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COURT OF GENERAL SESSIONS OF THE PEACE,
City and County of New York, Part III.

-----x
THE PEOPLE OF THE STATE OF
NEW YORK

against

MAX HERSCHKOWITZ, impleaded
with Robert Holmes.
-----x

:
: Before:

: HON. WARREN W. FOSTER, J.,

: and a Jury.

: #1801
:

New York, October 9, 1912.

Indicted for attempted burglary in the third degree.

Indictment filed August 14, 1912.

APPEARANCES:

For the People, ASSISTANT DISTRICT ATTORNEY CHARLES E.

COLLIGAN.

For the Defendant, JACOB SHAPIRO, ESQ.

A jury was duly impaneled and sworn.

James E. Lynch,
Official Stenographer.

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S O P H I A E C K M A N, called and duly sworn as a witness
on behalf of the People, testified as follows:

(The witness gives her residence as 319 East 8th
street.)

DIRECT-EXAMINATION BY MR. COLLIGAN:

Q You are in the confectionery business at 319 East 8th
Street? A Yes, sir.

Q And were in that business on the 10th of August of this
year? A Yes, sir.

Q And your place is in the city and county of New York?
A Yes, sir.

Q What is the character of the building, is it a tenement
house building? A It is a tenement house.

Q And you use a tenement for store purposes? A Only for
store, yes, sir.

Q On which floor, the street floor? A The store is on the
ground.

Q Yes, the ground floor? A Yes.

Q At what time did you leave your place of business on
that night? A One o'clock.

Q One in the morning? A One o'clock.

Q Will you state whether or not you locked the doors and
windows? A Everything was in the best condition.

Q You are positive of that? A Positively sure.

Q When next did you return to your place of business?

A It was about ten or a quarter to three. I was called down from the man that there is burglars in my store.

Q What did you see as to the condition of the doors or windows, if anything? A When I came down I came to the window, so you know the glass about how it is in a confectionery, it is one part opened with a chain, so the chain was pulled out and the corner was pulled out, broken, and part of the glass, the side part, was cracked through and through. It was tried to take out part of the glass, but they were caught in time.

Q Did you see this man there at that time when you arrived (indicating defendant)? A When I came down I saw this man and the other fellow, and the third one of them was run away.

Q You had no conversation with this man? A No, sir.

CROSS-EXAMINATION BY MR. SHAPIRO:

Q The first you knew of this so-called attempted burglary was when you were called down, isn't it? A What?

Q When you were called down, that was the first you knew of the so-called attempted burglary? A Yes, that's what they told me, there was robbers in the store.

Q You did not see this boy try to break into your place, did you? A No, sir, I did not.

Q And you did not see his companion Holmes? A No, when I came down they were locked up by two officers.

Q You found them in custody of the officers? A Yes, and

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the third officer was looking for the third fellow that escaped.

Q Was this near your store? A That was the third store, my store is 328 and this was 332.

Q Three houses away from your store? A Yes.

Q Your store is between Avenue B and C? A B and C.

Q And was this towards Avenue B or towards Avenue C?

A They ran towards avenue B.

Q How do you know they ran towards Avenue B? A I couldn't tell you that.

Q You did not see them run, did you? A No.

Q Then why did you say they ran towards Avenue B? A That is what I was told.

MR. SHAPIRO: I ask to have that stricken out that they ran towards Avenue B.

THE COURT: Yes.

Q You say the window was broken? A Yes.

Q What part of the window was broken? A The side part was cracked half a yard from the ground, where the glass is.

Q Was it scratched? A It was not scratched, it was cracked through and through.

Q A piece of glass, wasn't it? A No, only on the side part was covered with tin and a piece of tin was torn off the side, and the front window was also marks from a jimmy, big marks where they wanted to pull down the front window, but they was not able because we had two big locks inside.

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lady has her place of business? A Yes, just across the way.

Q Now, you recall the night of the 10th of August? A Yes.

Q And you were at home? A Yes.

Q And you have a room mate, haven't you? A I live with another man.

Q Did you see anything peculiar taking place that morning, late that morning? A I saw that between two and three o'clock they were standing by the window and working away at it.

Q Who was standing there? A Three men.

Q Do you know the men? A No.

Q Did you see the men that night afterwards? A I saw two, and the other one I did not.

Q Now, was one of the men this defendant here? A One was this one and one was another one.

Q Now, I want you to explain how it was that you happened to be up at three in the morning? A It was very warm and I wanted a drink of water. The seltzer was standing on the window-sill. I went to the windowsill, and when I came to the window I saw these men standing there working, and I opened the window and watched to see what they were doing. I saw them trying to open the window to see whether they could get in.

Q How far away from you were they? A Three houses.

Q Will you state whether or not any of them had a light?
A Matches.

Q When you saw them what did you do? A Myself and the

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other man went downstairs to look for a policeman.

Q How long did it take you to get a policeman? A Not long.

Q Well, how long approximately? A About five minutes.

Q What did you do when the policeman arrived? A I went and I called down the other boy; I went and called the wife, the lady, the one that was here.

Q Well, what next did you do? A That's all I did.

Q Where next did you see this man (indicating the defendant)? A In the Night Court.

Q Well, didn't you see him when he was caught? A I saw them when they held their hands up. The policemen told them to hold up their hands.

Q Where were they when the policemen told them to hold up their hands? A About two houses away from where this thing happened.

Q State whether they were walking or running when you first saw them? A They were running fast.

Q And when the policemen told them to hold up their hands they stopped? A Yes, and the third one escaped.

Q Did you see any one of them throw anything away? A I did not hear it--I did not see it, but I heard a sound.

Q And did you tell the officer afterwards about that?
A No, I did not. The officers found it out themselves.

Q Now, you are positive this is one of the men? A Yes.

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CROSS-EXAMINATION BY MR. SHAPIRO:

Q Where were you when you first saw the three men at this door? A In my house.

Q That is across the street from the place where this store is? A Just across the way.

Q And was it dark? A It was not dark. The electric light was burning.

Q Where was the electric light? A In the store.

Q There was an electric light burning in that store?

A The lamp was burning in the store, the lamp belonging to the *lady* that owns the store.

Q Was there any light on the street? A No, I saw smoke and I saw them using matches.

MR. SHAPIRO: I ask that that part be stricken out.

Q Was there any light on the street near the store? A It was a very light night.

Q I am asking you whether there was any light, any artificial light in the street near that store? A No.

Q It was the ordinary lights that can be found at three o'clock in the morning, on the average morning? A Yes, that's right.

Q And this light in the store, was it burning full force? A The lamp was there near the ceiling, across the way from my window, the usual light.

Q Full force? A It was a small light, but it was a very

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good light.

Q What kind of light was it that you saw, gas or electricity? A I think it was electric lights.

Q Well, didn't you see a flame? A I only saw that there was a light in the store and I could see them very well from my window.

Q Well, what did you see from your window? A I saw them working in front of the window about an hour, and I could not see that any longer.

MR. SHAPIRO: I would suggest that a more literal translation be given, because I understand the answer was, "I saw three people at the door". He said, "I saw three people at the door."

THE INTERPRETER: He said, "Three people at the window, I saw them working an hour and I could not look at it any longer."

Q Did you see their faces? A Yes, I saw them well from a distance. One had a blue cap and the other had a brown hat.

Q But did you see their faces? A A little.

Q Sufficiently to identify them if you did not see them since the time of that attempted crime? A Yes, I could see so that I could identify them again.

Q And you were on the second floor of a house on the other side? A On the top floor.

Q And you mean to tell this Court and jury that from the

top floor, on a dark night, three o'clock, you were able to identify three people working on the other side, with their backs turned towards you, so as to accuse them of a crime? A I said a little, I did not see them very well. I saw them a little.

Q What do you mean by a little? A I mean by a little that I know them.

Q You saw these boys before? A When I went to get the police they were still standing there and working.

Q Did you make any outcry when you saw these men at that door? A No.

Q None at all? You simply went down and went for the policemen? A I did not say one word.

Q At the time you were downstairs in the street were they still at the door? A They were stopping a little.

Q Were their faces turned toward you? A Yes, I saw them a little.

Q And they saw you? A They saw me, and the other man coming downstairs.

Q Two people together? A Yes.

Q And they did not stop? A They stopped.

Q Did they go away? A No.

Q They remained in the same spot? A Yes.

Q The other two boys that were with this boy, were they much bigger than this boy? A The other one was a little taller.

Q Who do you mean by the other man? A The third one.

Q Who is the third one? A I don't know.

Q Well, couldn't you describe him? A He had a light cap on.

Q That is all you know about him? A Yes.

Q And what do you know about this boy? A I saw this boy and the other two, they were smoking cigarettes all the time while I saw them, they were smoking cigarettes, and the third one was working away all the time. Then the two went to help. Then I saw that they would succeed in getting into the store very soon and I went away to get the police.

Q Well, why didn't you and this other man go over and grab these three boys working at the door? A Because I was afraid.

Q Now, you say two of them were smoking? A Two were smoking.

Q And one of them was working at the door? A Yes, two (pointing to the defendant).

Q You mean this one and another one were smoking? A Yes.

Q And the other boy was working at the door? A Yes.

Q So that this boy was not doing anything at the time when you saw him? A No, not at that time, but afterwards the third one called the other two to help him.

Q What do you mean by afterwards? A Two were holding onto the bottom of the window and one pushed something onto the bottom.

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QZ Well, you just said they were smoking all the time and one boy was working at the window? A They were smoking but afterwards he called them.

Q And you were watching them do all this work and you did not go to call a policeman, but were waiting? A I went an hour later and called the police.

Q An hour later you went and called the policeman? A Yes, I was afraid to go downstairs, but afterwards I did go downstairs.

Q You saw these boys working at the door for an hour?
A Yes.

Q Did you make any outcry? A No.

Q Is the neighborhood very well populated? A It was in the night time, it was quiet and no one was to be seen.

Q But it is easy enough to get a crowd there any night by making an outcry, isn't it? A At night time you can't wake up anybody.

Q So in other words, you mean to tell this Court and jury that you were standing at a window on the top floor across the street, watching three boys try to break into a store, and for an hour, and that in the hour's time the only thing they were able to succeed in doing was to make a crack in the window?

A I did not see the crack in the window. I only saw later the marks which they made with the instrument.

Q Now, let us get down to the time you called the officer;

where did you go for the officer? A Sixth street.

Q Sixth street and what avenue? A Avenue B.

Q And this other man was with you at the time? A Yes, he went with me.

Q And did you come back with the officer? A Yes, two officers. One came from Avenue B and one came from Avenue C.

Q When did you first see these boys after you came back with the officers? A When I came back with the policemen I saw them there.

Q Where were you when these boys were first seen by you? A I was not quite dressed when I came downstairs. I went towards 7th street and I asked a citizen there where can I find a policeman.

Q Just a minute, I am not asking you that. I asked when you came back with the policemen, where were you with the officers at the first time you first saw these two boys at the store? A I went to Sixth street and I came back with the officers.

Q Well, after you got back, how far away from this store were you when you first saw these three boys? A I saw these boys three houses away from there.

Q You were three houses away from there when you first saw them? A They were three houses away when I first saw them, and when they saw the police come then they started to run.

Q Where did they stay when the police came? A They saw

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the policemen coming around the corner.

Q And is this store in the middle of the block? A In the middle of the block.

Q And as soon as they saw the policemen they started to run, didn't they? A As soon as they saw the policemen coming they started to run, yes.

Q That is all.

H A R R Y R A P H A E L, (17th Precinct), called and duly sworn as a witness on behalf of the People, testified as follows:

DIRECT-EXAMINATION BY MR. COLLIGAN:

Q You are a member of the Municipal Police Force of the City and County of New York? A Yes, sir.

Q And on the night of the 10th of August you were working? A Yes, sir.

Q Where? A I was working on Avenue C from 11th street to 6th street.

Q Did you see the defendant that night? A Yes, I did.

Q Where? A I seen him on 8th street.

Q Did you arrest the defendant? A Yes, sir, I did.

Q Will you state the circumstances surrounding the arrest?

A At about 3:15 A. M. I was told that there were boys working on 8th street, in a candy store, that was on the outside working to get in. I ran there and as I was going there I seen these

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boys running away.

Q By these boys whom do you mean? A The defendant right in front of me and Robert Holmes and another man who got away.

Q All right, what did you do? A I placed them under arrest, and two witnesses, the one that was here testifying before me, and the other man identified them as the men who were working on the window and door.

Q Did you have a conversation with this defendant? A Not with this one, no, I didn't at the time, nothing at all, never said a word to him.

Q Did you have any further conversation with either of them? A When I found a jimmy.

MR. SHAPIRO: Just a minute. I object to the interspersing of any conversation had with the other defendant.

THE COURT: The objection to the question is overruled.

(Exception.)

Q You say you found a jimmy? A Yes, sir.

Q Where? A In a cellar.

Q On what street? A On 8th street.

Q Is this along the line where you saw these men running?

A Yes, sir, along the line.

Q Have you that jimmy here? A Yes, sir.

MR. SHAPIRO: If your Honor please, before anything further in this is permitted to go on I wish to object to the introduction of the jimmy.

THE COURT: It is not introduced.

MR. SHAPIRO: Well, I move to have that portion of the testimony stricken out as to the jimmy, on the ground that it has not been connected with this defendant.

THE COURT: Well, you may reserve your motion. We will go on with the testimony.

MR. COLLIGAN: Now, I offer the jimmy in evidence.

THE COURT: What identification have you?

MR. COLLIGAN: The other witness states that he saw one of these men who was running throw something along the line where they were running. The officer comes up after arresting them and picks up this jimmy.

THE COURT: Then I will receive it.

MR. SHAPIRO: I object to the admission of this jimmy in evidence, on the ground that none of the three witnesses up to date testifies they saw any of these defendants throw anything away. One of the witnesses testified he heard some sound. He did not identify the sound. This officer did not see the jimmy connected with either of the defendants or this defendant.

THE COURT: I will receive it. (Exception.)

(Marked People's Exhibit 1.)

Q Now, you had a conversation with this defendant respecting the jimmy?

MR. SHAPIRO: Your Honor, I object to that on the

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ground that it is leading and incompetent. This witness has already testified he had no conversation with this defendant.

Objection overruled. Exception.

Q Did you have a conversation with any or either of the two men? A With both of them.

Q State what the conversation was?

MR. SHAPIRO: If your Honor please, I object to this testimony on the ground that it has already been answered, that this witness has been asked whether he had any conversation with the defendants, and he answered he had a conversation with one of them but not with this one.

THE COURT: He may answer.

MR. SHAPIRO: Exception.

Q State where the conversation was connected with the jimmy? A When I had them in the station house prior to putting them in the patrol wagon---

MR. SHAPIRO: I ask that the party with whom the conversation was had be stated.

BY THE COURT:

Q Who was it? A I asked Robert Holmes, "Did you ever see this thing before"? He says "That don't belong to me, it belongs to the fellow that got away." Then I asked Herschkowitz "Have you ever seen this thing?" And he never answered.

BY MR. COLLIGAN:

Q Who was present if any one at the arrest? A At the ar-

rest there were two other officers and the witnesses.

CROSS-EXAMINATION BY MR. SHAPIRO:

Q Were you the officer that made the arrest? A I was one of them.

Q And whom did you arrest? A Why, we all, the three of us, closed in on these men and we locked them up.

Q You were coming from where? A Avenue C.

Q And the other officers were coming from where? A Avenue B.

Q And at the time you first noticed this defendant, where was he? A About three buildings away, which is about 80 feet, 80 or 90 feet away from the place where they tried to burglarize.

Q That is the time you first noticed them? A That is the time I first seen them.

Q And you were coming from Avenue C? A I was coming from Avenue C.

Q Now, can you tell us about how many feet it is from the corner of Avenue C to the place where this store is located? A Well, it must be about, well I am no practical man about figuring, but I believe it was about, according to the number of houses, it must be, it is about 100 feet or 75 feet.

Q This store is in the middle of the block? A It ain't exactly in the middle of the block.

Q Well, about? A Well, no, it ain't in the middle of the block. It is more towards Avenue C.

Q Well, you know about the length of that street, don't you? A Well, I don't know the length of any street. I could tell you about, but not exactly.

Q And you were rounding the corner of Avenue C when you first saw this defendant? A When I seen them running I was rounding the corner of Avenue C.

Q What were they doing at the time you first saw them? A Running.

Q Where was the arrest made? A The arrest was made, we halted them about three houses away from the place where they tried to get in.

Q The block on 8th street, on 8th street between Avenue C and Avenue B is a long block, longer than usual, isn't it? A Yes, sir, it is.

Q It is about twice the length of the usual street, isn't it? A Well, not twice the length, it is a long block.

Q Now, you mean to tell this jury that in the time it took you to round the corner of Avenue C and get to the middle of a long block, these boys who were running only were able to run the length of two houses? A Well, there was no outcry or anything that would cause these boys, would give these boys any idea we were coming, because these people came to us in a nice way. We were notified in a nice way, and that's how we got them.

Q You heard the testimony of the previous witness, didn't you? A Well, I heard as much as I could, being away at the

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other end of the room.

Q And you heard what he said, didn't you? A Not everything.

Q Well, didn't you hear him say that he was coming with that officer from around Avenue C, and just as he was rounding the corner with the officer the boys saw him and started to run; you heard him say that, didn't you? A I think I did, I am not sure, I couldn't hear everything he said.

Q Then the first time the boys saw you was when you rounded the corner? A The boys I don't know, they might have seen the other men. I don't know if they seen me. I know I seen them.

Q Were you running at the time? A I certainly was.

Q Why were you running when you knew there were two officers coming down from Avenue B? A Well, it is always customary to help one another out in case of trouble. It is my duty to run at that time of night anyway especially.

Q You knew two officers were coming down from Avenue B?

A I don't know how many were coming.

Q But you knew some were coming, officers? A Certainly, I could see them by the shield. There is a big electric light there and you can see.

Q Where? A On Avenue B and Avenue C, there is lights.

Q Were you on Avenue C? A Yes.

Q And you saw the shield of the officer on Avenue B?

A Yes, you can see it.

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Q Your eyesight is very good? A Very good or I couldn't pass the examination.

Q These boys were running just as you rounded the corner?

A As I came around the corner they started to run.

Q Do you know why they ran? A They must have smelled a rat, or otherwise they ~~not~~ wouldn't run, otherwise they would stand there.

Q Isn't it a fact that you saw two boys walking along 8th street? A I didn't see these two boys, these three at least, walking.

Q Isn't it a fact you were walking along 8th street?

A No, sir, it is not a fact.

Q And complaint was made? A It is not a fact. I was running.

Q On the strength of what identification did you arrest these boys? A On the strength of what identification?

Q Who identified these boys? A Why, the witnesses.

Q In what way did they identify them, what did they tell you? A They told me they seen these boys trying to break in.

Q These boys? A Yes.

Q Who told you that? A The two witnesses.

Q The one that testified just now? A Yes.

Q Did they describe their looks or anything, did they describe the looks of the boys at the time you arrested them?

A No, I simply says "Are these the men that you seen breaking

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in?" And they said "Yes, they are."

Q And you saw these two boys outside on the street, three houses away when you arrested them? A Why, I seen them running and I run after them.

Q And you did not see them at the door? A No.

Q You did not see them working there at all, did you?

A No, sir, I did not.

Q And one of these witnesses that testified before was with you at the time, wasn't he? A When I made the arrest he was there to identify them.

Q Didn't he call you? A Yes.

Q Was he there with you at the time when you were going around the corner of Avenue C? A Sure.

Q So neither he or you saw these boys do anything on 8th street at the time you rounded that corner? A Well, they were running when we seen them. They were not doing anything then.

Q That is all you saw, they were running? A Yes, that's all I saw.

Q That is all you saw, they were running? A Well, he had seen things before.

Q I am talking about that particular time. Now, where did you find this jimmy? A I found this jimmy in the cellar.

Q What cellar? A On Avenue--on 8th street between Avenue C and B.

Q Do you know the number of the house where you found it?

A I may have it in my little memorandum book. I think I have it. I am not sure. I have not got it in my memorandum book, the number of the house.

Q Do you know where the house was? A Yes, I do.

Q Do you know how many houses away from this house it was?

A About three or four houses away.

Q Are you sure? A About what?

Q Was it down in a cellar? A It was down in a cellar.

Q Do you recall the appearance of the houses along or near by this candy store? A All tenement houses.

Q Have they each a cellar? A They all have cellars.

Q Do you know how far in feet this cellar was away from the candy store? A I can't tell you how far in feet at all. Never measured it.

Q You don't know exactly how many houses away from the candy store you found this jimmy? A Three houses away. It was within three or four houses away.

Q Are you sure of that? What is that? A It was either three houses or four houses away.

Q Well, I would like to know positively whether it is three or four? A Well, exactly I can't tell you the number. It may have been a difference between 30 or 40 feet. I don't know where they threw it. That is I mean to say it may have been 30 or 40 feet, from four or three houses.

Q Was it right near where these boys were arrested? A Yes,

right near where they were arrested.

Q Right alongside of that? A Yes, I think it was in the same building, it must have been three houses away.

Q Three houses away from where they were arrested? A No, the jimmy was three houses away from the place where they were trying to Break in, and there is where they were locked up.

Q Where were these boys locked up, just where you found the jimmy? A Just where we found the jimmy.

Q Exactly at that particular spot? A In that cellar.

Q There was a cellar laying right alongside where these boys were standing? A They were standing over the cellar. The cellar is down below and they were on the sidewalk, that is, on the grating.

Q And they dropped ^{it}/right down through the grating? A Yes, that is where they dropped it.

Q Who dropped it? A Well, either one of the men. I don't know which one.

Q You don't know who dropped it? A No, I didn't see who dropped it.

Q Did you see anybody drop it? A Yes. I heard the noise, but I didn't see it drop.

Q You did not see who dropped it? A I could not tell who dropped it.

Q You heard the noise, you say? A Yes.

Q What was the noise you heard? A A metallic noise.

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Q Is there a grating over this cellar? A Yes, there is.

Q And do you mean to say the boys while running and standing right over a grating were able to drop a big jimmy like that so it would fall right through? A When we locked them up they were not standing right over the jimmy. We took them to the building line in order to look for the other man. There was three men.

Q Where was the other man? A One got away.

Q Which direction did he go? A He went in one of the buildings and we couldn't find him.

Q Was he with these boys? A Yes, he was.

Q How do you know that? A Because they all ran in the same direction.

Q They were all running at the time, the three of them?

A Yes.

Q That is all you know about it, that is all you know to connect these two with that boy? A Yes, that's all. I saw them running. What I know is I seen them running away from where they tried to break in.

Q You saw three boys running, in other words, and this was one of the boys? A Yes.

Q That is all you really know about this case? A That's all I really know.

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WILLIAM A. SMITH, (17th Precinct), called and duly sworn as a witness on behalf of the People, testified as follows:

DIRECT-EXAMINATION BY MR. COLLIGAN:

Q Did you assist in the arrest of this defendant? A Yes, sir.

Q Will you state to the jury briefly the circumstances surrounding the arrest? A I was in 6th street between Avenues C and B, only a short distance off the corner of Avenue B, when I seen the man on fixed post at Avenue B and 6th street leave his fixed post. I had seen a citizen come over and tell him something. What he told him I didn't know, but I seen him leave his fixed post, and when he left his fixed post I knew there was something wrong. I walked over and asked him the trouble. He told me that there was a couple of men--

BY THE COURT (interposing):

Q Never mind what he said to you. That is not competent evidence.

BY MR. COLLIGAN:

Q Just tell what you did in consequence of that conversation? A I went around up Avenue B to 8th street. I had learned that there was a couple of men attempting to burglarize a store. I says "We will go down now along the houses so they don't see us, because if they see us they have a good lead on us and if they attempt to run they will get away from us." So

we went along in close to the wall until we got near at hand, and these three defendants, there was three there and one got away, as we got close to them they seen us and they attempted to run. They only got a chance to go a few houses when they ran into our arms. We got two, and as we got the two I passed them over to the other men. I says "Watch them, there goes another up through the house."

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I chased him through the hall after him and he had got a start on me. I ran so fast that in running I swung the stick and I had to pass the stairway; by that time he had gained the first floor. I ran up after him.

MR. SHAPIRO: If your Honor please, I object to all this testimony as to the escape of another man that was there.

Objection overruled. Exception.

Q Go on? A I ran up after him, I again gained on him. I did not care to fire a shot at the man, not knowing that he had committed any crime or attempted crime. I didn't know what I was going to shoot after him for, so I wouldn't shoot. I threw the stick at him and the stick hit him across the legs and he fell, and he had again gained on me and gained the entrance to the roof and escaped.

On my way down before I chased this man I seen one defendant, Herschkowitz, *aa* I was coming down the street, when he noticed us and he ran three houses and stopped there and stooped that way (indicating) and I heard something sound, a sound as if something, a piece of iron had hit a grating. We looked around and couldn't see anything, and after the arrest the officer in the case, he went back and found the jimmy there in about three houses away from where this crime was committed.

Q Did you have any conversation with this defendant?

A I asked him who the other man was that escaped, what his name

was. I asked him what they were doing at that hour of the night.

Q What did he say? A They told me they were out for a walk.

Q And what is all you know about the case? A That is all I know about it.

CROSS EXAMINATION BY MR. SHAPIRO:

Q You were aware at the time you were first notified of this of what was taking place? A I was not notified. The man on fixed post was noticing I followed him up Avenue B.

Q Then you did not know anything of what was taking place? A Not at the time being, no.

Q You came up through Avenue B? A I was in 6th street near Avenue B.

Q You went up through Avenue B? A It was between 7th and 8th street on Avenue B that the other officer from the 15th precinct notified me of what was going on.

Q So that there were two officers coming down 8th street from Avenue B? A Yes.

Q And neither of you knew why you were going there? A I knew after I passed St. Brigid's Church on Avenue B, where I asked him where he was going.

Q Asked who? A I asked the officer what was the trouble, the officer that had been on fixed post.

Q And as a result of the conversation with him both of you were walking down 8th street? A He had told me where he was

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going, of what took him away from his fixed post.

Q All right. Can you tell us how much distance it is from the corner of Avenue B to this store? A Well, it is surely two-thirds of a block. Exactly how long one of those streets are I don't know, but it is two-thirds of the street from Avenue B.

Q But you don't know the length of the street? A I don't know the length, but I should judge it would be about three hundred to four hundred feet.

Q Where were you and the other officer when you first noticed this boy? A Well, we had not noticed him until we got within about, I should judge 150 feet away from the place.

Q About 150 feet away from the place, you first noticed these boys? A Yes.

Q What were they doing at the time? A Well, they had looked up and they attempted to run and they seen us, they immediately stopped short. This one defendant here stopped down and slid something in the grating, and we come up and grabbed them and told them to throw up their hands.

Q Where were they when you first noticed them? A They were in front of this candy store.

Q Standing there? A No, they were out a little way from the candy store.

Q On the sidewalk? A Yes.

Q And when they saw you coming they started to walk?

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A They started not to walk, on a trot like.

Q Run? A I wouldn't exactly call it run.

Q There were three of them? A Yes, three.

Q Were they all three walking in one line? A No.

Q How were they walking? A They were scattered like.

Q On the same sidewalk? A On the same sidewalk. One was facing Avenue C, the man that escaped.

Q One was facing Avenue C? A He had come up with them and attempted to go back to Avenue C.

Q Which was the one which was facing Avenue C? A The man that escaped.

Q So that the man that escaped was in back of these two?
A He was in back of them.

Q Did you hear the testimony of this second witness before? A The short stout man?

Q Yes? A I did.

Q You heard him say that these two boys did not hold any instruments in their hands, that they were smoking cigarettes all the time? A I did not.

Q You did not hear him say that? A No.

Q How do you know this boy was the one that dropped the jimmy? A I had seen him, he was the man nearest to the house line.

Q In front? A In front.

Q Nearest to you? A Nearest to me.

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Q And how far away from the place where this attempted burglary took place did you find the jimmy? A I didn't find the jimmy. The other officer found the jimmy.

Q And how do you know where it was? A He had told me so. That is where we looked for the jimmy, but at the time it was dark.

Q Who told you? A The other officer, Raphael.

Q Didn't you know that the jimmy was dropped? A I didn't know that there was a jimmy dropped, no.

Q You just testified you heard the jimmy drop? A I didn't say I heard a jimmy drop. I said something dropped which sounded like it.

Q Didn't it appeal to you reasonable to search and find out what dropped? A We looked down. I couldn't gain entrance to the cellar at the time and I didn't care to go in and wake people up at that hour of the morning.

Q When was that? A That was about three o'clock in the morning.

Q So that the jimmy was not found at that time ?
A No, not to my knowledge.

Q It was found sometime later? A As far as I understand, yes.

Q And at the time these boys were arrested no search was made for the jimmy, was there? A Yes, there was a search made.

Q But you couldn't get any? A We couldn't get in. The

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best we done was strike matches and look through the grating.

Q And when you came back later you found the jimmy?

A I did not go back later.

Q Who came back later? A The other officer.

Q And that is the one that found the jimmy? A As far as I understand, yes.

Q How much time elapsed between the time when these boys were arrested and the time he found the jimmy? A I don't know when he came back and found the jimmy.

Q Who made the arrest? A The other officer.

Q The one that testified here just now? A Yes.

Q He was the one brought these boys away? A With my assistance. It was on his post.

Q And at the time he was bringing them away he did not yet have the jimmy? A Not that I seen.

Q Now, you say one of the boys escaped? A Yes.

Q It was not this boy, of course? A Surely not.

Q Was the boy in back of him? A The boy in back of him which had run up with him, stopped short, turned around when he seen us and made for Avenue C.

Q Now, there were three officers altogether? A Yes.

Q And one was coming up from Avenue C? A Yes.

Q And two coming down from Avenue B? A Yes.

Q And there were three boys altogether walking at a trot, and still one of these boys was allowed to escape? How do you account for that? A He ran up through the building when he

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seen the officers.

Q Well, you were in front of him? A His back was facing me. I was not in front of him. I was in back of him.

Q Well, which way did he run? A He ran towards Avenue C. He had come running towards Avenue B with the other two defendants. When they seen us he stopped short and that is when this instrument was dropped.

Q When he saw you the instrument was dropped? A When the three of them seen us they stopped short.

Q You are just testifying about the boy that escaped and you said he was running towards Avenue C, and when he saw the officer coming up avenue C he ran towards Avenue B, and when he seen him he dropped this thing? A He did not. This is the man dropped it (indicating the defendant)

Q How do you know that? A Because he was the nearest to the house line when he dropped it.

Q You don't know what he dropped? A No.

Q All you know is he bent down? A He stooped down, he was right alongside the grating, he stooped down and I seen his hand go that way (indicating) and he straightened up again.

Q That is all? A And as he stooped I heard something click like.

Q Was the bottom of the cellar a cement floor, do you know? A No, there is dirt there, rubbish which probably congregated there for six months or more.

Q And you mean to say you heard a metallic clang on that?

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A As it went through the grating.

Q When that jimmy fell down into the grating, into the dirt and rubbish, that you heard a clang? A As it went through the grating I heard the clang.

Q But you say he bent down and gently threw something?

A He bent down, whether he dropped it gently or not I don't know.

Q But you heard the clang? A I did hear the clang.

Q You did not make any search for it? A I stated before I did make a search.

Q But you did not see anything? A I did not see anything.

Q Isn't it a fact -- I withdraw that -- you testified a moment ago that when you chased the third boy you did not fire a shot because you didn't know that a crime or attempted crime was being done? A Yes, sir.

Q Now, isn't it a fact that when you came there you found these two boys walking, and you in a conversation with the other officers said, "We can't arrest these boys, we got nothing against them", and the other officer told you "Oh, never mind, we will take them in anyhow". Isn't that a fact?

A I have made that statement, yes, sir, but after investigating and found where part of the window had been torn away, the baluster like on the corner of the window, the lock torn away from underneath this baluster and the window cracked and the window forced and marks of the jimmy on, I thought there was enough

evidence to make an arrest.

Q Yes, but you did not see these boys do that? A I did not.

Q And at the time you came up the other officer was right in back of these boys, wasn't he? A Which officer?

Q The officer just a moment ago? A He was in the back .

Q And he told you that some crime had been committed or attempted? A I had no conversation whatever with the other officer before ---

Q (Interrupting) But you just testified you said "We have nothing against these boys". A Not with this officer.

Q And you heard this officer testify before? A Yes.

Q And that officer testified that at the time he got up to these boys he knew that a crime was committed? A If he knew it, I don't know of what reason he had for knowing it. I didn't know it.

Q Well, why were you walking down Avenue B, or from Avenue B? A I had been informed there had been a crime.

Q Then you did know a crime was committed? A I didn't know it. I had been informed there had been.

Q You knew that something suspicious was going on in 8th street? A From what I had been told, yes.

Q You came down 8th street prepared to make an arrest? A If what had been told me was true.

Q Well then, why did you say to the officer "Let us let

these boys alone, we have nothing against them"? A Until we found we did have something against them we could not make an arrest.

Q But, he had found that already? A Not that I knew it.

Q Well, he testified to that a moment ago that at the time he came up to the boys, he knew that a crime had been committed. Why did you go back there for and search to see if a crime was committed? A Well, I didn't want to make an arrest and I didn't want to let the boys go until I knew what they had done, and I thought he should do the same.

Q Well, the only knowledge on which you made the arrest was when you came back and saw that the door had been tampered with? That is all the knowledge you had? A The door had been tampered with and the lock had been broken off and the window cracked.

Q That is all the knowledge you had? A And this man had dropped the jimmy.

Q You don't know whether it was a jimmy or not? A I did not.

Q Then why did you say that? A Because the other officer found this instrument afterwards in the cellar.

Q That is all.

MR. COLLIGAN: That is the People's case.

THE DEFENSE.

MAX HERSCHKOWITZ, the defendant, called and duly

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sworn as a witness on behalf of the defense, testified as follows:

(The witness gives his residence as 133 Goerck street.)

DIRECT EXAMINATION BY MR. SHAPIRO:

Q You are one of the defendants in this matter?

A Yes, sir.

Q You heard the charge against you, attempted burglary in the third degree? Are you guilty of that crime? A No, sir, not guilty.

Q Were you on 8th street between Avenue B and C, at three o'clock in the morning on August 10th? A I was over--

Q Were you there? A No, sir, I was over in 8th street nearer to Avenue B.

Q Answer the question, were you on 8th street between Avenue C and B at three o'clock in the morning of the 10th of August? A Yes.

Q Was anyone else with you at the time? A One fellow, Robert Holmes.

Q A friend of yours? A Yes.

Q Was there any one else with you at the time? A No, sir.

Q What were you doing on 8th street at three o'clock in the morning? A We come back from North Beach.

Q What time did you come from North Beach? A Well, it was around half past one.

Q Where were you going? A I went home and I tried to wake up my people to go to sleep. I says I wouldn't wake them

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up, I will take him home. I went up Avenue ^B and turned in 8th street to take him up.

Q Now, were you working at the time, at least were you employed at the time you were arrested? A Yes, sir.

Q For whom were you employed at that time? A Kramer.

Q Where has he his place of business? A He is a fruit pedler.

Q Where is his place of business? A Well, he has no business. He peddles with a wagon.

Q Well, where does he reside? A 98 Goerck street.

Q And you were working for him at the time? A Yes.

Q And what was the nature of your duties as an employe for him, what did you do for him? A I delivered the goods for him, sold some goods for him.

Q And because of the fact that were working for him, what time of day did you have to come out? A Between four and five o'clock.

Q Every day?

A Yes, sir.

Q On this particular day in question were you working for that man?

A Yes, sir.

Q And you were to go to work at what time that morning?

A Five o'clock I was supposed to be at work.

Q And where did Holmes live? A 103 East 105th street.

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Q And you were taking Holmes up to his house with the intention of going to work after that?

A Yes, sir.

Q How long had you been working for Kramer?

A About one month.

Q And before that were you employed?

A Yes, sir.

Q Where were you employed before that?

A By Max Steinberg.

Q Where is his place of business?

A 38 Bond street.

Q How long were you with Max Steinberg?

A Over a year.

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Q What were you doing there? A Operator on men's neck-wear.

Q What were you earning a week?

MR. COLLIGAN: I object to that.

A From fifteen dollars.

THE COURT: Well, it is already answered.

Q Fifteen dollars a week? A Yes.

Q Were you living home at the time? A Yes.

Q Were you living home at the time you were arrested?

A Yes, sir.

Q Have you a father and mother living? A Yes, sir.

Q Why did you leave the employ of Mr. Steinberg? A It was over the season.

Q There was no work to do? A Yes, sir.

Q And you were working piecework? A Yes, sir.

Q And then you immediately entered the employ of Mr. Kramer? A Yes, sir.

Q Did you ever have a bank account? A Yes, sir.

Q Where did you have your bank account? A April 2nd.

Q This year? 1912? A Yes.

Q In what bank? A The Dry Dock Savings Bank.

Q You opened your account on the 2nd of April? A Yes, sir.

Q What did you open your account with? A Ten dollars.

MR. COLLIGAN: I object to this kind of testimony as

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incompetent.

THE COURT: Well, I do not think I would waste any more time about that. I do not think the fact that a man has a bank account necessarily establishes his honesty.

MR. SHAPIRO: Well, a boy of his age, it tends to prove --

THE COURT: No, it proves he has a bank account and nothing else. We will not argue it any more.

Q Did you in any way attempt to commit the crime on 8th street between Avenue B and C on that night? A No, sir.

Q Did you have a jimmy in your hand? A No, sir.

Q You heard the testimony that you and another boy were standing smoking; do you smoke? A I never smoked in all my life.

Q You never smoked in all your life? A No, sir.

Q At the time you were arrested were you searched? A Yes, sir.

Q Was any instrument found on you? A No, sir, nothing at all.

Q Did you ever have in your possession any instrument, such as a jimmy? A No, sir.

Q Did you drop any jimmy down a cellar as you were walking along on 8th street? A I didn't drop anything. I didn't even bend down.

Q You were walking along? A Yes, sir.

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Q Were you running at any time? A No, sir, we were walking.

Q Did you see Officers coming towards you? A Yes, sir.

Q Did you run or walk when you saw them? A I was walking.

A Did you know they were coming after you? A No, sir.

Q Was there any one else on the street at the time? A Yes, sir.

Q Did you see somebody running? A Well, I didn't see any one run.

Q Well, was there another boy there? A There was one boy with me.

Q But you don't know anything about a third boy? A No, sir.

Q You were not a third boy, were you? A No, sir.

Q Did you stop at all at this candy store? A No, I was walking.

Q You were going on from Avenue C to Avenue B? A Yes, sir.

Q And at no time did you break into a trot or run? A I was walking all the way through.

Q At the time you were arrested was any conversation had between you and the officers? A No, sir.

Q Did the officers have a conversation among themselves?

A One of them said to another, "We ain't got nothing on these boys, let them go." No one of them said, "No, we will take

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them."

Q And that is all that was said? A That's all that was said there.

Q Was anybody there to identify you at the time you were arrested? A Well, there was one of them witnesses that took the stand, and he himself said that I was not the boy at the window.

MR. COLLIGAN: I object to this, what he said.

THE COURT: Objection sustained.

Q That witness is in court, you say? A Yes, sir.

Q All right, that is all.

CROSS-EXAMINATION BY MR. COLLIGAN:

Q How old are you? A Nineteen.

Q How long have you been out of school? A Five years.

Q Five years? A Yes, sir.

Q When did you begin to earn fifteen dollars a week?

A Well, after I have learned the neckwear trade.

Q When? A Around a year ago, a little over a year.

Q You left school at fifteen? A Yes, sir.

Q What did you do when you left school? A Well, I was arrested then.

Q For what? A I don't know for what.

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

Q You were in the House of Refuge, weren't you? A Yes, sir.

Q And you don't know what you were arrested for? A No, sir.

Q And that is when you left school? A Yes. I didn't leave school. While I was in school they took me out of school.

Q Well, don't you know what you were arrested for? A (No answer).

Q Now, you left school when you were fifteen? A I didn't leave school. I was arrested when I was in school. I was taken out of school.

Q At what age was that? A Around fourteen.

Q How long were you in the House of Refuge? A Sixteen months.

Q What did you do when you left the House of Refuge? A I went to work.

Q Where? A On Lafayette street.

Q In what line of business? A Neckwear.

Q And you worked there for how many years? A One year.

Q And you got fifteen dollars a week? A No, sir, that is when I first started the trade.

Q Well, at the end of the year then you got fifteen dollars a week? A No, sir, not at the end of the year.

Q Well, all right, you worked how long after that? A While I worked there some other fellow called over there at that job and he says he will give me a dollar more and I went to work for him.

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Q And you don't know what you were arrested for? A No, sir.

Q After serving sixteen months for it? A Yes.

Q You worked for a fruit peddler, you say, on the 10th of August? A Yes, sir.

Q Is he here to-day? A I think he is.

Q What day of the week was August 10th? A Saturday morning.

Q And you usually went to work at four o'clock in the morning? A Between four and five.

Q What time did you go to North Beach this night? A I went around three o'clock that day.

Q Three in the day? A In the afternoon, yes, sir.

Q Did you have any sleep the day before or that same day before you went at three in the afternoon? A No, sir.

Q Didn't have any sleep at all? A No, sir.

Q And you would tell the jury you were to go to work that morning at four o'clock? A Yes, sir.

Q What time did you leave North Beach? A What time? It was around twelve or half past twelve.

Q How did you come over from North Beach? A Grand Street car.

Q What did you say you were doing down in that vicinity?
A Sir?

Q What were you doing down there? A We were in amusement

places.

Q Where you were arrested at three o'clock in the morning, amusement places? A Well, I was taking Robert Holmes home then.

Q Taking him home? A Yes.

Q How old is he? A Twenty-one, twenty.

Q And you are nineteen? A Yes.

Q And you were taking him home? A Well, I was walking home with him.

Q And his home is away uptown in 130 something? A ¹⁰⁵~~150~~th street.

Q And yours is away downtown? A Yes.

Q And you want the jury to believe that that is the reason you were there? A Yes.

Q How did you get to Avenue B? A Well, he took me home and I went up and the door was closed, so I come down again and I told him I ain't going to wake my people up because I will have to go to work right away. So he says, "Take me up towards the elevated." So I told him I will take a little walk with him until the elevated. So I started to walk that way, went up on Avenue B and turned on Eighth street, and while we were walking on 8th street between Avenues B and C, while we were near Avenue C the cop come over to us and says we were under arrest.

Q What did you say to him? A I didn't say anything to him. I wanted to know why.

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Q Well, then you did say something to him? What did you say to him? A I asked him why.

Q Then what did he say? A He asked us if we were the fellows over at that store. So we told him no.

Q Had you seen any one else on the street? A No, sir.

Q No one else but you fellows? A Yes, sir.

Q Are you sure you were not with two other men? A No, sir, one.

Q Did you hear one of these witnesses here named Siegel testify that he saw you at the door of the store? A Well, at the time that they got us he says "I ain't the fellow that was at the store, it is the other fellow that got away."

He said

Q You were not the fellow at the store? A Yes, sir, that it was another fellow that got away.

Q You heard him say that? A Well, that was what he said at the time we were arrested.

Q He said that you were not the man that was at the store? A Yes.

Q But it was the other fellow that got away? A Yes.

Q Did you understand from that that he meant that the other fellow was with you? A No, sir.

Q What did you think he meant? What other fellow do you suppose he referred to? A Well, I don't know the other fellow.

Q Didn't you ask him which man he referred to? A Well,

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yes, sir, he says the fellow that ran up in the house.

Q The fellow that ran up in the house, and you were not with the fellow that ran up in the house, were you? A No, sir.

Q You had never been with him that night? A No, sir.

Q Now, isn't it a matter of fact that you three fellows were together? A We were not together.

Q And isn't it a fact that you attempted to burglarize that store? A No, sir.

Q And isn't it a fact that one of you had a jimmy? A Well, none of us had a jimmy.

Q And isn't it a fact that you were the only fellows on that street when the officers came, and isn't it a fact that Siegel, that witness, pointed you out as one of the three men? A No, sir, he did not point me out.

Q What did he do? A At the time when they got us he says, "This ain't the fellow that was over there."

Q He said you were not the man? A Yes, sir, he said that.

Q Did you hear him testify on the stand to-day? A Yes, sir.

Q Did you hear him say to-day that he said you were the man? (No answer).

Q That is all.

I S I D O R E K R A M E R, called and duly sworn as a witness
on behalf of the defense, testified as follows:

(The witness gives his residence as 98 Goerck street).

DIRECT EXAMINATION BY MR. SHAPIRO:

Q What is your business, Mr. Kramer? A Wholesale produce.

Q And in the course of your business do you operate a horse and wagon? A Yes, sir.

Q Do you know Max Herschkowitz? A Yes.

Q How long do you know him? A I know, I sell his father, he has got a store and I sell his father goods.

Q Well, how long do you know Max Herschkowitz? A From the store I know him.

Q Well, how long? A About a year.

Q Was he employed by you? A Yes.

Q Was he employed by you on the 10th of August, 1912, at the time of his arrest? A He worked for me from July until--

Q Well, at that time he was working for you? A Yes.

Q What were his duties as employe to you? A To go down for the horse in the morning and bring it down. Then I went down on the dock to buy goods.

Q And you were with him? A What, with the horse?

Q Well, when did you first go with him? A What do you mean?

Q Well, you were supposed to meet him every morning, were

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you? A Yes.

Q At what time did you meet him every morning? A Five o'clock.

Q And before that time he was supposed to go down and get the horse and hitch him up to the wagon? A Yes.

Q And he was supposed to do that on that morning in question, wasn't he? A Yes, sire.

Q Do you know Max Herschkowitz's reputation in the neighborhood? A I know from his father, he is very good.

Q You only know from his father and that he is an employe of yours? A Yes.

Q That is all.

MR. CODLIGAN: No questions.

MAX STEINBERG, called and duly sworn as a witness on behalf of the defense, testified as follows:

(The witness gives his residence as 126 Cannon street).

DIRECT EXAMINATION BY MR. SHAPIRO:

Q Mr. Steinberg, do you know Max Herschkowitz, the defendant in this action? A Yes, sir.

Q What business are you in? A Neckwear contractor.

Q Where have you your place of business? A 38 Bond street.

Q And you recall when Max Herschkowitz was in your employ? A Yes, sir.

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Q When did he leave your employ? A Well, he left around June.

Q Around June of this year, 1912? A Yes, this year.

Q How long had he been working for you? A Over a year.

Q And what was the nature of the work he did for you?

A Operating.

Q On a machine? A On a machine.

Q He was working for you over a year, you say? A Over a year, yes, sir.

Q And did you discharge him? A No, sir, it got slow after the season and he left the trade.

Q Did you employ other working men? A Yes, sir.

Q How many others? A About twelve more.

Q About twelve more besides him? A Yes.

Q You have your neckwear place now too, haven't you?

A 38 Bond street.

Q You would be willing to take this boy back in your employ, wouldn't you? A Yes, sir.

Q You have always found him honest when he was with you?

A Yes, sir, I used to trust him with money and everything, used to send him to the bank and used to send him to houses and all over. He used to go to the bank for me and I used to send him out with work to deliver sometimes.

Q You used to entrust him with money for the bank? A Yes.

Q And you would send him around with work? A Yes.

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Q And you have no complaint against him at all? A No, sir.

Q And you would be willing to employ him to-day? A Yes, sir.

MR. COLLIGAN: I object to that.

MR. SHAPIRO: That is all.

MR. COLLIGAN: No questions.

MR. SHAPIRO: The defendant rests. Now, if your Honor please, I move to dismiss the complaint in this action, on the ground that there has been no sufficient identification, no sufficient proof of the motive of this crime or intention to fasten itself upon the defendant in this action.

Motion denied. Exception.

Mr. Shapiro closed the case on behalf of the defense.

Mr. Colligan closed the case on behalf of the People.

The Court charged the jury.

(The jury found the defendant guilty of attempted burglary in the third degree).

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The People vs. Max Herschkowitz.

THE COURT'S CHARGE.

HON. WARREN W. FOSTER, J.

THE COURT: Now, gentlemen of the jury, the defendant at the bar is not charged with burglary. He is charged with attempting to commit burglary.

Burglary is the breaking and entering into a building, or any part of a building, with the intention of committing a crime therein. There are two elements: First, the felonious intent, as the law has it, that is to say, the intention of committing a crime. If there was an intention of committing a crime^{therein}, and then a building is broken into and entered, it is burglary. Here it is claimed that the defendant, with the intention of burglarizing the premises, did an act tending to burglarize them, but failing in its purpose. That is to say, that the defendant, with the intention of breaking into these premises, used a "jimmy" on the door. If the defendant did any act with the intention of committing crime, which act failed to complete the crime, and yet tended towards its commission, he is guilty under the law of an attempt.

An attempt to commit a crime is by our law made a crime. Thus, Mr. Foreman, if I struck at you and some one caught my arm before it struck you, I would attempt

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to strike you, and if I attempt to strike you, that is a crime. Here, the charge is an attempt at burglary; not burglary, ^{but} attempted burglary. You have heard the evidence pro and con. Take it and use your own good common sense. It is true that when citizens take their places in the jury box, it is not expected that they leave their common sense behind. You are expected to use that same common sense, that knowledge of human nature that you use in your ordinary affairs. If you do that and weigh the evidence carefully, giving the defendant the benefit of every reasonable doubt, and at the same time trying the case fairly for the people, you will do your full duty.

Gentlemen, take the case and determine whether or not the defendant is guilty of an attempt at burglary in its third degree.

MR. SHAPIRO: If your Honor please, I ask your Honor to charge the jury that this case rests purely on circumstantial evidence, and as such --

THE COURT: Well, I do not know that it does. The officer says he saw the boy there. That is direct evidence. I cannot tell them it rests solely on circumstantial evidence. It is for the jury themselves to weigh all the evidence, giving it the credence which they think it deserves.

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MR. SHAPIRO: And that if the jury find the evidence to be solely circumstantial, the facts proved must be all consistent and point to the guilt of the defendant and besides must be inconsistent with his innocence.

THE COURT: Well, that is good law, but I do not think it applies in this case. Gentlemen, take the case.

MR. SHAPIRO: I take an exception.

(The jury retired at 12:45 o'clock p.m.)

The jury returned to the court room at 2:05 o'clock p.m.

THE CLERK: Gentlemen of the jury, have you agreed upon a verdict?

THE FOREMAN: We would like to have read over the testimony of the witness, Mr. Siegel.

THE COURT: Yes, the stenographer will read the testimony.

(The stenographer reads the testimony to the jury as directed)

THE COURT: Now, gentlemen, if that answers your question, you may retire.

(The jury rendered the following verdict:

We find the defendant guilty of attempted burglary in the third degree).

MR. SHAPIRO: If your Honor please, I move to set

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aside the verdict of the jury on the ground that it is
against the weight of evidence, on the further ground
that there has been no identification at all of the
prisoner, and on all the grounds specified in Section 999
of the Code of Civil Procedure.

Motion denied. Exception.

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