL: I object to his arguing with the

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witness. He can't say that, any more than he could answer the questions they objected to.

THE COURT: Objection sustained.

MR. DERBY: We take an exception.

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THE PEOPLE REST.

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MR. DERBY: Now, your Honor, we renew our motions made at the opening of the case, for the dismissal of this indictment, and also move for the dismissal of the indictment and the direction of a verdict of acquittal on the ground the people have failed to establish a case; upon the further ground there is a fatal variance between the indictment and the proof, in that the indictment alleges this crime was committed in the City and County of New York, whereas it appears from the testimony it was committed in the County of the Bronx.

THE COURT: The motion is denied.

MR. DERBY: Exception.

THE COURT: Now, gentlemen, if you will kindly indicate to me how long you consider it desirable to sum up. I only say that so-- not to hurry you at all. About how <sup>long</sup> would you like for the summation, Judge? Take any length of time you want.

MR. CURTIS: It is quite a space to go over, and--

THE COURT: How long would you like?

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MR. CURTIS: I certainly would like until half past one. I may not use that time, but I would not like to be hampered, or limited, because, as your Honor knows, in your practice, very often the other side will refer to your omission in speaking in reference to certain testimony.

THE COURT: You can take all the time you wish to have.

MR. CURTIS: I will try to close, if I can, by one o'clock.

THE COURT: I will tell you, Judge, the Court will take a recess at about one o'clock, but if, at one o'clock, you are in a position to tell the court that you will close, say, in a matter of fifteen minutes, or half an hour, so that your summation may not be interrupted, a recess will be taken at the conclusion of your summation. Of course, if at one o'clock you want to talk longer than half an hour, we will have to take a recess.

MR. CURTIS: Yes, sir.

MR. WASSERVOGEL: I might say, your Honor, I think I can get through within an hour.

THE COURT: You may take all the time, Mr. Wasservogel, you think you ought to take.

MR. CURTIS: Shall I go to the jury?

THE COURT: You may address the jury.

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(Mr. Curtis then sums up the case to the jury on behalf of the defendant as follows)

May it please the Court and Gentlemen of the Jury:-

Whenever a man is arraigned before the court charged with a grave offense, and he states that he is unable to employ counsel, the court, in a spirit of generosity and a desire to administer properly justice in its tribunal, appoints counsel from out of the body of the Bar to defend the rights and to protect the interests of the accused party; and so it is with my learned brother Derby and myself were appointed by the Court to see to it that no advantage should be taken of the defendant by reason of any unequal combat on his part with the astute and vigilant District Attorney, with all of the power of the Commonwealth awaiting behind him.

Now, so far as my learned associate is concerned, you have seen how well and truly he has discharged the sacred function, so regarded by our profession, and in what signal and able a manner he has attended to the interests and protected the rights of this defendant; and I have only one standard of ambition in this case, and that is that I may be able to equal his zeal, his ability, in the conduct of this case.

I say the law protects the interests of the defendant, and I have given you an illustration of the way in which the court administers that law in assigning counsel to

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the accused; but the law goes further, and probably you will hear as clear an exposition of the law, when the Court comes to charge this panel, as was ever listened to by a number of laymen; and I remember the fact that in this very room, two or three days ago, I heard a charge in a homicide case which recalled to me the golden days of the bar and the bench, when the Bench did not descend to join in the prosecution of the defendant; and in that most marvelous charge, and I say marvelous because so conspicuously different from the hundreds that I have heard, not one expression of opinion as to the merits of the case was indulged in by the Court.

Now, I know how fallible is human nature; I know how easily influenced the minds of the jury are by the slightest intimation from the Court as to its view upon the facts in the case; and that is very proper y so, because the jurors say to themselves, the counsel for the people, the learned District Attorney, the advocates of the defendant, will present their views from a partizan standpoint; but the judge who sits in the trial, and whose legal and judicial functions are to declare the law on all questions that may arise during the giving of testimony, the law says that the Judge shall not express his personal view of the case.

Now, I say that calls us back to the golden days of the bar. It calls us back to the time when great

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men graced the legal profession, and when the law was administered by great Judges and great minds.

Now, I venture to say the Court will charge you, as it is elementary law, that you must not start out in your investigation in this case with the assumption that the defendant is guilty of the crime charged in the indictment; but you must start out with the presumption ever in your own minds that he is entirely guiltless of the offense charged against him, unless it appears affirmatively by the proof that he is guilty.

Now, I wish you, gentlemen of the jury, to keep that fundamental principal of the law clearly in your minds. Let it be as a beacon light to guide your deliberations, and you cannot go astray.

Now, it is conceded in the proof that this is a young man, almost a boy. He was born in the Empire of Russia, in that part of the Russian Domain that was the share of the Empress Catherine in the spoils of Poland. He comes from the town of Grodno. That is on the road to Moscow, where the campaign of 1812 was waged by the French against the Czar Alexander. It is on the road to Wilna, and all that country is historical land; all that country brings to the recollection of the historical student those great contests that were waged in Poland for supremacy, not only in that land, but, incidentally, in the German Empire. It is now a part of Russia.

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This young man was born in that land, and he comes, I want you clearly to understand, not from a race of men whose lives are given to violence, not from a race of men who are indicted in our Courts, as a rule, for homicides, but he comes from a race of men, and every line of his case shows it -- he has spent some of his life in the criminal courts-- will tell you that the people from who he is descended are among the most orderly, law abiding people, in this or any other country, and that is why it is that, in recent times, the fact that the names of certain Hebrews were identified and connected with a conspicuous tragedy excited such attention and astonishment.

They are not a homicidal race. They are not a race that violates systematically the law, but they are a race that, in pursuit of their business career, have built up a country by their allegiance to the law, by their lives as good citizens, and I start out with the proposition that it is known of all men that they are the last people, as a people, as a race, as a nation, to be, and I contend they are yet to be connected with any act of violence.

Now, there are some things that are conceded in this case, and let us address ourselves for a few moments to those things that are conceded, and the first matter in concession is there is no evidence that there was any

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mind the recollection of all the proof that has been presented here; but, as I remember the testimony, his chief object in going to that school was to acquire the English tongue, so that he could make himself useful as a citizen in the land of his adoption. Now, there is no question about that.

My learned friend, with a dramatic air that seems at times to be peculiar with himself, asked him to write his name in Russian, and then he introduced the signature of the defendant to some paper in the Coroner's clerk's office, and wished you to compare the two.

Now, my learned friend must know, because he is a practical and a bell letter, as well as a legal luminary, I have been informed, and I have no doubt it is true, that his ability has been required to try causes in other states, in order to convict men of deeds obnoxious to the law. Those are his qualifications. That is why he is here. He is not here because he is ignorant of the law. He is not here because he lacks the art of the advocate. He is not here because he is incompetent, and an imbecile, but he is here because nature has clothed him with the power to bring guilty men to justice. So that you must remember, when you view the work of such a man, you must in your minds say what was the guiding motive of the sentiment that dictated the

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particular policy? Was he seeking to arrive at the truth, or was he seeking to add new laurels to his reputation? You must think of all those things.

And here is one thing that the learned Court, in the charge the other day, which ought to be printed or painted or written on the walls of every Court house in this country, the learned Judge said to you that, while he applied the law, your sacred province was the testimony, and the law did not dare to invade it. In other words, under our government, under our form of government, the Court applies the existing laws, but even the daring of a judicial officer would not seek to usurp the powers which the constitution of the country and the State have placed in the hands of the Jury.

No man can put his foot into your domain. No man can tell you what the facts are, except in the way of argument, as my learned friend and I may do.

Now, then, with that clearly before you, let us go back to this matter of the English. My learned friend will argue with you that he talked English.

The eighth juror, I think it was, put a question: when one of the officers was on the stand, "Did he say this in Yiddish, or did he say it in English?" I saw the drift of his mind, and I saw how that question was aiding this investigation.

Now, gentlemen, do you believe that that boy, only

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five or six or perhaps seven months in the country, do you believe that boy, who was seeking as a student to acquire knowledge of the English tongue in the night school of the City of New York, was competent to use language in English that it is claimed <sup>he</sup> uttered?

To me, it is simply preposterous, and I again ask you to remember that the brother of the deceased upon the stand, in answer to a question either of mine or Mr. Derby, said that he took him to this night school for the purpose of acquiring the English language.

Now, gentlemen, I shall speak of that, perhaps, further on, when I come to discuss the testimony of the officer; but before I approach that subject I want you to understand that there <sup>are</sup> some things in this case not only that are conceded, but they cannot be contradicted; and I intend to treat you with the utmost fairness, and I know that you are there for the purpose of doing justice between the commonwealth and this defendant, and that you are there without any prejudice against race conditions, degree, or history.

This man was done to death, it is plain, by two bullets from a certain pistol, and I wish to say at this point, and I shall request the learned Court to charge you to that effect, that there is no legal evidence before you gentlemen of the jury in this case that the

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pistol that my friend has so dramatically flourished in the air is the pistol that was used on that occasion, and I will tell you why, and this may be a question that will be left to you by the Court. It usually is, I believe, where that question is at all in doubt. The law provides that there must be a continuous line of identification between the weapon presented in evidence with the weapon used in the commission of the offense, and so careful is the law on that subject that it is necessary for the prosecution to prove that the pistol presented is in the same identical condition as it was when it was used in the commission of the felony; that is the law; and I call your attention to that incidentally to show, to my mind, the exceeding laxity of the proof, the vital proof, or some of the vital proof in this case.

We have a weapon picked up in the street. None of the evidence required by the law, that is, none of the controlling evidence required by the law, is presented for its identification. But let that pass.

Here is another thing we must concede. Unless you say the Spaniard, or Italian, I think it was, saw this occurrence, as he narrates, no human eye witnessed the final meeting between the defendant and the deceased. That which occurred in that place, outside of the

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testimony of this Italian, was witnessed only by the eye of the all seeing one, of the Judge who never errs. Let us see is that true?

Now, the first witness they produced was the brother of the deceased. In his testimony before the Coroner, and I challenge you on this point to disprove my assertion in his testimony before the Coroner, he said not a word about the uplifting of the hand, the threat, veiled or otherwise, "You shall suffer for this", or "I have the strength to make you suffer for this", or words to that effect; the exact words I don't remember.

How and why do those things occur in the presentation of a criminal cause? I will tell you how it seems to me they occur. You would naturally suppose that, before the Coroner, immediately after, comparatively speaking, the occurrence of the homicide, that the facts in the mind of the witness would be as fresh and verdant as they would be in the trial of the cause perhaps months later in a Court of justice. But, in going over the case, the astute mind of some one discovered that there was no motive, no sufficient motive, and there was no premeditation, because there was a lack of a threat, there was a lack of any expression of a desire or intention to do harm to this defendant. And how was the memory of the witness jostled. That we

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don't know. That is one of the things, as Robert Hall said, that go up to the day of judgment.

He was asked upon the stand, did you testify so and so before the Coroner? He seemed to be confused or staggered in his recollection, and the learned Court said that he could properly make the answer "I don't remember". He sought refuge in that suggestion, and he who had testified before the coroner, but not a word about a threat, not a word as to a menace, not a word as to the uplifting of the threatening arm, replies to the question put to him "I don't remember about it". Now, the fact stands out, and that can't be controverted, the fact stands out that he did not swear to it before the Coroner.

Now, gentlemen, let me ask you, would you not, in the transaction of your daily business, if you came in contact with a man who made a statement on a certain day solemnly as to a fact, and then, as his caprice or interest dictated, change that statement subsequently, wouldn't you naturally have a suspicion of the entire statement made to you? Now, that is the condition of the law; that is the position of the law.

I believe the Court will charge you, and I shall ask the learned Court to charge you, that if any person on their side, or ours has stated wilfully any matter

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that is false, any matter that is untrue, in the language of the learned Court the other day in that charge to which I have referred, it will be your duty to reject his evidence, except it be corroborated on material points.

Now, was it vindictiveness that prompted it? You must account for the natural feeling that a brother would have upon the stand in the pursuit of the one that slew his kinsman. We don't object to that. That is human nature. But you are here under your oaths, and you are to do exact justice. You are not to be swerved by a sentiment of prejudice or a burst of passion. You are not, because the District Attorney in that sonorous voice will ask you to put down shooting in New York. You are not to give a verdict against the evidence, the proved testimony in the case.

Now, in this Coroner's Court, the first scene, so far as a legal investigation is concerned, was enacted, and there they were sworn, the witnesses, to tell the truth, the whole truth and nothing but the truth, and to suppress nothing, to conceal nothing. The man who is guilty of suppressio veri is guilty of moral if not legal falsehood.

Now, of course, it may be said that this Coroner's Court is more a subject of ridicule than of interest to the people. That has nothing whatever to do with it. It is a sort of survival of the old Common Law. It is a sort

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of an antique institution, struggling on its feet like a drunken man amid the monuments of civilization.

The Coroner, s Court has been spoken of in comedy, has been spoken of in jest, has been spoken of in history, but, although the Coroner, s Court does not possess perhaps that dignity which surrounds the tribunal in which you sit, a man is under his oath at that place, and a man who testifies at that place is bound by his evidence, <sup>and</sup> if ~~it~~ is not in harmony with the testimony given on the trial of the case in a Court, then he can be justly criticised and censured for that.

Now, I want you to examine it and see how this evidence as to motives, see how this evidence as to premeditation will appear. The learned District Attorney will stand before you as the Officer of the People. He is vested with the dignity of a legal avenger, and he will tell you that you must find this young boy guilty of murder in the first degree. Why? Because there was premeditation, he will argue. Why? Because there was an intention on his part to consummate in that violent manner the bloody tragedy that took place there. That will be his contention.

Now, I contend this at the start: That there is not, properly viewed, the slightest evidence to show that that boy, at the time he returned to that store, returned to that store with an intention to take human life.

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And I want you to remember another thing. Outside of this Italian, there is not any evidence whatsoever of what took place in that store at the time this tragedy was enacted. Keep that in your minds as you go along.

Now, if the decedent had not been killed--if the deceased had not been killed, and if the characters of the two men were compared, if they were put side by side before you, would you arrive at the conclusion that the character of the deceased was in any way superior to the character of this accused person?

Suppose this tragedy had not turned out as it did, have they proved that this defendant is unworthy of belief? Have they proved that, on the record of his life, there is a smudge or a blemish? Have they proved that he was ever engaged in any dishonest action? Have they proved that he did anything while in this country save to raise himself in the social circle and the business world, step by step?

He went to work, it seems, for a man who is a fruit-*er*. He went to work for Schwartzmann. He went to the night school, as I have told you, all evincing not only the existence of thrift on his part, not only a desire to get an honest living, but a desire to lift himself into the civilization of the people among whom he had come to dwell. Isn't that true? And can they claim, can

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they claim any more for the deceased?

I am not here to malign <sup>the</sup> deceased, but I am here to show, if I can, that the character of this defendant up to this unfortunate hour, was equally good with that of the deceased.

Now, my learned friend, and it occurred to me at this moment, and I will notice it, put a question that a little surprised me, and, of course, in this profession of ours, we are the victims of constant surprises; we are stimulated by human genius and legal ability. He asked a witness, that was Schwartzmann, how old he was, how much do you weigh, and I think he asked him how tall he was; and on one occasion he compared the relative stature of the two men. Of course, the defendant was lifted a little above the others, being on the witness stand; and, while he did not tell you his object, I thought I perceived it, and it was then that he will argue to you that this defendant was a strong man, that he was an active, alert man, that he was physically the superior of the departed, about whom we know very little, except what is told to us by the brother; and he will argue to you that this story about the struggle for the pistol, this explosion, in the first instance -- what took place after the first explosion is unworthy of credence, because, among other things, this defendant was the superior if anything, in physical

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strength and figure of the deceased. That is the only argument which I can imagine the fertility of his genius will present to you.

Now, let us see about this but a moment. You saw them side by side; that is, the brother and ~~this~~ unhappy boy. To my mind I thought that Schwartzmann was physically the more powerful man; he may not have been quite as tall; perhaps he don't weigh as much. It is mainly not weight that constitutes physical strength; and the impression was irresistible in my mind that, if the departed brother was in any way a counterpart of the one who is presented here as a witness, that this defendant was in no sense the superior in physical power. I don't know any other object for which that was introduced.

Now, let us go into this case and see. Was there any human motive for this boy to kill this man prior to this transaction about the salary and about the employment?

Now, this boy is impulsive, this boy is impressionable; and when my learned associate put the question to him as he sat on the stand there, "Do your Father and your Mother live over there in Brodno?" He burst into tears. That is not the sentiment of a murderer. It is the most holy sentiment that can animate the breast of man.

"Honor thy Father and thy Mother", is the only commandment that carries with <sup>it</sup> a promise, "That thy days may be

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long in the land which the Lord thy God giveth thee."

Now, that commandment came from Sinai. That commandment has withstood the assaults of paganism and heathenism, and that commandment is embodied in the principal of love which exists throughout the educated and civilized world, the religion of the Christian Redeemer.

That boy's mind went back to the home across the Sea; and if there is one trait in the Jewish character that I admire it is the love of parents and the love of home; and it is known of all men that in the Jewish home the sanctities of life are adored, virtue is preserved. They make good citizens, they make factors in the advancing progress of the republic.

That boy burst into tears when he thought of his father and Mother, when he thought, perhaps, how great was their affliction when they heard of his trouble and his despair. You can't blame him. That is not a cold blooded murderer.

Well, is there any question that he went to work for Schwartzmann? None. Is there any material question about the cause of difference? None. And I want you to remember, and the Court will tell you, that you are to judge of a witness by his manner, his appearance, his bearing.

I want to ask you honestly, as honest men, did that boy falter once under the relentless cross examination to

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which he was subjected? And could you, could I, could my learned associate withstood an assault of that character and come off victoriously, as he did, without contradicting himself in the slightest degree?

It is agreed, then, that the argument was about the wages. But there was another point. The boy wanted Saturday to himself. Saturday was his sabbath. Our Sabbath is the first day of the week. And it showed, gentlemen, that from his standpoint, as he was brought up, he was true and loyal to the religious belief that had been inculcated in him; and so he said, "I want the Sabbath for rest", and that is the Holy day for the Hebrew, as the first day of the week is the Holy day for the followers of the Redeemer. You know that.

By learned friend on his cross examination sought to entrap him, sought to show that he could not be right in his recollection in regard to Saturday, because the night school did not keep open. He did not contend that it did. He said he wanted Saturday for a day of Rest. And I submit that in every point and every part of the case where the learned counsel sought to entrap him he failed.

Now, I ask you, gentlemen of the jury, in speaking of this first witness -- he is really the first witness, the brother -- if this case rested on his testimony would

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you, under the principal of law I have invoked, convict this young man of any crime whatsoever? Much less would you condemn him to die a shameful, violent death on the scaffold.

You leave this place, you go away, time will soon render your account with eternity. There is coming an hour, before the narrow bed and the long sleep, when every important act of your life will come in review before your memory, and perhaps, in the spirit, the Diety may ask of you, "what did you do with your brother?" A human life, a human soul, is passing through while I speak to you twelve breasts, and do you realize all that that suggestion means?

Why, I have no doubt that the learned District Attorney will stand up here, the officer of the commonwealth, he, with all the sentiment of society behind him, he, with all the resources of the state at his command, and tell you you must put this boy to death as an example.

You can't put him to death on this proof if you look at it, not with the eye of prejudice, but if you look at it with the eye, the clear eye of a calm investigator.

Now, who is the next witness? The next witness they call is that little girl, that sweet budding flower of

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human innocence. And why do they call her? I can't understand, when I remember her testimony. Mark you, the little thing that arrived in a case, the little things very often point to you the solution of a great problem.

Did anything occur while the little girl was there? Was any altercation indulged in between the two? You can't say there was.

Did the defendant show, as the learned District Attorney remarked, did the defendant show that he was mad, or angry? "No", came from the sweet voice of the child. "What did you see?" "I saw nothing except he came in, and I heard the noise of what seemed to me to be falling coin or money".

"Now, wait a minute. What did he do after that?" "Why, he went out quietly, and before he passed to the door he said Good-bys".

Not a word about the arm being raised, and the threat. Not a word.

Now, that little child is mistaken, because there has never been any contention here on either the ~~her~~ side, or our side that there was anything but paper money talked of and suggested. She didn't see the money, she ~~and~~ didn't see the denomination of the coin. Her testimony was, in substance, I may not give it verbatim, that it sounded, it had the noise of falling money or coin.

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That is a new element in the case, and it irresistably suggests that that girl was mistaken about the time that she was there. It was some other time that she was there, if that occurrence took place.

You must remember that that child has been more or less in the companionship of the brother of the deceased and of those immediately about him. You must remember that. And the human mind is so constituted, you know that yourself, that when a suggestion is made a thought is suggested, that it becomes a part and parcel of the mind, so to speak, and people believe, even adults, grown people, that an occurrence took place that never did occur.

But, take her testimony as it stands, not a word was said between the two. He was engaged at the counter. The defendant came up to the counter, not in any bellicose mood, not in any spirit of antagonism, and she heard a noise as of the falling of coin, for sooth, and that he went out, and as he went out he said "good-bye".

Now, you must keep in mind, as I said before, in discussing that question, because your mind will probably, perhaps my mind would be if I sat in your place, <sup>be</sup> carried away by the irresistibile power of my learned friend, by exciting not your reason, but your passion.

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Now, is there anything in the testimony of that child that militates against this defendant? I ask you gentlemen that question? I ask you gentlemen that question in all seriousness.

Now, the next witness. The next witness that I shall refer to is the police officer. I will come to the testimony of the Italian later on. Of course, it will be idle for me to say that there is not a feeling of unrest in this community, of suspicion in this community, in regard to the police, and if I should stand up and say to you that, on proven records, that the police of this County were men zealous in the discharge of their duty, zealous to preserve the rights of citizens zealous to protect their property, you would laugh at me.

But you would not be wholly right. I have no doubt that there are in the police department to-day men who are as honest as you, but this I do know, and I have seen a great deal of it, gentlemen, in my experience, which has been one of many years and has covered a great deal of territory, I regret that in many instances I must agree with the judgment of that Magistrate who recently said that the testimony of the police was not to be received with the weight that the testimony of other people should be received.

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Now, why is that? Why is it? Is it a sense of depravity? Is it a condition of moral insurrection? Why is it that in all criminal transactions they <sup>are</sup> called upon to fill in any hiatus that may occur in the case, and to supply the proofs necessary to establish the legal features of a prosecution? Why is it?

My conclusion is this: that their course of life, their associations render them reckless as to the power of an oath.

You must remember that they are not dealing with powerful men; they are not dealing, as a rule, with citizens of accepted worth; they are not dealing, as a rule, with men like you. They are dealing with the poor, the outcasts, the oppressed, and a snort of contempt comes from the nostril when they contemplate the small game they pursue. Why do they do these things?

Now, this man Northrup, it occurred to him that he must supply a motive, he must supply an intent, because through all this terrible web woven by the hand of fate is stealing this thread of intent, of motive, first degree of murder, which is death, second degree of murder, which is captivity for life, worse than death, manslaughter, all this has a legal object, and of course the learned Court will charge the Jury in this and all other cases, that those degrees are so and so in phrase, those degrees are

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so and so in legal applications, and if the Jury are satisfied that a threat was made, if the Jury are satisfied that a menace was uttered, if the Jury are satisfied that an intent -- and do you remember how cunningly -- I say cunningly because it deludes the minds of men, the motive and intent ran through that case that was read by the Court in his charge the other day. Very often lawyers have confounded the two, but the argument on this policeman's testimony will be what?

Why, gentlemen, you have the fact that this man perished. You have the fact that this man was in the street, you have the fact that he fell into the hands of this officer, who immediately interrogated him. It is a wonder to me that some of these policemen don't claim to have a knowledge, not only of Yiddish, but Chinese and all other languages. He examined him, he said, in English, and he says that, among other things, the defendant told him that he had stated, in substance, to the deceased, that if he did not pay him this money which was in dispute between them he would kill him.

Now, that was a formidable man that sat in that chair. He had a hardy physique, he had a quick mind. He had an indomitable purpose, and a good deal like Javert in Les Miserables. He may have been one of those extraordinary characters that saw no evil in the destruction or in

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the manner of the destruction of a malefactor under the law. There are such men, and they are not confined to the Police.

To that man sitting in that chair, to my mind, a human life, very little notice taken of it. But he forgot, and they all forget that at some time or other, he had sworn directly opposite, or had omitted to swear to that fatal testimony which the District Attorney seeks to tack to the web of this proof. What was it?

My learned associate handed him the minutes of the Coroner, and he said, "Read through that, and if you can find the slightest trace of any such testimony given by you before the Coroner, say it now." Deliberately, and I don't believe his pulse moved out of its accustomed way, he said -- he read that testimony through, and without a quiver of an eyelid he had to admit it was not there. That was very important.

Now, I ask you as honest men, lay by this question about the English for the present. Do you, as twelve business men of the City of New York, believe that he ever had the extended conversation which he says he did with this defendant? Now, be fair about it. No matter what you may think about the rest of the case, be fair on that. Would you take a man's life on that? That is the way to reason these things. It is not to the storm of denun-

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ciation of my learned friend, but among yourselves to say it is a very singular story.

Why, we have one of their witnesses swearing that he took the defendant up to the night school. For what? Why, that he might learn. And then we have another of their witnesses, that is this policeman, swearing to an extended conversation, and the rendition on the part of himself and the defendant of just that English which a man beginning to learn the English language would not know.

Now, we know another thing, and I suppose, while the Court may not take judicial notice of it, I know that the learned District Attorney had some object when he interviewed the testimony. This man's name, when anglicized, is Eli, or Ely Geller. I suppose, in the Hebrew, it is Elias, the same as was the name of the Prophet. They made a great outcry, or will, about that. Every man on this panel knows, or can inform himself, that there is the greatest similarity between the capital letters of the English tongue and the latin language, and in many instances whole words are so committed to that fact that they are the same in the two languages. Now, I can't show that to you, because it is not in evidence. The Court would not probably have permitted me to put it in evidence.

Now, would you hang that boy on the similarity in the Russian name and the English name, as it appeared by the

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signature.

Did he hesitate to write the name? Now, witnesses who are sensitive on that point, and who are not telling the truth, will always show, when called in that quick way that my friend used, will always show an aversion to writing their names. Now, that is all there is in that.

It is the tragedy of great trials, and the tragedy of great trials is very often worked out by the most insignificant matters of fact.

Of course, my learned friend, who goes everywhere to prosecute the malefactor knows that he had some object in introducing that evidence, and will probably tell you, but I want you, when he does it, to remember what I have now said to you on that point.

Now, to come back. I intended to shorten my address to you--

THE COURT: Judge Curtis, may we suspend just now for a moment?

MR. CURTIS: Now, gentlemen, before I leave the testimony of the brother, I want to call your attention to a very important piece of contradiction in the evidence, and I challenge any answer on the other side on this point. Schwartzmann swore, that is, the brother, that he saw no money paid the defendant; he swore that. In the Coroners Court, he testified that five dollars was paid him, and

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he saw it paid.

Now, I don't want to censure unjustly any witness, but I want to ask you, if a witness is so faulty in his recollection, if he makes such contradictory statements as that, is he a reliable witness, more particularly when he is a Nemesis and an avenger on the trail of one who slew his brother? I understand his feelings, and to a certain extent, I sympathize with him, but we must remember that this is a matter that is to be decided by the evidence. And remember another thing. If you are carried away by slander and prejudice, if you have persistently, and I know it is impossible that you should be in that frame of mind, if you have persistently set your faces against the truth, and you want the blood of this boy, why, of course, this contradiction, grievous as it is, perhaps will not affect you.

But I have the greatest faith in an American jury, and I believe that, in some way or other, perhaps unknown to us who spend our lives before them, unknown to us, they get a sort of habit of coming pretty near the truth; and I now will resume what I have to say, or was about to say, about this officer.

I am not one who denounces whole people, or, as Edmund Burke phrased it, would indict whole people, and I have said to you before that, in common with other citi-

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zens of this town, I believe there <sup>are</sup> straight and honest men in the Police Department, and that that fact sooner or later will appear; but that there is an extraordinary degeneracy relative to cases in Court, I think I am justified in saying that that is the fact .

I don't say that they are at times conscious of what they say, but , from long practice, they have an intuitive knowledge of the weak and the strong points in a case, and they know just the spot where the bolstering of a statement, the coloring of a statement, the change in a statement, will either liberate a man , or leave him a dangling heap of clothes off the scaffold. There is no question about that, I think, in the mind of any man who has ever had much experience with their evidence.

Now, I have not the minutes before me, but if -- I won't stop to read them to you, because I know that you have been very patient here, and you have listened to all this evidence with great deal of attention, and I have not the slightest doubt that its salient features are in your minds; but bear with me a few moments when I analyze the testimony of this officer.

Now, this defendant said, did he not, that when he got through this terrible experience in the store, he went out in the street, and he walked up the street, and I am not quite sure , but I think in answer to a question

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of the learned Court, he said he walked toward the north. I am not aware that there is any serious contention between him and the officer until the time they met. He walked away from the south. He was dazed, to use his own agonized expression. He was dazed. We will come to this transaction further on. He did not run away from anybody. He threw the gun, or the pistol, or the weapon, in the street. That proves nothing. And it has been held in courts of law that flight in itself is not evidence of crime. The learned Court will charge you about that.

But, so far as I can gather from the conceded testimony, after this awful calamity was over, he walked out into the street. He did not try to run away. When he saw the officer, did he flee from him, as to a city of refuge? He walked toward him.

Now, what is the conversation, according to this officer? He had not seen the gun when he arrested him. He saw the gun after he took him into custody. He said, substantially, and I hope I get this as nearly as he stated it as possible, and you must remember, as I told you before, never to forget the intelligence of that officer, the conscious knowledge of what his position demanded, his ability, -- he says, "Is this your gun?", or something of that sort.

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Is that naturally an expression that would be used and understood by the defendant? He says he might have said it, but he don't understand English, and he didn't hear it.

Then he goes into a description of the conversation that he had. For instance, that there was a dispute about the wages, or salary. Now, that is information which could have been known by this time to a score of people, because it was open and notorious that, whatever difficulty there was between these two men, arose out of the wages, and arose out of the request to quit and leave the employment. Everybody knew that. There is nothing so serious in that. But the point that I wish to make with you is this: That he gives here an account which he never gave before, and he gives here an account which brings, as he believes, this boy within the shadow of the scaffold -- intent -- motive. "I told him that, if he did not pay me my money, I would kill him." That is premeditation, murder in the first degree. "I told him that I would kill him". Do you see what that comes in? How like a mosaic that fits in?

If the defendant had been a Hottentot, and had never spoken any English to an English or Irish or Scotch person in his life, he would have told that;

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and in your hearts, down here, you know it. He never in his life had that conversation that he is claimed to have had with this defendant.

Don't you suppose that, with this relentless pursuer in the District Attorney's office, who has sent so many men to the fatal chair, don't you suppose that, if he could have proved by any evidence outside of the police that this boy spoke English that he would have done so? The resources of the office he represents are immense, and, as one famous criminal pathetically said in a Court of justice, "I came back to New York because they would have got me anyhow". And there is no spot where the arm of the District Attorney does not reach, and there is no hemisphere on this planet to which he cannot track the man he wants, and if he wants evidence, if it exists, he will get it; and it was of the utmost importance to show motive, intent, to prove that this conversation was had with this policeman. Now, let us see.

We put on the stand a very reputable citizen, a fruit merchant, I don't know whether it was one of the jury, or whether it was the learned District Attorney, put the question, "But how did you always address him?" "In Yiddish."

Now, you must remember, and you probably know, that the grand old Hebrew tongue, as the forefathers understood

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the Hebrew, is not in popular use. It is used <sup>by</sup> the scholar-  
ar. It is used in seats of learning. It is used as matter  
of conclusive reference by the Historian, perhaps in ref-  
erence to the works of one of the greatest men who ever  
lived, and that is Josephus, who wrote The Institution  
of the Jews. But you must remember that, since Titus  
encamped upon the hills around Jerusalem, those people  
have been wanderers on the face of the earth, compelled  
so by the tyranny of their oppressors, compelled to be so,  
and in ever land that they visited, in every land that they  
have visited, in every land that they have traded in, in  
every land where they have been identified with the Commer-  
cial life of an Empire or a Republic, this grand, magnif-  
icent, original tongue, has become, as it were, corrupted  
by idiom among the people, among the people with whom  
they dwell. That you all know.

But there is not doubt that he spoke the truth when  
he said -- I am speaking of the defendant; he was examined  
quite rigorously by Mr. Wasservogel on his early life---  
I have no doubt he spoke the truth when he said "At home I  
spoke Yiddish".

Now, the Yiddish spoken in Poland is not the Yiddish  
that is spoken in Hungary, or in Spain, or in Portugal.  
It is, as I told you, the grand old Hebrew that has become  
corrupted by the adoption of certain dialects and idioms

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of the people among whom it is spoken. He says, "At home I speak Yiddish". Why wouldn't he speak Yiddish at home? Why wouldn't he? That was the tongue of his fathers. That was an adaptation of the Hebrew language, which is the language of prophecy and poetry and immortal history.

There is no man living who can say that there is such a work, or can be such a work in the whole history of the world as the bible, and you know as well as I that a great portion of the old Bible is filled with grand literature of the whole world.

But he says "At school, I spoke the Russian." Why?

When those three robbers, Frederick the Great, Katharine of Russia and the Emperor of Austria went into Poland and made the partition of Poland, they even issued in Russian Poland a ukase compelling the people to abandon their peculiar national dress, and I always use the word national in regard to the Jews, although they have no country. The whole world is their country, and they have stood upon it against oppression for centuries. They issued in Russia the ukase-" You must speak Russian" , that is why it was taught in the schools.

He told the truth. Why should he talk to this police officer? Was he insane? Why should he disclose to

this police officer what he knew about his own affairs? Was he insane? They don't explain that.

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I ask you Gentlemen, as honest men, whatever you may do in this case, whether you condemn this boy to death for what I shall presently demonstrate to you he is not responsible for, whatever may be your outcome, I want you specifically in your own minds, to come to a conclusion in regard to this matter of speech, because it is simply, from our view, preposterous.

As I said before, you hear of these Police, in order to secure a conviction, talking with Hottentots, with Arminians, or Greeks. I have never known one of them that did not swear that a man spoke pigeon, or broken English that they interrogated, and in many instances I knew it was impossible.

Now, let us see. There was a little boy introduced into our testimony this morning, and before he was allowed to give his evidence he was examined by the Judge, and you heard that examination. Have you any doubt that that little boy told the truth? I don't believe it will be contended by my opponent, or that it will be asserted, that the leprosy of falsehood has descended into the soul of that young and gracious boy. What did he say?

I will show you in a minute why it is important, and I will show you that the astute eye of my learned friend last sight of nothing. His comprehensive mind takes in all the features of the case.

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If we had failed to prove by that boy that this defendant was at his Aunt's house that morning, my friend, in summing up to you, would have said, "Gentlemen, you have only the word of the defendant as to that, and he is within the shadow of the gibbet, he is swearing for his life."

Comes the sweet voice of this child "He was at my Aunt's house, or my Grandmother's house", whatever the relationship was, you remember it; he did not awaken her; he went away; and he fixed the hour at about nine o'clock, I think, showing that his story in that respect was correct.

Now, there was nothing happened there on Saturday of a tragic nature, was there? There was nothing happened there before he went out on Sunday morning with the packages that he had to deliver, was there? There was nothing happened there, certainly, until somewhere in the neighborhood of ten o'clock, perhaps ten fifteen, and I want you to keep your mind on this.

Now, Mrs. Okun, she was called to prove what the defendant said when arrested. I will go to that in a moment. She swears on her re-direct examination that, as she left the place, she saw the little girl come in. The little girl swears that she was there during this occurrence about the silver.

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Now, nothing occurred while Mrs. Okun was there, and nothing could have occurred while the girl was there, because she says nothing happened except the matter of the coin, which is extremely improbable, and which I don't think admits of a discussion. So, when Mrs. Okun came in, nothing occurred.

Now, there must be, it seems to me, a sort mistake about the time, the exact time, but the evidence would seem to show on both sides that it was somewhere in the neighborhood of ten o'clock, from ten to ten fifteen.

Now, Mrs. Okun's testimony is important only in this view--now, you see that serpent of the intent, that serpent of the motive, crawling its slimy way through the theory of this case. You see how artistically this is all grouped together, what a Mosaic it is.

Mrs. Okun, who was asked on Cross Examination, "Did you see the defendant when he was arrested?" A Yes, sir.  
Q Did he talk with you?" She said, "Yes, sir."  
" In what language?" A In Jewish."

Now, it depends all on the construction that the jury may place on what she said he said and what he said she said. They are right together. She says she asked him, in substance, what the matter was; I don't give you the exact words; I haven't the minutes; and I wouldn't take the time to read them; but, as I said before, if I mistake the

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evidence, I know you will correct me, and very severely, too. She said "What is the matter?" He said, in substance, "The whole thing was caused by a dollar; he goes to the devil," or something like that.

Well, now, the whole trouble was caused by the dollar, no doubt about that. Because it was the difference between the defendant and the deceased about the money was due him that precipitated the discussion. So far, that is right. I am assuming now that she got his language correct. "He goes to the devil", or "It goes to the devil" or "He goes to the devil".

What did he mean by that? Did he mean by that he knew then of his death? Did he mean by that that controversy about the dollar finally appeared in the tragedy? There is no question about that. And whether he meant "He goes to the devil", or "He goes to his death, "we don't know, except from the recollection of Mrs. Okun.

What does he say on that point? He admits that he said to her "It all grows out of a dollar". I think that was correct, too, and I think, if I may be allowed to say of a deceased man, that the uncontradicted evidence here shows that he was rather grasping, that he was not treating his help as the Holy scripture inculcates, or as the duty of an employer to a servant demanded. He was rather grasping. At any rate, there was a dollar be-

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tween them. He says he told her that he didn't say "The devil". But, conceded that he did, is there anything peculiarly significant in that?--"He goes to the devil". It might have meant he was killed, or he was injured, or some calamity happened to him. Would it show any intent, would it show any motive? Is it like the menace of uplifted arm and the threat "I am strong yet, and you will suffer"? Be fair, now. Nothing like that. It is anything like that which is in the testimony of Northrup, I think that is the name of that officer. That is something new in the whole case. "I told him if he didn't pay me I would kill him". Anything like that? Nothing.

Now, Gentlemen, we come to the discuss very briefly, and I feel this way about this case: I have been appointed in conjunction with my learned friend, and he has been drawn not only from his professional duties, but from his labors in a seat of learning as a lecturer in a College, and I can say myself that I have suffered grievously, professionally, by being compelled to come here, but I have been appointed by the Court, I have been appointed by the Court, and if I neglected to do anything in this case, if I omitted anything, it would be a subject to me of life long regret. I consider an appointment of the kind made by the Honorable Court in this case as a distinction. We are the servants of the officers of the Court, and it

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is our duty at all times to respond when the Court makes a selection and requires our services, and therefore it is that, perhaps, I am taking a little more of your time than I otherwise would, because I want to go to bed tonight and believe that I have done what I could.

Now, we will come directly to this --

THE COURT: Judge Curtis, it is now one o'clock. Would it be agreeable to you to have the Court take a recess at this time?

MR. CURTIS: Yes, sir, if it is agreeable to the Jury.

THE COURT: I suggest it because, apparently, you are at a point now in your address at which you might be interrupted without any inconvenience to yourself.

MR. CURTIS: Yes, sir, your Honor is always gracious to the Bar, and I appreciate it very much.

THE COURT: Well, suppose we take a recess, then, for half an hour. Gentlemen of the Jury, you are admonished not to converse among yourselves, on any subject connected with this trial, or to form or express any opinion thereon, until the same is submitted to you. The Court takes a recess for half an hour; that will be until half past one.

(The Court accordingly took a recess until one thirty P. M.)

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## AFTER RECESS.

Mr. Curtis resumes his summation to the Jury on behalf of the defendant as follows:

Your Honor, and Gentlemen of the Jury:

Gentlemen, I am going to hurry on, and I will only detain you a short time.

There is one thing at this point I would like to call your attention to. I suppose the learned District Attorney will argue the proofs in this case shows that the in pistol belonged to us. I shall demonstrate to you a moment that the evidence ~~is~~ is all in our favor on that point.

Now, I am asking you to believe that the defendant has told the truth in his story, because there is no evidence in this case that warrants you in believing that he is an untruthful man. Now, to open up that question, <sup>we</sup> purposely put upon the stand two or three people to swear to his good character, his reputation among men for truth and veracity and honesty and for peace and quietness.

Now, as a law student, even twenty five years ago, it was the general custom, I think, among the learned gentlemen on the bench, to charge the Jury that where no evidence was submitted of good character it was assumed to be good; but we have gone further than that, and, ~~until~~ under the eye of our powerful adversary here, we boldly

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challenged them to prove that his character was other than the one that we proved here. You will remember that; and, therefore, I can assume that, so far as his past reputation is concerned, this unfortunate calamity is the only instance in his life that causes tears of bitter regret.

Now, in regard to this pistol, I will demonstrate to you, so far as it satisfies the purposes of the law, that that was not our pistol, but was the pistol of the deceased.

Our man swears positively that he had no pistol when he returned to that store.

Now, to controvert that, and to controvert the other testimony in the case that leans in that direction, the learned District Attorney puts the brother of the deceased back on the stand, and he stated that he had never seen a pistol in his brother's place, and, that while he made no search for a pistol, no such weapon ever came under his observation in that store.

Now, listen a minute. When the brother of the deceased was on the stand the other day, the question was asked him, if you remember, and now I want to repeat what I said before the recess, that if you find me misquoting evidence, or mis-stating evidence, in any way, correct me, it is not intentional, I am speaking to you entirely from

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memory in this case, and I am not, as you see, referring to the minutes, but I think, in a general way, I remember the testimony as it was given. He was asked the question if he had ever seen a pistol in or about his brother's room, or in or about his brother's place of business, and he said he never had.

Now, gentlemen, that is what the law calls negative evidence, and it is only important where it is corroborated in some very essential particular by the other testimony, and then it does not have, as I believe the Court will charge you, it does not have weight and influence of direct testimony. For instance, a familiar illustration of the whole general term, in a very important case, was that one man who swore that he saw an object was to be believed against fifteen men who swore they did not see the object. In other words, that is the distinction which the law draws between affirmative evidence and negative evidence.

Now, the affirmative evidence is all with us. The defendant states that it was not his pistol, and what I had to say about its being introduced into the testimony I do not repeat, because it is not necessary.

Now, we will come to discuss this defendant, or, rather, before I come to discuss him, I want to make a slight allusion to the Italian who was a witness in the case.

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He certainly was not before the Coroner, and we had no knowledge, of course, that he would be examined here, but I am going to ask you, and I am going to ask the Court to say, that in a very important matter he entirely corroborates this defendant, and in a matter about which there can be no dispute whatsoever, because it comes from the lips of their own witness, and it is this: He testified that he saw the defendant coming out of the door, or through the door, into the street, and behind him he saw the deceased.

Now, you must remember, and perhaps the learned District Attorney will illustrate this matter more thoroughly by his charts and diagrams, but you must remember that it is conceded in the evidence that the deceased was lying across the threshold; he was not back in the room; he was not back behind the counter; he was not under the shelter of any article of furniture in that room; he lay as he fell in pursuit of this defendant.

Now, my friend spent considerable time, it seems to me, to show that some fireman, I forget his name, did not see any knife in the place. Well, he forgot, of course, that the brother of the deceased swore that the business was that of a delicatessen, and that, in the operation of the business, there were two knives used in the store; there is no question about that; and, of course, they were

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comparatively sharp, to be used for that purpose. Therefore, the testimony on that point on their side is very meagre, and on our side is full <sup>and</sup> conclusive. It is the testimony of their own witness.

Now, the question presents itself to you on this Italian's testimony, if my memory is correct, he does not swear very clearly whether he saw what he says occurred in the store through the window, or through the door, and, as I remember his testimony -- if I am wrong, now, correct me -- he was standing away from the door, some feet, and I forget the exact number. Do you remember, Mr. Derby, do you remember?

THE COURT: I think that he indicated the position in the room, which the foreman fixed as a distance of eight feet.

Mr. Curtis: Eighteen?

THE COURT: Eight feet.

MR. CURTIS: Very good.

THE COURT: He fixed the distance as eight feet; the foreman fixed it as eight feet.

MR. CURTIS: I am very grateful to your Honor, and to you, Mr. District Attorney.

I want you to keep this cardinal fact in your mind, and that is this, that when the body was found it was found some feet removed from the counter. It was found some

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feet from the rear of the room, and nearly across the threshold. I think that fireman swofe it was very nearly across the threshold, just within it.

Now, the body must not be there; clearly, unless he was pursuing the defendant; and we come to that part of the case which, after all, the one that I think challenges your attention very seriously.

I have already said what I desire to say in regard to the pistol. I have already said what I desire to say about the cause of the quarrel. I now come to discuss the defendant's evidence.

Now, Gentlemen, the law used to be that a man in this State could not go on the stand and testify in his own behalf, but some legal reformers got a law passed by the Legislature of the Commonwealth that gave the accused that privilege, and I need hardly say to you that the sagacity, the common sagacity exercised by lawyers always keeps a guilty man off the stand, and in that way that act has prejudiced the interests and the destiny of more than one individual in entanglement with the law.

He was not compelled to go on the stand, and the Court would have been compelled by the law to charge you that his failure to go on the stand could not be taken against him, and he in no way sacrificed any of the legal rights by remaining off the stand, but it seemed to us who

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have been entrusted by the Court with this sacred mission, it seemed to us that we could not discharge our duty to the defendant and the People without the Jury knew the whole affair from our standpoint; and I have a right to argue on the evidence that if he had been kept off the stand, in the channel of review, it might have been a very serious question whether the State had made out a prima facie case.

We discarded all that; we put this boy and his destiny into the crucible of your belief or disbelief.

Now, what is his story? He goes on and tells you, I won't repeat that part of it, where he was born, and his experience in the old Country, and his relatives there, and his coming to this land, where he sought employment and where he sought to lift himself in the social scale and to become a business man, like all of his people.

Now, I repeat to you, don't forget it, if this calamity had not happened to that boy, if he had been entangled in that most unhappy business, is there any gentleman on this panel that would hesitate to have employed him, on the recommendations of his life, his record and his service to others?

Now, that is a fair question. And, therefore it is, are you not rushing at a conclusion, taking away from him the sacred presumption of the law, his innocence, until

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guilt is established, when without any testimony to the contrary to the actual facts, you say that he is not worthy of credence because he is swearing for his life?

Well, of course, he is swearing for his life. Of course, he cannot preserve his life until he tells the facts, and unless he tells the facts just as they occurred. Some eye in the Jury will discover the error, some voice in the Jury will be raised against him, possibly, and the result would be that his testimony would not be credited.

Now, let us look at it. I said to you before the recess that I have never seen a young person or an adult or person, any person whatsoever withstand the cross examination that he endured. Now, you may think, gentlemen, that that is a very slight thing. It is not. You know they say our profession are the worst witnesses in the world. I don't know of many lawyers in my acquaintance that could sit there and withstand the combined assault of the District Attorney and the Jury and all the questions that were put to him, and I failed, and I watched very closely, I failed to see where he at any time was inconsistent.

Now, let us think. There is no question that there was a difference about this money. It was really two dollars, and when he used the language one dollar to Mrs.

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Okun , if he really used that language, that was a mistake either of hers or his . The mistake was two dollars.

He had no money. He went away from there, so far as this evidence disclosed, because the little girl says he exclaimed "Good by", amicably. Now, a man with the latent intent in his heart to destroy his neighbor does not part with him under circumstances of that nature, with an amicable adieu, good by, does he?

He says that he wanted to see his Aunt. Now, his Aunt lived in this City. Perhaps she was the only and solitary relative that , in this friendless and forlorn condition, Providence had left him. Here was a man, a stranger to the Country, here was a man unable to speak its tongue. Here was a man that believed that he was in considerable trouble, and so he was, and it seemed in the evidence , and that is nowhere contradicted, that , in some conversation with the deceased, the deceased refused his request to pay him the money that he demanded, and said "If you don't like this", or "if you don't adjust it in this way, you can bring me in the Court and sue me." You remember that .

Now, perhaps the deceased had had more experience about our Courts than the defendant, and perhaps he had that peculiar inevitable influence that some men in bus-

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iness acquire from political machinery, that he had influence and power in the land. We don't know anything about that. But here was a helpless boy, here was a boy to whom even that six dollars, or five dollars, or whatever it was, was all he had, represented all his little fortune. And you could see upon the stand that he is an intense creature, he is a man of deep feelings, as the burst that he exhibited when he thought of those dear ones in the old land shows. Now, just follow that. Analyze the character of this boy.

He says that he went up to see his aunt, to get her advice about it. Now, witness the innate delicacy of the boy. The Aunt was asleep. He didn't desire to wake her, and his purpose crystalized in a desire to go back to the store, to have no trouble with the law, and to accept what this merchant or this deceased would give him. Now, that is frankly what he said. Was any flaw picked in that?

You remember those most certain questions put by the learned Court in endeavoring to trace any possible purchase on his part of a pistol. In the first place, it was the Sabbath day; that is, it was the Sabbath day of the Gentile; and the stores and pawn shops, where articles like pistols and other weapons<sup>of</sup> offense are purchased and <sup>were</sup> sold. How deep was the scrutiny of the learned Court. He asked him every possible question in regard to the

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procurement of a pistol. Each one of those questions was answered with the frankness of the truth.

What was he to buy a pistol with? He had not his money then, and it was shown that he had only been in the employment of the deceased for about twenty days; and you know there was a great figuring in that delicatessen store there besides the cheese box as to what was due for lodging, and what was due for this and that and the other. Very close and thrifty were those merchants. Properly so. But he had no money to buy a pistol with, if all these stores had opened their doors and invited him within. You see that. There is his story.

He goes into a restaurant, to get something to eat. He goes to his Aunt's house. He comes back. And the question was put by Mr. Derby, I thought it was a very pertinent question, and, Gentlemen, it covered this whole case, he came back, he says, in answer to Mr. Derby's questions, "With what purpose did you go back? " " I came back to tell him that I would settle". I am giving you substantially what he says; I am not giving the words; if I am wrong; correct me; he came back, he says, with the purpose of accepting what Mr. Schwartzmann had offered him, and closing up the whole matter; and he didn't want any law suit.

Now, Gentlemen, here is the quid obscurum of this

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case. Here is the whole thing. No eye but that of the Creator knows what took place in there except the eye of the man who undertook to tell you on the stand the history of that occurrence. If the man had not died, if the man had lived, the one who perished, I mean, he could have told you, but outside of the great day of Judgment probably no one but this defendant can tell you exactly what took place in that store. Let us see.

In the first place, he denies he saw the Italian. In the second place, he said that when he returned that, instead <sup>of</sup> meeting him in a conciliatory spirit, why, the deceased reproached him and threatened him. Now, is that unnatural? Is that impossible? Is that without reason? Ask yourselves. And he said, in substance, "Why are you back here?" And he said he was there to effect a settlement of the matter and a reconciliation between them. Then he speaks about this pistol.

Why shouldn't he have had a pistol? He slept, that is, the deceased, slept in a little room off the store; I don't think it was a large room, and, therefore, he describes it as a little room, he slept there, perhaps, to protect his property. Every now and then we read of these street attaches entering a store: Quite recently, comparatively so, down in Flatbush, they entered a jewelry store and killed the man at his window-- No, at his coun-

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ter. You are all familiar with that. They have become very daring; and in those little delicatessen stores that do an extensive trade, you know very well they have considerable cash on hand, and that much of their business is done at night, and much of the money that they take in is taken in after the bank has closed, at three o'clock. What more natural thing than for the deceased, if he slept in that room, not only in a spirit of thrift, but for the sake of protecting his property, what more natural thing in the world than to protect it by a pistol?

Don't you know that, if, in the vast wilderness of this city, this gun had been purchased that day at a hardware store or at a pawn broker's shop, the vigilant eye of the Police would have been as searching as the mind of the learned Judge today? And they would have traced that pistol to this boy with unerring instinct.

You examine that pistol. There is no mark on it particularly. There is the mark, perhaps, of the maker, or of the kind or character of the pistol. That is my recollection. There are thousands, thousands of such.

Was any attempt made to prove on this trial that those bullets that were displayed so ostentatiously even fitted that pistol? Not at all. Not an attempt was made. And in the light of all the law on the subject of identification, why it struck me with surprise that you were en-

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trusted with the consideration of that pistol in the proof.  
But so it is.

Now, I ask you gentlemen, is the story of his improbable? If he told the truth about the first explosion, the first shot, my learned friend will probably present it to you in that shape, but if he told the truth about the first explosion, that ends this case, and I will tell you why.

He says that there was a struggle between him and the deceased for this gun. Very likely. Nothing unusual about that. As they stood face to face, there was the struggle; that struggle was renewed when he returned back to the counter. Then that pistol exploded. Singular if it had not. And there is nothing in the nature of the wound inflicted that presents the conclusion that the wounds were received exactly in the way that he describes they must have been received. There was a wound in the clavicle, which penetrated the lung. The description of the other was not so perfect as of the first, but that of itself was exceedingly simple. Two men struggling for a gun, face to face, He said he got possession of it. That showed that he was superior in strength to the deceased. That is all that showed. But in the struggle it went off. Who can contradict him? You can't assume a thing against a man. You can't presume a thing against a man, unless it is supported by proof. You would not take a man's life

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without any proof.

Now, the learned District Attorney will argue to you this way, see if he don't: There is circumstantial evidence to show that the description of the defendant is not correct about that explosion. Now, what is that circumstantial evidence? Evidence of that officer that he said that he, in English, asked him the question. "And was it replied to you by this defendant in English also?" See their evidence.

Mrs. Okun said this, that and the other. I discussed that before the recess.

What other possible testimony is in the case about the nature and character of that explosion?

You can't take the Italian's word, you can't take the Italian's estimate, his opinion, of the character of that struggle. Why on earth shall you disbelieve what the boy says, and believe the theory which can't be uttered by the dead man, and which no living eye can support? That is the most extraordinary position in which a case can be put. I think with <sup>every</sup> ~~any~~ confidence that it could be argued before the Court that there is no such circumstantial evidence here that corroborates the theory, not the story of the prosecution, but the theory of the prosecution; and this is one of those cases in which, Gentlemen, you have circumstantial evidence to support a theory.

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Now, let us see what the circumstantial evidence is. I believe it has been said by a very great Judge, that the most dangerous evidence on which a conviction can be predicated is circumstantial evidence. Why? Because from circumstantial evidence the human mind, always fallible, must deduce certain things in favor of and consistent with the theory of the prosecution.

Now, in this case, you have not, with the single exception of the dictum of the Italian that he saw what he states he saw, you have not a word in this case as against the story of the defendant.

Now, listen. That explosion occurred. Whether the wound in the clavicle was the first wound, or the wound in the head was the first wound, does not appear in the medical evidence in this case, and the medical testimony in this case is very hazy, misty. It was not for us to develop. It was for my learned friend, who certainly makes no error, and if he had not been a little suspicious about the quality of his testimony in that direction, we might have had a clearer idea in regard to the medical testimony.

Now, what does he say? He was dazed. Why wouldn't he be? He was excited. My friend may contend to you there was not a knife in that store. We said that the deceased picked up a knife, or put his hand upon a knife. He start-

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What told that man? What endowed him with the intuition to see into that thing? We don't know whether it was a special act of Providence, or what it was, but the fact remains.

Now, then, here is a case where, on the very slight circumstantial evidence in corroboration, you are asked to destroy the life of this boy. Are you not nearly as guilty if you do that as was Cain when he slew Abel, and the Lord asked him "Where is thy brother?" "Am I my brother's keeper?"

Yes, you are your brother's keeper. And the law has put you, and Providence has put you, in this place, to stand between the people and the defendant, and you said upon your oaths, when you consented to act as jurors, that you would give a fair trial to this boy, that you would not condemn him in the absence of proof, that you would not destroy him through the weapon of prejudice.

Yes, and I am very much obliged for this suggestion from my learned associate, to whom I owe so much in the trial of this case. To what purpose was the deceased pursuing the defendant, who was armed? Was the deceased pursuing the defendant, who was armed? What was his purpose? Their own evidence shows that he was pursuing him.

If the boy was not responsible for the explosion, he should not die, and if, when he fired, believing, in

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answer to the query of my learned associate, that he felt that his life was in menace, without an intention to kill, but to inspire the sentiment of fear, he should not die.

Can you give back life? Can you restore to strength and beauty the form of the departed? After your fiat has gone forth, and would become embalmed in the records of this Court, this boy goes to his death, how can you answer for your share in it?

Now, this suggestion has another point, and it is very valuable. Could he have had any other purpose than revenge or punishment?

For instance, the defendant says he didn't know until he got back that this man had been wounded in the manner described in the testimony; that he saw no blood until then. This man's body when found indicated that when life left him and the spirit went out into the world beyond, that he was pursuing this defendant, either for revenge for the explosion -- he might have attributed it to him -- he was pursuing for revenge for that injury and to punish him.

Now, the law says distinctly, and it is a principle of law as old as Chief Justice Shaw, and it was initiated in a case which has become dominant doctrine in all this land on the subject, and I believe the learned Court, <sup>who</sup> will charge you in this case, will not forget it, if a man

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honestly believes that he is in peril of his life, or of bodily injury, he has the right to use such methods and violence even as will protect himself; much more so in this case, where the evidence really points to but one conclusion, that the deceased, when he met his unfortunate death, was pursuing this defendant, who was flying to the street, as to a City of Refuge.

Now, gentlemen, you can't, by any argument or sophistry, you can't, by the weird influence of my learned friend, so often exercised over Juries, you can't get away from those standard facts.

There were knives in the place. Yes. Used in the business. The defendant said he pursued him with a knife. He lay across the threshold, feet away from where the first explosion took place. Can you get away from that?

But is it sufficient for you to say, "Well, the man is dead. It is true that this deceased was not exactly just and right about his treatment of him, that is all true, but the man is dead. Now, who killed him. We don't want any positive evidence as to who killed him. We will assume that the man with whom he had the difference killed him." That is all you can say in this case.

Would you destroy the life of your worst enemy on the testimony of that policeman?

Now, those are questions you must ask your conscience.

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You may be indifferent, perhaps, of the life of this individual. He disappears from the surface. He makes no sound. But if he is wrongly convicted, and if he is left to perish, remember there is no time and there is no eternity in which you can satisfy your consciences.

He is in a strange country. He looks appealingly to you as the embodiment of the law of this land, and he says to you, as he said upon the stand, "I am no murderer"; and he has not been proved so. You can't argue logically and say he has. "I am no murderer; I demand an asylum in your justice."

Are you equal? Are your moral natures equal to it? Are you equal to the task of declaring the truth and the law when the truth and the law are not popular?

Now, gentlemen, I want to keep my word with you, and I simply leave this case with you, and let not the historian have it to record at some future time that a stranger, an alien, a mere boy, was taken in your midst and tried under the forms of law, convicted against the spirit of law, and condemned on circumstantial evidence, very slight in its character, condemned to death for a crime which he declares he never committed.

THE COURT: If, before the District Attorney begins his summation, any juror would like to retire for a moment, he may do so. The Court will take a recess for ten min-

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utes. Gentlemen of the Jury, you are admonished not to converse among yourselves on any subject connected with this trial, or ~~form~~ or express an opinion thereon, until the same is submitted to you. The Court takes a recess until half past two.

(The Court accordingly took a recess until two thirty, P. M.)

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A F T E R        R E C E S S .

Mr. Wasservogel then sums up the case to the Jury on behalf of the people, as follows:

May it please your Honor, Mr. Foreman and Gentlemen of the Jury :

In spite of the eloquent and most interesting address of the learned Counsel for the defense, wherein he discussed everything from the religions of the past, the religions of the present to the conquests of the Russian Empress, wherein he discussed everything except the real, the vital facts in this case, in spite of that, Gentlemen, the question that you are called upon to decide is a simple one.

It is conceded in this case that at least one of the shots which struck Raphael Schwartzmann was fired by this defendant, and it is from the surrounding circumstances, from the circumstances which preceded the shooting, from

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the facts which followed, from the relationship between the parties, that of employer and employee, from the evidence given by this man himself, that you can without any difficulty at all determine the motive which actuated him in the commission of his crime, and come to a conclusion as to what degree of the crime charged against him he ought to be convicted of.

Now, it may be, Gentlemen, that a dollar or two to you or to me may seem nothing. I am free to confess there was a time in my life when it meant much. This young man here, Raphael Schwartzmann, twenty two years of age, just starting out in life, opened up this little delicatessen and grocery store. To him a dollar or two might have meant a whole lot. You or I, if we had a quarrel with a clerk over a few dollars might say "Oh, take the money, get out of here", but is there any reason that has been urged here why Raphael Schwartzmann should have paid one penny to this defendant if it was not coming to him?

And it was in this small delicatessen and grocery store that this defendant was employed, at a salary, I believe it was twelve dollars a month, and he also received his board and lodging. Those facts you already know.

On Saturday morning, October 12th, he worked until about ten o'clock. It was not a day which he observed as the Sabbath, because he worked Saturday until ten o'clock

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in the morning.

There was some dispute as to the time which he was en-  
 titled to be off, <sup>as</sup> and the result of that dispute it was  
 decided that the defendant should leave the employ of  
 Schwartzmann, and it was agreed between them then that  
 he was to return the following morning, at which time the  
 amount which was due him was to be determined. He was to  
 be paid, and they were to quit, once and for all.

Now, the testimony of Abraham Schwartzmann, the broth-  
 er of this young man, is attacked by the learned Counsel  
 because it was not quite as full in the Coroner's Court as  
 in this Court.

Now, I don't know, Gentlemen, whether any of you at  
 any time were in a Coroner's Court. My friend calls a  
 Coroner's Court, or speaks of a Coroner's Court, as strug-  
 gling on its feet like a drunken man. A Coroner's Court is  
 very much like a Police Court. In a Coroner's Court you only  
 bring out such evidence as is absolutely necessary to  
 determine whether the man ought to be held for the action  
 of the Grand Jury, or whether he ought not to be held for  
 the action of the Grand Jury.

The Coroner, as you know, is not a lawyer, as a  
 Judge upon the bench is, and the matters are not gone into  
 deeply at all. As a matter of fact, we only produce such  
 evidence as we absolutely need. Time and time again in

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the Coroner's Court we will call the Police Officer alone, or one or two witnesses, and when the trial itself comes on in General Sessions or the Supreme Court, we have ten or fifteen witnesses who know all about every little detail, as it is necessary when a man is charged with the commission of the crime of murder.

This young man has told you, Abraham Schwartzmann, that on the morning of October thirteenth, that is, Sunday morning, at about seven o'clock, they were figuring out the amount which was due to the employee. They said there was five dollars due. He said there was six dollars due. They refused to give him six dollars. There was an argument about it. He left. He wouldn't take the five dollars which they offered. He went out, and he promised to get square, or used some words to that effect. He was mad. He went away. He came back.

The next time we see him in that store, a little girl is present. Now, in the presence of that girl he didn't want to start a discussion, he didn't want to start a quarrel, he didn't want an eye witness, so when he saw that little girl there, and there cannot be any dispute in your minds that that little girl was there, because Mrs. Okun, the other witness for the prosecution, told you that she saw the little girl go into the store when she, Mrs. Okun, went out of the store; there can't be any dispute about that.

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He came in. Schwartzmann saw him, handed him some money, and he walked out. He bided his time; probably waited somewhere in the neighborhood; he waited until he knew there was no one in that store but the proprietor.

He goes back, and then, when he goes back, we find upon the testimony of the Italian Coal dealer just exactly what did occur.

Let me read it to you. It is short. I am not going to rely upon my recollection in the trial of a man charged with murder. I want you to decide this case on facts and facts alone. This Italian is asked :

"Tell us all you heard and that you saw that morning with respect to the shooting?" He says, "I went over to deliver some coal to one of my customers. In coming back, passing in front of this store here, I heard the report of a pistol", and he indicated on this picture with a pencil mark the point where he was at the time when he heard that pistol shot, a point from which he could see all that was transpiring in this delicatessen store. He says, "I turned around and I saw a man with a pistol in his hand, pointing this way", and he indicated how that man was standing with the pistol in his hand. "I saw then the man with the pistol in his hand come out on the sidewalk and the boss of the store go after him, and when he got near the door the man that fired the first shot turned back."

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Mind you, he was walking out of the store with the pistol in his hand, the pistol that remained in his hand all the time.

"He turns around, fired the second shot, and then I saw the man fall down."

The man, referring to the proprietor, "He came out by coming around from behind the counter".

He was behind the counter all the time; he went near the door.

"He went near the door, and this defendant fired the second shot".

"Q Where did he fall? A Right at the door.

"Q And did you see what the defendant did, if anything at that time? A I saw him throw the pistol in the street. I saw blood. I got scared, and I went down in my basement. After a little while I came out, and I saw the defendant in the custody of the officers."

And so there we have the defendant coming out of the store mad, mad as can be, threw away the gun; he walks off

A police officer, having heard the shots, goes after him. The defendant did not come up to him and meet him. The police officer testified that he came from behind and walked up to this man and grabbed him by the shoulder and spoke to him, and he questioned him, and the defendant did say to him that he was the one that committed

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this crime.

My friend asked why, why would this man make such an admission. Do you know why? He was mad clean through at that time. He didn't care who knew it. He wanted every one to know. "I killed him; he wouldn't pay me; I killed him because I had the right to kill him". That is what was going through his mind at the time, and that is why he told the police officer that he did shoot the man.

He may not have told it in as good English as you speak, but he did tell it to him in broken English, sufficient for the officer to understand; and upon the defendant's knowledge of the English language, I will refer to that in a few minutes.

The officer brings him back in front of the delicatessen store. A crowd of people gather around, all Jewish people, because most of the people in that neighborhood are Hebrews.

Did he say to a single person in that crowd, "this man that is shot there menaced me with a knife"? Is there a single person to whom this defendant said that? Not one.

But Mrs. Okun came in. She kept the little store next door, the shoe store. She knew this defendant; she had bought things in this grocery store. She spoke to him in hebrew, in Yiddish, rather, and he

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answered her. She asked him "Why did you do it? Why was this done?" or words to that effect; I don't remember the exact words; and you know what he said, according to her testimony. "I asked him 'Who did it, who did it?' He answered, 'He', referring to the man who was shot, 'Didn't want to give me the dollar, and he goes to the devil.'"

An ambulance surgeon was called. He was taken-- the man was taken to the hospital, and died almost immediately.

We have shown you by the testimony of the positions that this man -- listen to this -- "Had a number of bruises on his face, his lower lip was cut, he had a bruise on the bridge of his nose, he had another bruise at the root of the neck, and he had some bruises on the right side of his face, the right side."

What does it all indicate to you? He probably punched this man first, gave him a good beating, before he used the gun.

In addition to that, there was the wound in the left or right side which penetrated the right lung. There was the other wound which entered the right ear. There is no question about that.

They say the medical testimony was not clear. They say there was no proof that the bullets came from this gun, that the bullets fitted into this gun; but I say to you that the bullets did fit into this man's body, and the bullets were taken from this man's body, and the bullets

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are here in Court; we showed them to you yesterday, the bullets which were taken from this poor boy's body.

They talk about this boy(defendant). How about the boy that was killed?

Here are the bullets. There are two of them. There is another one there.

Now, what is the defendant's version of this affair? I promise you, gentlemen, that I will not consume near as much time as my friend did. He has been very ably defended by two lawyers who were assigned to him by the Court.

In a murder case it is provided by law that the Court may appoint Counsel to defend. Such an appointment is considered a great honor, and is much sought after, for two reasons. My friend remarked that he suffered grievously in being compelled to come here. Now, the two reasons are these; In the first place, as I have said, it is a great honor. In the second place, the State pays five-hundred dollars, so that you see this is an honor that even such eminent gentlemen as these will seek. And they were doing no more than their duty in coming here and defending this young man, and there is not a lawyer in the City --

MR. DERBY: Your Honor, I take exception to the remarks of the District Attorney that this honor is sought by Counsel in this case, as he well knows the rules of

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the Court.

The Court: There is no evidence in this case, nothing to indicate that either of the Counsel sought it.

MR. DERBY: That is absolutely unjustified.

THE COURT: There is nothing to show that either of the gentlemen appearing for this defendant sought the appointment from the Court. Proceed, now.

MR. WASSERVOGEL: I say to you gentlemen that this is an honor which is much sought after, for the reasons which I have already stated, and that I repeat.

Now, what is the defendant's version of this affair? He realizes that it is incumbent upon him to make some defence here; he has got to say something; so he tells you a story which is a tissue of lies.

Surely, gentlemen, you will not say that a man who is able to commit murder will hesitate when it comes to committing perjury.

He produces several character witnesses. He produces two witnesses with whom he lived for about two weeks, who tell you that, so far as they knew, he had no gun.

Now, while it is usually very difficult for the State to produce one witness who actually saw the commission of a crime, you can always get a hundred or more people who will say "I didn't see it." That is easy.

So, these people who were called here as character

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witnesses, as witnesses who told you that they never saw a gun in his possession, they know nothing at all about the facts.

The defendant himself has taken the stand. In a case of this kind, the law does not compel a defendant to take the stand, but where it is put right up to a man that he is the one who committed the crime, where it is put right up to a man that he used a gun, where it is put right up to a man that he discharged that gun at a man who is now dead and buried, it is absolutely necessary for him to go on the stand, and these lawyers would not have done their duty by him if they had not put him on the stand.

He tells you that he speaks no English. That at home with his Father and Mother he would speak only Yiddish; that he went to school in Russia, and there was taught only the Russian language.

On the witness stand here, he decided to speak in Russian, in spite of the fact that all the people with whom he had any dealings in the City of New York spoke in Yiddish.

Now, it may be that this defendant knew that there were some men on this Jury that understand Yiddish; it may be that he knew that I would understand him if he spoke in Yiddish; it may be that he wanted more time to think over a question when it was put to him, because, no matter

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how faithful the Interpreter may be, there is always something which is lost in the translation, and that is why he preferred to talk in Russian. So you see he is more shrewd than my friend would have you believe.

He says that in Russia he was taught to read and write in the Russian language only, and you will recall that I had him write his name in Russian.

In the Coroner's Court, he signed his name, in what I call very good English. My friend says that there are letters in the Russian language which are exactly similar to our own letters. I challenge him to pick out any of the important letters in the name Eli Geller as written in Russian, and point out in what respect they are similar to the name as written in English.

This man learned how to write English. When he learned how to write English, he must have learned how to speak it. He spoke it sufficiently well to tell the officer what the officer has testified to, and there is absolutely no reason in the world why you should come to the conclusion that Officer Northrup came into this Court, took this witness stand here, swore by the Almighty God to tell the truth, the whole truth and nothing but the truth, in a case where a man's life is at stake, and deliberately to perjure himself. Will you put such a stain on an officer's name? Do you believe that he came here with any such foul pur-

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pose in mind? It is ridiculous.

What does the defendant claim? In the opening address of the learned Junior Counsel for the defence, he said this is what they were going to prove? "The deceased, Schwartzmann, thereupon went into the back of the store, and returned with a gun, returned with a pistol, and started to make an assault upon the defendant, and the defendant, who you will see, if you observe him on the stand, is a very powerful young man, tremendously strong in the arms and in the chest, he grabbed the arm of Schwartzmann and took the pistol away from him. Schwartzmann retreated behind the counter, went near where the cash register was, and the defendant thought he was going to open the register and pay him the money. He did not do that, and the defendant leaned over the counter and said to him, 'Pay me the money'. And then afterwards -- and he fired a second time, to frighten Schwartzmann. The second shot was fatal, and Schwartzmann dropped .

in " Then he argues, this way: If Schwartzmann was pursuing the defendant, as testified to by the People's own witnesses, if he was in pursuit, if he was after this man with a loaded gun", now, the gun was in this man's hand (indicating defendant), not in the dead man's hand-- "It will be argued to you quite properly, that if Schwartzmann was coming after the man with a loaded gun, he must have

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had only one purpose in his mind."

- There is no proof in the case at all that Schwartzmann was going after this man with a loaded gun.

MR. DERBY: It is perfectly clear what the meaning was, your Honor.

MR. WASSERVOGEL: I didn't interrupt Counsel throughout three hours.

THE COURT: Don't interrupt.

MR. WASSERVOGEL: Now, this is what they did show: He says that on this Sunday morning after dispute, <sup>the</sup> about the payment of this money he wanted six dollars. His employer, the young boy who owned the delicatessen store, would pay him only four dollars. He went away. He says that he came back at about ten o'clock; that at that time the store door was closed; that he opened the door and went into the store; that the boy who owned the store was alone at that time; that he demanded some money or money from him, and that he refused to give him the money; that he said, "Well, I will stay here until you give it to me"; and that Schwartzmann then went into the back of the store, and came out and went up to him with a gun in his hand, and held it near him, and that he, the defendant, took the gun away from him.

Now, there you have it. The gun is in the possession of the defendant. No claim at all that , in the strug-

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gle by the defendant to take the gun away from Schwartzmann, that it exploded at that time. There is no such claim here.

Take his own version of this affair, and you must come to the conclusion that he is guilty of the crime charged against him, because at that time the gun had not exploded; and we have the defendant with the gun in his hand. Schwartzmann retreats behind the counter, he goes near the cash register, the defendant stands in front of the counter; they are right opposite to each other.

You will remember, when he was on the witness stand yesterday, I had him indicate and show me how he was standing, and I stood this way, and he said this is the way he stood (illustrating). There was the boss, on the other side, near the cash register. Here was the defendant (Illustrating)

Now, what do you suppose he was saying at the time this man, the defendant, the boss, went near the cash register? "Open that cash drawer; give me my money."

He says, while he was standing this way, (illustrating) Schwartzmann bent over, the little fellow, he was shorter-- it is admitted that he was shorter than that boy, Abraham Schwartzmann, whom you saw here, several inches shorter than he, this powerful fellow standing on the other side with a loaded gun, and Schwartzmann bent over, he

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claimed, and tried to take the gun away from him.

Do you believe that popcock, such tommyrot, do you believe that?

And then, in that struggle, when Schwartzmann, in fear of his own life, tried to take the gun away from this man, why, if there was any self defense at all, in this case, gentlemen, it was on the part of Raphael Schwartzmann, who was trying to preserve his own life, because the gun was in the hands of this defendant, and not in the hands of Raphael Schwartzmann at that time.

He says that at that moment, when Schwartzmann was trying to take the gun away from him, the gun was discharged, the gun was discharged, and the bullet went into this man's lung, and he says that, with a bullet in his lung, though the blood must have been spurting from this boy's breast, he didn't see any blood.

On, no, he only saw what he wanted to see, nothing else. He couldn't see any blood, but he did see-- he couldn't see any blood, but he saw Schwartzmann pick up a knife. Where does the knife come from?

In a delicatessen store, you know there are knives. He says, "I saw him pick up a knife, and I saw him run towards the door, around behind the counter. At that moment", he says, "I was nearer to the door than

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he was".

I am going to read to you what he said, so I can't be accused of saying anything which is not in the record.

"Q Did you grab hold of his hands? A Yes sir.

"Q With both of your hands? A With my right hand I grabbed his hand in which he held the revolver, and I took it away from him, and with the left hand I pushed him away .

"Q And you took the revolver from his hands?

A Yes"

"Q Now, in the struggle to take the revolver from him, the revolver did not go off, did it? A No, no shot".

"Q And after you had the revolver in your hands, you remained outside of the counter? A Yes, sir.

"Q He was behind the counter, was he? A Yes, he was between the table and the wall; that means inside of the counter.

"Q And the cash register was on the counter, wasn't it? A No, the register was not on the table. It was fixed to the wall.

"Q And the register was behind the counter?

A Yes, behind the counter.

"Q So, in order to get to the register, he , Senwartzmann, had to go behind the counter; isn't that right? A Yes.

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"So that, at that particular moment, he was standing at the register, behind the counter, whereas you were standing in front of the counter? A Yes, I was then standing on the outside of the counter.

"Q And you bent over the counter, didn't you, this way (Illustrating)? A No.", he says, "I was standing straight, erect, only my hand I put on the counter.

"Q You were standing straight at the counter, and your hand was there, wasn't it? A Yes.

"Q And at this time you say your boss was at the cash register? A Yes, sir.

"Q And he tried to take the gun away from you while you were standing there? A Yes.

"Q And then, as he tried to get the gun away from you, you say it was discharged? A Yes.

"Q And after you heard the pistol, did you remain standing there? A I may have remained there a second on the spot, not knowing what to do; I don't know.

"Q The gun remained in your right hand, did it? A Yes, in my right hand."

Even after the first shot, gentlemen, he did not put the gun down; it was still in his right hand.

"Q The store was still closed, wasn't it? A Still closed.

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"Q You say you saw him going from behind the counter towards the door, with the knife in his hand; is that what you said? A I only saw him grab the knife and start to run. Then I don't remember any more.

"Q And he ran towards the door from behind the counter? A Yes, towards the door.

"Q But you were the nearest to the door, weren't you? A No, he was nearer to the door, because while I was standing on the spot, not able to move, he ran towards the door, and then he was nearer.

"Q But you are the one that opened the door, aren't you? A After the shot, I started to run, and I opened the door.

"Q So that you got to the door before your boss did? A Yes.

"Q And you opened the door? A Yes.

"Q You do know that you still had the revolver in your right hand, don't you? A Yes, sir.

"Q And you did hear the revolver go off? A Yes, I did.

"Q And you fixed point blank at this man's head, didn't you?"

Now, what do you suppose he said to that? You may remember it.

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"Q. You fired point blank at this man's head, didn't you? A. I didn't see any head then.

"Q. You knew he was in the store? A. I knew that he was in the store.

"Q. And you knew that he was standing right near you there, because you saw the knife in his hand?

A. I didn't aim at him. I aimed at a place where he was not as yet, so as to frighten him".

Gentlemen of the jury, do you suppose that a man who is bleeding to death from a wound in his lung required to be frightened any more?

He said he discharged the revolver the second time only to frighten the man. Do you believe that? Do you believe that second shot was fired only to frighten this dead boy?

In spite of all that my learned friend has told you, the State is not revengeful. Another death in this case means nothing. We are not looking for any laurels as Judge Curtis would have you believe. We are here trying to do our duty as you twelve men have been called to do yours, and nothing else.

If you believe that this second shot was fired at the boy who was bleeding to death by this defendant solely to frighten him, why, let him go.

He says that he was excited, that he doesn't know

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what really happened, that he walked out on the street, and, in spite of the fact that he says he was dazed, he is positive, he is positive that the Italian coal dealer was not there at all. Both can't be true.

He admits that Mrs. Lunin spoke to him, but denies that he said to her what she testified to about he wouldn't pay the money, he goes to the Devil.

I think it was the tenth juror, that had him repeat, in Yiddish, exactly what he did say, as he claims, and it was repeated, and he said, "On account of a dollar the whole thing occurred". That is his version of what he said to Mrs. Okun.

Everybody in this case, according to the defendant, is lying. He is the only person that is telling the truth. All these people, although they don't know him, according to his statement, came here and framed up a conspiracy against him, to do him wrong, he, the only one that caused this young boy's death.

We have shown you, by young Schwartzmann, that his brother never had a gun. We have shown you, by the fireman who came there and found Raphael Schwartzmann bleeding to death, that he saw him lying there in the doorway in that store. He did not have a knife in his hand, and there was no knife lying near him.

Surely, if this man had run out with a knife in his hand, the knife would have been lying right near the spot

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where he himself fell, bleeding to death.

They needed a knife. If the knife had been there, they would have noticed this knife, because they needed one to cut the apron which he wore, but there was not any knife there.

The Italian coal dealer also says that this man had no knife.

An appeal throughout the argument of the counsel was constantly made to your sympathies in this case. I am not one of those gentlemen who believe that, when a juror takes his place in the jury box, he is to divest himself of all feelings of human sympathy, of all feelings of humanity. It is natural for men to be sympathetic, and I need hardly tell you that the feelings of human sympathy are as strongly embedded in my breast as they are in the breast for the counsel for the defense; but before we extend our sympathies to a man we must ask ourselves, gentlemen, is he deserving of our sympathy?

What sympathy had this defendant for the victim of his crime, whom he shot down in cold blood? What right, I ask, had this defendant to constitute himself Raphael Schwartzmann's judge, jury and executioner, all in one?

Mind you, he brought the charge. He says, "You owe me money" That was the charge. Mind you, he tried the case. He found the verdict. "I find you

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guilty, you owe me money". Mind you, he passed the sentence. "I have found you guilty; the sentence which I impose upon you is that you die."; and he fixed the time of the sentence. You must die now, this very moment; and, without an instant's warning, gentlemen, with out a second's preparation, this boy's life was snuffed out, rushed into the presence of his Creator absolutely unprepared.

The Divine command "Thou shalt not kill" has been engrafted into the laws of man, and made part of the penal law of this State.

There never was any pity in this man's heart. He is not entitled to the sympathy of honest men. This was murder. It was deliberate, because he came there with a gun. It was premeditated, because he went there not once, but three times. He had time to think it over. He did think it over.

This was murder, murder in the first degree, and, gentlemen, it was not manslaughter, because in manslaughter the design to effect death, the intent to kill, is not present.

This was not murder in the second degree, because in murder in the second degree there is neither premeditation nor deliberation. In this case, we have both.

I might go further, gentlemen, and say to you that

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never have I known of any case which more clearly spelled out the crime of murder in its first degree, and if this case does not spell out that crime no case does.

This is Friday. I want to get through. I am not going to detain you much longer. I realize full well that a criminal trial is a serious matter to a defendant who is on trial. But it is also serious to the community, the community in which you live, and in which I live. the community ~~xx~~ which all of us love, and honor and respect, and if a man charged with the commission of a crime is brought to trial before a duly constituted Court, and is shown to be guilty, not beyond a reasonable doubt, but beyond any possible doubt, and then a jury, representing the business intelligence of the community, says, "Oh, what do we care about the evidence; we will let him go", or they might even say "We will convict him of some lower degree of the crime; what do we care", why, gentlemen, all you do then is to put a premium upon crime, and it becomes impossible to enforce the criminal law, because you then announce that in the County of New York murder may be committed, and a man may go free, or, at the most, get a few years in prison.

If men who have claims against others are to be permitted to take the law into their own hands, instead of taking their law suits into a court of justice, why

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do you know we will soon be living, in the County of New York, in a condition of riot and of anarchy? There is no question about that; absolutely none.

One word more, and I am through. Before you were selected as jurors in this case you all, each and every one of you, declared yourselves strong minded men, ready and willing to enforce the law. Upon the evidence that we have produced here, the State now asks you twelve men of New York to redeem the promise which you made before you were selected as jurors, to redeem your promise by declaring this defendant guilty as charged in the indictment.

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THE COURT'S CHARGE.

GRAIN, J.

Mr. Foreman and gentlemen of the jury:-

The defendant, Ely Geller, is charged in this indictment with the crime of murder in the first degree. The indictment is an accusation in writing. It is nothing but an accusation. It creates no presumption that Ely Geller is guilty. Ely Geller has said by his plea that he is not guilty, and you have been empanelled and are now acting as jurors in this case so that you may determine from the evidence, and from the evidence alone, and from the evidence as you recollect it, whether or not the defendant is guilty of the crime of murder in the first degree, as charged in the indictment, or guilty of any other of the lesser degrees of homicide which will be defined to you in this charge.

It is fitting that you should be told, at the very threshold of the charge, that you are the exclusive judges of the facts; that your duty is not measured by what may be the opinion of counsel for the defendant respecting what that duty is, nor is it measured by what the opinion of the Assistant District Attorney may be as to what your duty is. Your duty is measured by a statute explained as to meaning by numerous decisions, so that the law regarding what your duty is is settled law.

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That duty is with open mind, with the calmness of critical analysis, to scrutinize the evidence in this case, oral and documentary, or by exhibits, and measuring it by the law's definitions to be given to you in this charge, to say whether or not Ely Geller has been shown by the proof to be guilty of the crime of murder in its first degree, beyond a reasonable doubt, or guilty of any other of the lesser degrees of homicide to be defined in this charge; and, of course, it is just in proportion as you are possessed of the capacity for dispassionate, critical analysis, just in proportion as you are possessed of the capacity of setting over against the evidence in the case the law as it is defined to you, that you are qualified to discharge that duty of which you are the custodians.

What do I mean when I say that you are the exclusive judges of the facts, and that it is your duty to weigh the evidence, by the use of the word "evidence"?

I include the spoken word of witnesses responsive to questions put, insofar as the answers have been allowed to stand, not being stricken out upon motion of the defendant's counsel, or upon motion of the Assistant District Attorney, or by the Court of the Court's own motion. I include every exhibit which has been offered and received in evidence. And if, during the progress of this trial, there has been any concession respecting a matter

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of fact, and I do not say that there has been, that concession, if there be one, is also included when I speak of the evidence to be considered by you.

I exclude everything that was said by any witness that was stricken out under any of the circumstances mentioned. I exclude any exhibits, if there be any such, merely marked for identification and not received in evidence. I exclude any colloquy or conversation that there may have been between counsel during the pendency of the trial. I exclude anything which may have been said by the Court in ruling upon the reception or rejection of offered evidence. I exclude anything said by the Court in disposing of any motion during the pendency of the trial, and I tell each one of you twelve men now that, when you retire to deliberate, you will be wholly uninfluenced by the Court's disposition of any motion, because the Court's disposition of motions does not import any expression of opinion by the Court as to what your verdict should be.

Everything not falling within the definition of evidence as that has been defined to you, but coming to your hearing during the pendency of the trial, other than the summation of counsel on both sides, and other than the charge of the Court, will be dismissed from your mind when you retire to deliberate, and form no part of the

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subject matter upon which your verdict will be reached.

The purpose of the summation of counsel is that, through the medium of the summation, the contentions of the respective parties may be presented to a jury, so that a jury may be facilitated by the summation on both sides, and have their minds directed to the contention of both sides. But no trial is to be regarded by a jury as any contest of ability between counsel, and no verdict is to be predicated upon any impression entertained by any juror, if such there be, that it should be one way or the other way because of superiority of ability on the part of one counsel over the other.

The verdict is to be based upon the evidence, and when you retire to deliberate you are not confined in your discussions to any considerations which may have been advanced by counsel on either side, as they doubtless of all men would be the most ready to tell you. No matter how extended a summation, or how competent counsel, it is entirely conceivable that there may be points on both sides, which, upon reflection, they might have wished to direct your attention to, which, in the stress of the trial, or the labor of the argumentation of the summation, have been overlooked; so that the entire subject of the guilt or innocence of this defendant, in the light of the law to be charged, and in the light of the evidence,

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is for your discussion in the jury room; and if, during the process of that discussion, a difference of opinion should arise as to what, in point of fact, the testimony was regarding any matter, it will be your right to be brought again to the seats in which you now are, so that, in the presence of the defendant and in the presence of his counsel and in the presence of the Assistant District Attorney, and of the Court, there may be read to you, for greater certainty, from the official notes of the minutes of the trial, taken stenographically by the Court stenographer, that portion of the testimony respecting which a dispute or controversy as to what it was may have arisen; and, while every endeavor will be made to make this charge as plain to you as language can make it, if, when you retire to deliberate, something said during the progress of the charge was not plain to some one or more of you, and you desire to have it, if possible, made plainer, you can, in like manner, be brought where you now are, so that your difficulty or embarrassment as to comprehension being brought to the attention of the Court, that part of the charge not plain to any one, or more of you may, if possible, be made made plain, by additional statements in that regard from the Court to you, in the presence of the defendant, his counsel and the Assistant District Attorney.

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The weighing of evidence is a figurative term. It presents to the mind a balance of scales and weights. The weights in a trial on one side of the balance are the propositions of law, consisting of definitions brought to the attention of the jury, and the evidence as defined in this charge is that which is put on the other side of the balance, and the weighing process, as suggested at the threshold of this charge, is an analytical process initiated by a recollection of what was testified to, and it is just in proportion as you accurately recollect the evidence that you become qualified, when you retire to deliberate, to write the past from the standpoint of what the facts as disclosed by the evidence may be on the question of the guilt or innocence of this defendant.

The considerations which should influence you in determining what credence you will give to the testimony of any witness are purely matters upon which you are required to exercise your judgment, and anything said in that regard as to the points to which you may not improperly direct your attention are said suggestively, and not in a mandatory way.

You may not improperly consider all that a witness has said upon any given subject as intending to express the meaning of the witness, rather than an isolated

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answer to an isolated question. Is the story as told by the witness probable, or improbable? Is it consistent with itself? Is it in conflict with the testimony of some other witness? Is it in conflict with the testimony of other concurring witnesses? Is it in conflict with such testimony respecting merely an immaterial matter, or a material one? What was the witness's manner in testifying, as indicative of truth, or the reverse, as indicative of accuracy of recollection, or the reverse? What was the witness's seeming intelligence? What were his or her opportunities for observation and capacity for observation? What is the witness's relation to the controversy? Biased, or unbiased, interested, or disinterested?

I suppose that, not improperly, that whole matter might be summed up in the statement that you are expected in the discharge of your duty to bring the evidence in the case to the test of all those ordinary rules adopted by men of good judgment in the affairs of life in the determination of the question as to whether a statement heard is accurate, or inaccurate, true or false.

If you should reach the conclusion that any witness had committed deliberate perjury respecting a material matter, then and in that event you are at liberty to wholly disregard the testimony of such witness.

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It you have followed me to this point, you will see that, in a certain sense, nearly everything that has been said to you in the charge is preliminary, not involving a definition of either the crime of murder in its first degree or yet a definition of any of the lesser degrees of homicide, nor a statement of the rules of law applicable where it is claimed that a homicide is excusable, or where it is contended that a homicide is justifiable.

The Code provisions limit the duty of the Judge presiding to a statement of what the Judge presiding conceives to be the propositions of law upon which a jury should be informed in order to enable them to reach a verdict, but the Court of Appeals very recently, namely, on the 31st of December last, commenting upon a somewhat earlier decision of that Court, may be said to have somewhat enlarged the statutory obligation of the Judge.

Quoting from the case of the people against Fanning, reported in 131 New York, at page 659 and page 663, the Court of Appeals say:

"In a criminal case, we think the Judge has the right, and, indeed, it is his duty, to present the evidence to the jury in such light and with such comments, that the jury may see its relevancy and pertinency to the particular issues upon which it was admitted, and thus the better be qualified to appreciate its character and weight and to determine its credibility"

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So that what I shall have to say to you now divides itself into two parts, the first of which is in the discharge of the statutory duty, and the second of which will be in obedience to the suggestion now for a second time made by the Court of Appeals in this State.

I will read to you, without comment, and, more particularly in that connection without any attempt at analysis, certain portions of the article of the penal law entitled, "homicide". I will then read to you, likewise, without analysis, the provisions of Section 42 of the penal law. After I have done that, I will refer to these different provisions in the order in which their subject matter will, in my opinion, be logically the matter of consideration by you, and, so reverting to them, will make such comment as may appear necessary to make their meaning plain to you.

The law says, "No person can be convicted of murder "or manslaughter unless the death of the person alleged "to have been killed and the fact of killing by the defend- "dant as alleged are each established as independent facts, "the former by direct proof and the latter beyond a "reasonable doubt."

"Homicide is the killing of one human being by the "acts, procurement or omission of another."

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"Homicide is murder, or manslaughter, or excusable homicide, or justifiable homicide".

"The killing of a human being, unless it is excusable or justifiable, is murder in the first degree when committed from a deliberated and premeditated design to effect the death of the person killed or of another."

"Such killing of a human being is murder in the second degree when committed with a design to effect the death of the person killed or of another, but without deliberation and premeditation".

"In a case other than one of those specified in Sections 1044, 1046 and 1047, homicide not being justifiable or excusable is manslaughter".

Section 1044 is the one defining the crime of murder in its first degree; section 1046 is the one defining the crime of murder in its second degree; section 1047 is the one declaring the guilt of a person who, against the provisions of that section, fights a duel outside of the State of New York.

"Such homicide is manslaughter in the first degree when committed without a design to effect death, in the heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon".

"Such homicide is manslaughter in the second degree

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"when committed without a design to effect death, by any  
"act, procurement, or culpable negligence of any person,  
"which, according to the provisions of this article,  
"does not constitute the crime of murder in the first  
"or second degree nor manslaughter in the first degree".

"Homicide is excusable when committed by accident and  
"misfortune in doing any lawful act by lawful means,  
"with ordinary caution, and without any unlawful intent."

"Homicide is justifiable when committed in the law-  
"ful defense of the slayer, when there is reasonable  
"ground to apprehend a design on the part of the person  
"slain to commit a felony or to do some great personal  
"injury to the slayer and there is imminent danger of  
"such design being accomplished, or in the actual resis-  
"tance of an attempt to commit a felony upon the slayer,  
"or in a place of abode in which he is".

"An act otherwise criminal is justifiable when it  
"is done to protect the person committing it from  
"inevitable and irreparable personal injury, and the  
"injury could only be prevented by the act, nothing more  
"being done than is necessary to prevent the injury".

I have now read to you certain sections and parts  
of other sections found in the penal law, in part in  
that portion of the penal law which is entitled "homicide",  
and in addition I have read to you a portion of section  
42 of that law, which is entitled "rule when acts done

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in defense of self or another."

I now retrace the ground covered by these provisions, with comment and analysis, for your information and guidance when you retire to deliberate.

And, first, your attention is directed to the circumstance alluded to at the very beginning of this charge, that the defendant is charged with the crime of murder in the first degree. The law's definition of that crime may be said to be, in part, a negative definition, that is to say, it is a definition which begins with the exclusion of homicides under certain circumstances, for it reads:

"The killing of a human being, unless it is excusable or justifiable, is murder in the first degree when committed from a deliberate and premeditated design to effect the death of the person killed or of another".

Therefore, in determining whether, any given case falls within the law's definition of the crime of murder in its first degree, it is necessary that one should be informed as to what it is that the law says constitutes an excusable homicide, and also what it is that the law says constitutes a homicide which is not criminal but justifiable; and, when you retire to deliberate, in logical sequence your attention will be directed in the first instance as to whether or not there is in this case

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that proof required by the law that the person said to have been killed, namely Raphael Schwartzmann, was killed by the defendant as alleged, which, as already told you, is something required to be established by direct proof; that is to say, the fact of the killing is required to be established by direct proof.

If in this case upon the evidence you entertain no reasonable doubt that Raphael Schwartzmann is dead, and that he died as alleged in the indictment, that he died because of certain wounds received by him from the penetration into his person of substances which were discharged from a pistol, and that pistol was in the hands of this defendant, you will enter upon the consideration of the question as to whether such killing of Schwartzmann by the defendant constituted an excusable homicide.

What, then, has the law to say regarding excusable homicide? Homicide is excusable when committed by accident and misfortune in doing any lawful act by lawful means, with ordinary caution, and without any unlawful intent. That law you will examine, and you will examine the evidence in the light of that law.

Homicide is justifiable, says the law, when? When it is committed in the lawful defense of the slayer. Under what circumstances? The law answers that

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question, and answers it in this language: "When there is reasonable ground to apprehend a design on the part of the person claimed to commit a felony". That is to say, a crime which might be punishable by death or by imprisonment in the state prison.

To assault another with a knife, unless the assault can be justified under those provisions of law applicable to the defense of self defense, is a felony, and an act done with intent to commit such an assault, but failing to effect its commission, is likewise a felony, in that it is an attempt to commit that crime.

Unless such act is done under such circumstances which render it an act falling within what the law has to say regarding the defense of self defense, homicide is justifiable, moreover, when there is reasonable ground to apprehend a design on the part of the person slain, to do some great personal injury to the slayer, provided always there is imminent danger of such design being accomplished.

And homicide is also justifiable in an actual resistance of an attempt to commit a felony upon the slayer, and, as stated, unless the act falls within the law's definition of what it is that constitutes the defense of self defense, an assault which is wilful and wrongful and made with a dangerous weapon, is a felony, and

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an act tending to effect such an assault, but failing to effect its commission, is an attempt to commit that crime, and, likewise, a felony.

Section 42 says an act otherwise criminal is justifiable under certain circumstances, and when the query is put as to what the circumstances are which make an act which would otherwise be criminal justifiable, the first part of the answer is, when it is done to protect the person committing it from personal injury; and when the question is put, to protect him from what kind of personal injury, the law answers the query from two viewpoints, by characterizing the personal injury from the viewpoint of its likelihood to happen, but for the doing of the act which otherwise would be criminal, and in that connection says, "from personal injury which would be inevitable"; and then the law characterizes the character of the personal injury from the standpoint of its extent, and says in that regard that it must answer to the description of a personal injury which would be irreparable.

And then the law adds this qualification, by way of limitation, as to when such an act which otherwise would be criminal is justifiable, mainly, "and the injury could only be prevented by the act, nothing more being done than is necessary than to prevent the injury".

Under that section, in the edition of the penal

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law which is now before me, there are certain annotations by way of thoughts, being extracts from or the substance of matters decided in certain cases therein referred to, and certain statements contained in those notes are now made a part of this charge, namely, the following:-

"Before a person can justify the taking of life in self defense, he must show that there was reasonable ground for believing he was in great peril, that the killing was necessary for his escape, and that no other safe means was open to him".

"When one believes himself about to be attacked by another and to receive great bodily injury, it is his duty to avoid the attack, if in his power to do so, and the right of attack for the purpose of self defense does not arise until he has done everything in his power to avoid its necessity".

"One without fault, if attacked by another, may kill his assailant, if the circumstances be such as furnish reasonable ground of a design to take his life or to do him great bodily harm, though, in point of fact, he is mistaken".

"A defendant in a criminal case who interposes the plea of self defense is not obliged to establish it by a preponderance of evidence. The burden is upon the prosecution throughout the trial to establish the crime

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"charged beyond a reasonable doubt, and if upon the  
"whole case, including the testimony on behalf of the  
"prosecution and on behalf of the defendant, a reasonable  
"doubt of the defendant's guilt arises, the jury must  
"acquit".

Everything which has been said to you respecting  
what it is that the law says regarding excusable homi-  
cide and what it is that the law says regarding justi-  
fiable homicide and what it is that the law says respect-  
ing the rule when an act is said to have been done in  
defense of one's self has been said to you so that you  
may determine, in the light of the evidence in this  
case, whether or not the killing of Raphael Schwartzmann,  
if he was killed by the act of this defendant, is to  
be characterized as an excusable homicide or a justifi-  
able homicide, and for the purposes of enabling you, in  
the event that upon the evidence you entertain no reason-  
able doubt that it does not fall within what the law has  
to say it is that constitutes excusable homicide, or what  
it is that constitutes justifiable homicide, that you  
might proceed to consider the question of this defendant's  
guilt or innocence of the crime of murder in its first  
degree.

So that, if the killing of a human being is not  
excusable, as the law defines excusable homicide, nor  
yet justifiable, as the law defines justifiable homicide,

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it is murder in its first degree when committed from a deliberate and premeditated design to effect the death of the person killed.

Before a person can be found guilty of the crime of murder in its first degree, a jury must be satisfied from the evidence beyond a reasonable doubt that the killing was neither excusable nor yet justifiable.

The jury must, moreover, be satisfied beyond a reasonable doubt, that the killing proceeded from a design to effect the death of the person killed, and a jury must moreover be satisfied beyond a reasonable doubt that that design answered to the description of a deliberate design, and a jury must moreover be satisfied from the evidence beyond a reasonable doubt that such design did not merely answer to the description of a deliberate design, but that it also answered to the description of a premeditated design.

What is meant by a deliberate design? What is meant by a premeditated design? Those words have been the subject of comment, construction and definition, and that by the highest court in this state, namely, the Court of Appeals, and your attention is now directed to certain extracts forming portions of two opinions in two cases in that court, and those portions of such opinions are now made part of this charge, and you are told that, in so far as they define the word "deliberate", and the

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word "premeditated", and in so far as they pass upon what those words mean when used in the law's definition of murder in the first degree, they are to be regarded by you as stating the law in this case.

In the case of Leighton against the people of the State of New York, reported in volume 88 of the New York Court of Appeals Reports, Judge Danforth, in delivering the opinion of the court, at page 120, says:

"To bring the case within the statutory definition of murder in the first degree, it was necessary that the crime should be perpetrated from the deliberate and premeditated design to effect the death of the person killed. An act co-existent with and inseparable from a sudden impulse, although premeditated, could not be deemed deliberate, as when under sudden and great provocation one instantly, although intentionally, kills another, but the statute is not satisfied unless the intention was deliberated upon, If the impulse is followed by reflection, that is deliberation. Hesitation even may imply deliberation; so may threats against another, and selection of means with which to perpetrate the deed. If, therefore, the killing is not the instant effect of impulse, if there is hesitation or doubt to be overcome, a choice made as the result of thought, however short the struggle between the intention and

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"the act, it is sufficient to characterize the crime  
"as deliberate and premeditated murder".

In the case of the people against Majorie, reported  
in Volume 91 of the New York Court of Appeals Reports,  
Judge Harle, delivering the opinion of the court, says,  
in this same connection:

"Under the statute, there must be not only an  
"intention to kill, but there must also be a deliberate  
"and premeditated design to kill. Such design must  
"precede the killing by some appreciable space of time,  
"but the time need not be long. It must be sufficient  
"for some reflection and consideration upon the matter,  
"for choice to kill or not to kill, and for the forma-  
"tion of a definite purpose to kill; and when the time  
"is sufficient for this, it matters not how brief it  
"is. The human mind acts with celerity which it is  
"sometimes impossible to measure, and whether a deliberate  
"and premeditated design to kill was formed must be deter-  
"mined from all the circumstances of the case."

If, in the course of your deliberations, you come  
to the consideration of the question of this defendant's  
guilt or innocence of the crime of murder in its first  
degree, and should, upon such consideration, in the  
light of the evidence as you recall it, be of opinion  
that he is not guilty of that crime, or should, upon the

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evidence, entertain a reasonable doubt as to whether he was guilty of that crime, it would become your duty to consider the question of this defendant's guilt or innocence of the crime of murder in its second degree; and, therefore, your attention is now directed to what the law says constitutes murder in its second degree.

Murder in its second degree is a homicide which is not excusable; it is a homicide which is not justifiable. The jury must have reached the conclusion in a given case upon the evidence that there is not reasonable doubt that the killing was neither excusable nor yet justifiable, and if, reaching that conclusion, and having considered the question of the defendant's guilt or innocence of the crime of murder in its first degree, under the circumstances mentioned, the jury comes to the consideration of the question of the defendant's guilt or innocence of murder in its second degree, then the evidence must establish to a juror's satisfaction and beyond a reasonable doubt, before a defendant can be found guilty of murder in its second degree, that the person said to have been killed was killed and was killed by the act of the defendant, and that he was killed by the defendant when the defendant entertained a design to effect his death, but that design need not answer to the description of a deliberate de-

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sign; that is to say, a design with deliberation; nor to the description of a premeditated design; that is to say, a design with premeditation; so that, the difference between murder in its first degree and murder in its second degree is this: That the design to kill, in the case of murder in its first degree, must, as stated, answer to the description of a deliberate and premeditated design; and in the case of murder in its second degree, the jury need only be satisfied beyond a reasonable doubt on the subject of the existence of a design, that there was a design to kill.

The evidence is not required to go to the point that such a design, if it existed, was deliberate or premeditated.

If, under the circumstances mentioned, you come to the consideration of the question of this defendant's guilt of the crime of murder in its second degree, and should thereupon, upon a consideration of the evidence, believe him to be innocent of that crime, or if, upon the evidence, you should entertain a reasonable doubt respecting his guilt of that crime, it would become your duty to consider the question of this defendant's guilt or innocence of the crime of manslaughter in its first degree; and your attention is now directed to the law's definition of manslaughter in its first degree.

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Manslaughter in its first degree must be a killing which is neither excusable nor justifiable, but it is not required to be a killing which was the result of a design on the part of the defendant to kill the person, whom he is said to have slain.

The evidence, however, must satisfy a jury beyond a reasonable doubt that the killing, being neither excusable nor yet justifiable, and being without a design to effect death, was a killing which was done in the alternative either in the heat of passion, but in a cruel or unusual manner, or by means of a dangerous weapon.

If, under the circumstances stated, you come to the consideration of the question of this defendant's guilt or innocence of the crime of manslaughter in its first degree, and should thereupon, in the light of the evidence, believe him to be innocent of that crime, but upon the evidence you entertain a reasonable doubt respecting his guilt of that crime, it would be your duty to consider the question of this defendant's guilt or innocence of the crime of manslaughter in its second degree.

The law says "such homicide", and the force of the word "such" is to exclude excusable homicide and to exclude justifiable homicide, "such homicide", therefore,

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which means homicide that is neither excusable nor is justifiable, "is manslaughter in the second degree when committed without a design to effect death", in which respect manslaughter in the second degree is like manslaughter in the first degree, "by any act, procurement or culpable negligence", which, according to the provisions of the article relating to homicide does not constitute the crime of murder in the first or second degree or manslaughter in the first degree.

Now, I have discharged, with the exception of calling your attention to a provision contained in the Code of Criminal Procedure, the duty laid down upon me by statutory law of bringing to your attention the law applicable to this case.

There is a section, No. 395, contained in the Code of Criminal Procedure, the whole of which will be read to you, and you are told that you may consider it inapplicable to any evidence in this case. If it is applicable to any evidence in this case, as you recollect the evidence, then you will apply that section, your attention in that event being directed more specifically and pointedly to the latter part of that section.

"A concession of a defendant, whether in the course of judicial proceedings, or to a private person, can be given in evidence against him unless made under the

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"influence of fear produced by threats, or unless made upon a stipulation of the District Attorney that he shall not be prosecuted therefor, but is not sufficient to warrant his conviction without additional proof that the crime charged has been committed."

It is proper that I should charge you in this connection that the reading of this section to you imports no expression of opinion by the Court that there is any testimony in this case anywhere, any evidence whatsoever, answering to the description of a confession, as that term is used in this section which has just been read to you.

Now, I have discharged the statutory duty, the duty evolved upon me by a section of the Code, and I am about to discharge that duty which, in the interest of justice, in harmony with the opinion of the Court of Appeals, reiterated in a recent utterance, forms part of that which a Judge should do in a case like this. It is, perhaps, in a sense, the harder part of the duty, because it must be done, with the statements made as plain as the English language can make it, that, in the domain of fact, you are supreme, and that, therefore, if anything is said respecting the evidence in this case which differs from your recollection of it in this charge, your recollection will control you when you

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retire to deliberate.

As I recall the testimony in this case, on the 13th day of October, 1912, a man by the name of Raphael Schwartzmann, a young man, weighing about 140 pounds, was the proprietor of a small delicatessen and grocery store in that portion of the county of New York known as the Borough of the Bronx.

Connected with him in business, although perhaps not in partnership, was a brother somewhat younger than himself, who has been a witness in this case; and in the employment of the elder Schwartzmann, as a delivery clerk, for a period of about twenty days preceding the 13th of October, was this defendant, Ely Geller, a young man, whose age perhaps has been given during the progress of this trial who had been but a few months in this country, and came from a town in Russia, who had had one previous employment, at least, in America, and who was in the receipt of wages from the elder Schwartzmann.

As part of the defendant's compensation, there is testimony going to the point that the elder Schwartzmann was to pay for the defendant's lodging, and there is testimony going to the point that the defendant lodged in a room which, I think, was selected for him in the building in which the delicatessen store was, or in an

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adjoining building, but up stairs, in rooms occupied by the witness Sophie Goldberg and her husband, Harry Goldberg.

There is testimony going to the point, and I recollect it, that, shortly before the 13th of October, 1912, and the 13th of October, 1912, was a Sunday morning, the defendant had certain conversations with both of the Schwartzmanns, or, at least, in the presence of one or the other of them, relating to the hours, in substance, during which the defendant was to be required to work, the defendant urging, as I understand his contentions, in those conversations, that, as he was desirous of attending a certain high school in the evening, the Schwartzmanns should live up to that which the defendant contended had been the agreement at the time of his hiring by them, that he, the defendant, should be allowed to quit work at an hour earlier than the Schwartzmanns appeared to have allowed him to leave.

As I recollect the evidence, these conversations did not result in a mutual agreement or understanding respecting the hours during which the defendant was to work, and that being so the defendant signified an intention to leave the employment of the elder Schwartzmann.

There is testimony going to the point that the elder

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Schwartzmann suggested that the defendant remain at least one day longer, namely, over until Sunday, the first talk having been on a Saturday, as I understand.

There is testimony going to the point that the defendant was not unwilling to remain one day longer, namely, from the Saturday until the Sunday, and that on Sunday morning, October 13th, 1912, the defendant came, at an early hour in the morning, from the room in which he slept, up stairs, to the door of the delicatessen store, and into that store; that he performed certain duties incident to his employment on that morning, in the delivery of articles of merchandise sold by Schwartzmann, and that, on that morning, and you will recollect with more particularity than I can attempt to state it, there was a conversation respecting the amount payable to this defendant by the elder Schwartzmann, and that, at some time during that morning, there was a difference of opinion between Schwartzmann on the one hand and the defendant on the other as to the amount that he should be paid.

If I recollect the testimony, the defendant figured that he was entitled to a payment of six dollars; Schwartzmann contended that, at most, he was entitled to five, and that, making certain deductions, he was entitled to but four, and there was a difference of at

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least one dollar, and possibly two dollars between them. This difference, at the earlier hour in the morning on Sunday, appears to have been an unadjusted difference; that is to say, there is testimony going to the point that, at the earlier hour in the morning neither party concluded to yield his contentions.

The defendant gives evidence, as I understand him, to the effect that this dispute being still on, if one may call it a dispute, or difference regarding money matters, he went to an elevated station of the Third Avenue Elevated Road, on Third Avenue, near the place of his employment, and took a down town train on the Elevated Road, for the purpose of going to his aunt's house, at 17 Attorney Street, and obtaining advice from her.

His testimony is, as I recall it, in substance, that he got off the Elevated train at Grand Street, walked from the Grand Street station to 17 Attorney Street, reached his aunt's house, found her in bed, had some talk with a little boy who has been produced as a witness, and returned to the delicatessen store.

Why did he go back? Did he go back in order that there might be an amicable settlement of the wage question between himself and Schwartzmann, or in order that he might receive the minimum amount mentioned, namely,

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four dollars, the amount, in other words, that Schwartzmann had expressed a willingness to pay him?

Did he go back with a view, in the event of a refusal, to do Schwartzmann some injury?

Did he go back with any intention to commit the crime that he now stands charged with, or any of the lesser degrees of homicide?

Now, these questions, if they can be answered at all by you, if you consider that the answering of those questions is important to the solution of this case, must be answered by you in the light of the evidence in the case, and in the light of that alone.

When the defendant got back to the delicatessen store, did he go into the store, and was he then paid some money, and did he then go out of the store, and were there one or more persons in the store when he went in and when he came out? Or are the witnesses who have testified in substance to that mistaken in their testimony?

The defendant, having gone out of the store, re-entered the store? And, if he re-entered the store, did he re-enter the store having been paid, or for the purpose of obtaining payment, or, if not for the purpose of obtaining payment, for some other purpose?

Here again, if it becomes at all important in your

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consideration of this case, to answer those questions, you must answer them upon the evidence, and upon the evidence alone.

When the defendant was inside of the store, and we will say inside of the store at a few minutes after ten o'clock, and on an occasion when he and the deceased, so far as disclosed by the evidence as I recollect it, were alone in the store, what was it that happened? And what was the sequence or order in which that which happened at that time in that store did happen?

During the progress of this trial, my recollection is that there are just two persons who purport to give testimony, as eye witnesses, as to what happened inside of that store on the morning of October 13th, 1912, at a time when this defendant and Schwartzmann, the deceased, were alone in that store, and one of those persons is a witness produced by the people named Savino Jiocchino, and the other one is this defendant.

What does Jiocchino, taking his whole testimony, purport to say, if he was inside of the store? Where does he say he was at the time that he says that he saw the things respecting which he has given testimony?

My recollection of the evidence is that the witness Jiocchino, after saying that he was on the sidewalk, and on the sidewalk in front of the delicatessen store,

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indicated with his hand an approximate distance as the distance that he was from the door of the delicatessen store, and after a little conversation that distance was fixed by the foreman as eight feet, so that perhaps it may be said, if my recollection is correct, that the witness Jiocchino purports to testify that he was about eight feet from the door of the delicatessen store.

What does he say that it was that attracted his attention? Was it something that he saw with his eyes, or was it something that he became conscious of through the instrumentality of another sense.

As I recollect the evidence, it was, in the first instance, something that he became conscious of through the instrumentality of another sense, namely, the sense of hearing. He heard a report. That is to say, he heard the discharge of a fire arm; and I recollect his testimony to be, in substance, that he then turned and looked and saw, and he purports to tell you, as I recollect his testimony, what he saw; and in that regard the part of the store in which he says that he saw the defendant and the part of the store in which he says he saw the man now deceased, He purports to describe an attitude of the defendant, and he purports to tell you the movements of the defendant and the movements of the deceased, and the places, or about the places, inside

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of the store that they respectively reached, and their relative positions, in part, towards one another; and he purports to state, as I recollect his testimony, that he heard, at a certain time, when, as he says, the defendant was in a certain position, and when, as he says, the deceased was in another position, a second report; and then he purports to tell you some of the things which transpired immediately after the second report, and more particularly in that connection what he himself did, and one or two things that he says that he saw the defendant do.

The defendant purports to tell you why he went into the store at about ten o'clock, or a little after ten, and the part of the store to which he first went, and where the deceased was at that time, and what the deceased first did, and then what happened.

And, as I recall it, he purports to tell you in that connection that the deceased went into a rear room, and came out with a pistol, a gun; and that then, while they were both in a certain position, a struggle ensued for the possession of the gun, during which the gun did not go off, but the defendant wrested it from the possession of the deceased, and that then the deceased went towards or near the cash register, and that he, the defendant, believed that the deceased was going towards the cash register for the purpose of paying him, the de-

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fendant, that which the defendant contended was owing to him at that time, or that which the defendant says he was willing to receive at that time as the amount due him, and that he approached where the deceased was, in order that he might receive that which he says was coming to him; and then the defendant, in substance, as I recollect his testimony, says that there was a struggle on the part of the deceased to re-possess himself of the gun, and that in that struggle, unintentionally, without volition, the gun went off, and the defendant purports to say in that connection that he did not know at that time whether any bullet had been discharged from that gun and had penetrated the person of the deceased; that the deceased moved towards the door, on the inside of the counter, with a knife in his hand, and that he, the defendant, stopped for a second, or an instant, at the point where he was at the time that he had wrested the -- I do not mean at the time that he had wrested, but at the point where he was at the moment that the explosion had taken place, and, then himself moved towards the door, and that there was a moment when the deceased was nearer to the door than himself, but that he got to the door first, referring to the defendant himself, and that, in fear, and because of fear, without other motive, and without taking aim, that he discharged for the

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second time the gun, at a point at which he did not believe the deceased to be, in order that he might frighten the deceased, in order that he, the defendant, might get out of the store.

That, very imperfectly stated, is the Court's recollection of the substance of the defendant's testimony respecting that which transpired inside of that store.

Now, place the testimony of the Italian over against the evidence of this defendant. Give the testimony of the Italian's testimony that is in conflict with the testimony of this defendant, and, if it is in conflict, in what particulars is it in conflict? Wherein do they differ? And, if they do differ respecting a material circumstance connected with the occurrence, what is the truth, judged from the standpoint of the evidence of the two men as given, and from the standpoint of all the testimony that there is in this case, namely, all the evidence.

A pistol has been offered and received in evidence. It is one of the exhibits in this case. Was that pistol the property of the deceased? Was that pistol the property of this defendant? Did this defendant take it to the store, or did he get it from the deceased while he, the defendant, and the deceased were alone in the

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store?

A verdict is not to be predicated upon surmise, but a verdict may lawfully be predicated upon all the inferences which may be legitimately drawn from the testimony and evidence in the case.

Can these questions be answered from the evidence in the case? Can they be answered with reasonable certainty? If they can be answered with reasonable certainty, what is the answer that is required by the evidence in the case to these questions, always assuming that in your deliberations you should consider these questions as bearing upon the determination which you are to reach.

Two witnesses have been produced, one a woman, a neighbor of the deceased and a neighbor of the defendant, who purport to testify to something which, as she says, the defendant said to her when the defendant was in custody of the police officer, immediately adjacent to the delicatessen store.

You will recall what her testimony is to that effect, and you will recall what the defendant's testimony is respecting what it was that he said to her.

What did he say to that witness, and what was meant by that which he did say. What light, if any does the defendant's utterance in that regard throw upon

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the circumstances attending what occurred in the store at the time when the pistol was discharged inside of the store?

The defendant, according to his testimony, and according to other evidence in the case, after the pistol had been discharged a second time, went in a certain direction, and was met by a police officer. That officer has been called as a witness in this case. He was called as a witness in the Coroner's Court, and on both occasions, responsive to questions put, he purported to state certain sayings as having been said by the defendant to him. You will recall in that regard what he purported to say in the Coroner's court. You will recall in that regard what he purported to say upon this trial.

You will recall the defendant's evidence respecting the circumstances of his arrest and the presence or absence of conversations by him with the officer, and you will consider the question, insofar as it may be determinable from the evidence in this case, as to what the defendant's knowledge of the English language was.

Did he say that which the officers says that he said when the officer was a witness in the Coroner's Court? Did he say that which the officer says he said while the officer was a witness on the trial of this

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action? And if he did say what the officer has testified to in such regard, what is the import of that testimony, as bearing upon the question of this defendant's guilt or innocence?

The defendant has produced in his own behalf certain witnesses whose testimony has gone to the point that they were acquainted with the defendant; that they were acquainted with other people who knew the defendant; that they were acquainted with the defendant's reputation for peace and quiet and for truth and honest, and that that reputation, as they view it, was good.

The Court of Appeals has held that, in certain cases, evidence of good character may create a reasonable doubt, where, but for the introduction of such evidence, no doubt would exist in the minds of jurors respecting the guilt of the defendant.

There is testimony in this case respecting the locality and the nature of the wounds found upon the person of Raphael Schwartzmann, testimony going to the effect that there were certain bruises upon his face, and testimony going to the effect that there was a pistol shot wound in his right ear, just behind the hole of the ear, and that the course of that bullet was downward and towards the left, and to the effect that there was a pistol shot wound in the person of Raphael Schwartzmann above the

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center of the right collar bone, and that the course of that bullet was through the second rib, downwards and backwards, and that it lodged in the ninth dorsal vertebra; that it was a course more strictly downward than the course of the bullet which entered behind the hole of the right ear.

If the position of these wounds, their number and extent, throws any light upon the question as to what happened inside of that store, and as to how it happened, that light is light that is afforded by the evidence in this case, and will be availed of by you in reaching your determination.

There is other testimony in this case to which allusion has not been made. You will draw no conclusion from the circumstance that some items of testimony have not been alluded to that they are regarded as either of greater or less significance or weight, if any, than those which have been the subject of comment. Reference to them has been omitted for the sake of brevity, although I may say, and say without any hesitation, that during the progress of a murder trial the very last thing to be taken into consideration is the question of time. We all of us have all the time that by any possibility may be required in performing our respective functions.

This is a criminal action. In a criminal action,

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the burden of proof is upon the prosecution. That burden requires that, before a defendant can be found guilty, a jury must be satisfied from the evidence beyond a reasonable doubt as to his guilt.

A defendant in a criminal action is presumed to be innocent until the contrary be proved, and in case of reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal.

A reasonable doubt is a doubt that is a doubt that is founded in and is sustained by reason. It is not a whim; it is not a caprice; it is not the action of unreasonable sympathy. It is only a doubt which answers to the description of a reasonable doubt as thus defined which warrants and requires a verdict of not guilty, in the absence of an affirmative belief on the part of jurors, based on the evidence, that a defendant is innocent, and not guilty.

In this case there may be certain evidence which may not improperly be said to answer to the description of circumstantial evidence, and the law has something to say respecting circumstantial evidence.

In determining a question of fact from circumstantial evidence, there are two general rules to be observed, one that the hypothesis of delinquency or guilt should flow naturally from the facts proved, and the consistence

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with them, or, secondly, the evidence must be such as to exclude to a moral certainty, that is to say, beyond a reasonable doubt, every hypothesis but that of the defendant's guilt of the offense imputed to him.

Those rules you will apply in this case insofar as any of the evidence in this case may properly fall under the law's definition of circumstantial evidence.

Now, gentlemen, I may have omitted something.

MR. CURTIS: I respectfully request your Honor to charge the jury that the testimony of Officer Northrup as to the conversation he states he had with the defendant at the time of the latter's arrest is directly and positively denied by the defendant?

THE COURT: The jury will recollect the evidence in that regard.

MR. DERBY: I have three requests to make, your Honor.

THE COURT: Will you hand them up?

MR. CURTIS: And will your Honor indulge me a moment? The charge as a whole is unexceptionable.

MR. DERBY: The only exception I take is to the charge that the location of this store was in the County of New York, and in the Borough of the Bronx. I take exception to that statement. Our contention is it is in the County of the Bronx.

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MR. CURTIS: That goes to the general objection to the introduction of the evidence, I suppose, but I would like your Honor to charge the jury that it appears there was but one person that testified that the features of the deceased were disfigured, swollen or bruised, and that that may or may not have been caused when he fell upon the floor of the room near the open door.

THE COURT: Oh, that is comment, and I think that I will leave the evidence in that regard to the consideration of the jury.

MR. CURTIS: That they may consider it. They may consider whether the bruises, the swollen condition of the face, the injuries to the face, were the result of the fall, as the body must have pitched upon the floor.

THE COURT: The jury will consider the evidence.

MR. CURTIS: Will your Honor kindly note an exception?

THE COURT: Any requests, Mr. Wasservogel?

MR. WASSERVOGEL: None at all, your Honor.

THE COURT: Now, Mr. Derby, I think that these requests are covered in my charge.

MR. DERBY: That gives them in a slightly different form, and I respectfully request your Honor to

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charge in the language there given.

THE COURT: I am asked to charge you gentlemen as follows: "That the defendant is entitled to the benefit of every reasonable doubt on every phase of the case, and that, therefore, he is entitled to be acquitted if the jury believe he was acting in self-defense, or even if they have a reasonable doubt whether or not he was acting in self-defense.

"That where the defendant offers testimony that he was acting in self-defense it is not necessary for the defendant to prove that fact to the satisfaction of the jury, but the prosecution is required to prove beyond any reasonable doubt that the defendant was not acting in self defense.

"That one without fault himself who reasonably believes that his life or limb are endangered will be justified in killing, although he was mistaken as to the danger and peril he was in, and, in fact, was in no danger.

I charge you that.

MR. WASSERVOGEL: Just one thing, your Honor, I want to call to your attention.

THE COURT: Yes.

MR. WASSERVOGEL: In stating the evidence as to the time when the deceased tried to wrest the revolver

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away from the defendant, your Honor neglected to say that at that time they were separated by the counter, that the deceased was standing near the cash register, inside the counter, whereas the defendant was outside the counter.

MR. CURTIS: That is a matter of testimony.

MR. WASSERVOGEL: Well, your Honor neglected to state that.

THE COURT: That is a matter of testimony, and you will recall, gentlemen, what the fact was. I do not purport to have stated the testimony with any precision to you. Your recollection will control you. Now, gentlemen, you can retire.

(The jury then retires, at 4:58 P. M.)

(The jury returns to the court room at 12:12 A M)

THE CLERK OF THE COURT: Please rise, Mr. Foreman. Gentlemen of the jury, have you agreed upon a verdict?

THE FOREMAN OF THE JURY: We have not.

THE COURT: Mr. Foreman, I am in receipt of a communication from you to this effect: "To his Honor, Judge Crain. It is impossible for the jury to agree," signed with your name, Mr. Foreman.

Do you declare yourselves to be unable to agree upon a verdict?

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THE FOREMAN OF THE JURY: We do.

THE COURT: Do you ask to be discharged from the further consideration of the case?

THE FOREMAN OF THE JURY: Yes, sir, we do.

THE COURT: Gentlemen, in view of the length of the trial, which was not long, and the circumstance that you have been out now, in the opinion of the Court a reasonable length of time, and in view of the fact that you have declared yourselves to be unable to agree upon a verdict, and have asked the Court, in writing and orally, to be discharged from the further consideration of the case, you are discharged from the further consideration of the case, and, gentlemen, you may now leave. The Court wishes to thank you for the attention that you gave to the case. You are excused for the balance of the term, with the thanks of the Court.

(The jury then leaves the Court room)

THE COURT: Judge Curtis, I will hear you.

MR. CURTIS: If your Honor please, I have reflected with great care upon my duty in the premises, and have come to the conclusion, and in that conclusion I believe my colleagues will acquiesce, to offer a plea on behalf of this defendant of guilty to manslaughter in the first degree. I believe that in doing this I am subservient to the true interests of this defendant.

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THE COURT: I will hear you, Mr. Wasservogel .

MR. WASSERVOGEL: If your Honor please, in view of the fact that this case has been on trial now, I believe, for five days, and the jury have heard all of the evidence, and is unable to agree, I think that I would be justified in recommending the acceptance of the plea offered by the defense, by Judge Curtis, on behalf of the defendant, rather than to put the County to the expense of another trial. Under all the circumstances, I do recommend the acceptance of that plea.

THE CLERK OF THE COURT: Ely Geller, do you withdraw the plea of not guilty heretofore entered by you, and plead guilty to manslaughter in the first degree? Is that your plea?

THE COURT: Before the plea is taken I will say that, acting on the recommendation of the District Attorney, and for the reasons suggested by him, the Court will accept that plea. Now, the plea may be taken.

THE DEFENDANT, (Through the official interpreter, Edward J. Rosenthal) Yes, sir.

(The defendant is duly sworn and his pedigree taken.)

THE COURT: I will remand you until Friday next. It will be in the room of Part Five continued term. In the meantime, a probation officer, Mr. Kamminsky, will investigate.

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