

START

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CASE

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B e f o r e :

HON. JAMES T. MALONE, J.,
and a jury.

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Frank S. Beard,
Official Stenographer.

CASE STUDY

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THE PEOPLE'S TESTIMONY.

FREDERICK MARTIN, of 209 West 66th Street,
a witness called on behalf of the People, being duly sworn,
testified as follows:

DIRECT EXAMINATION BY MR. PRESS:

Q Mr. Martin, what is your business? A Just now I'm
in the restaurant supply business, catchup business. I sup-
ply restaurants and oyster and chop houses.

Q How long have you been in the restaurant business?

A Twenty years.

THE COURT: Pardon me.

BY THE COURT:

Q Did I understand you to say that you are in the ketch-
up business? A Yes, sir; supplying restaurants and oyster
houses with ketchup.

BY MR. PRESS:

Q On the 27th day of July, 1913, had you a restaurant?

A Yes, sir.

Q And where was it situated? A 172 West End Avenue.

Q 172 West End Avenue? A Yes, sir.

Q And that is in the county of New York? A Yes, sir.

Q And about how long had you been in business in that
place? A About three months.

Q Eh? A About three months.

MR. SIMPSON: Now, I place upon the record, at this time,

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a motion that I ask your Honor to declare this trial a mis-
trial, upon the ground that the jurors in the previous case
have come in, and rendered their verdict in the presence of
this jury, to the prejudice of this defendant.

THE COURT: Motion denied.

MR. SIMPSON: Exception.

BY MR. PRESS:

Q You said, I believe, that you were about three months
in this place prior to the 27th of July, 1913? A Yes, sir.

Q That is, at 172 West End Avenue? A Yes, sir.

Q Now, before that time did you have a restaurant in any
other part of the City? A Yes, sir.

Q Where? A 520 West 47th Street.

Q 520 West 47th Street? A Yes, sir.

Q Between what avenues was that? A Between Tenth and
Eleventh Avenues.

Q And how long had you maintained the restaurant there?

A I had a restaurant in two places in that street, two places
in the same block, altogether about two years.

Q And during the time that you had that restaurant there
did you know this defendant? A Yes, sir.

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

Q And a man by the name of McGlynn? A Yes, sir.

Q And a man by the name of Flood? A Yes, sir.

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Q And also one by the name of Reynolds? A yes, sir.

Q Is that correct? A Yes, sir.

BY THE COURT:

Q Did you know them by name or by sight? A By name.

Q You knew all of them by name? A Yes, sir.

BY MR. PRESS:

Q Well, did you know their addresses? A I did not, except one.

Q And who was that? A McGlynn.

Q McGlynn? A Yes, sir.

Q That was when you resided down there, at 47th Street?

A Yes, sir.

Q But, after you moved to West End Avenue, did you know of your own knowledge where he lived? A No, sir.

Q Now, the night of the 27th of July, 1913, did you see this defendant? A Yes, sir.

Q Eh? Speak louder, please? A Yes.

Q At about what hour of the night was it? A At about two or three minutes past twelve.

Q Two or three minutes past twelve? A Yes, sir.

Q And at the time you saw him where were you? A I was behind the counter.

Q Behind the counter? A Yes, sir.

Q Were there any persons in the store proper at that time? A I beg your pardon?

Q Were there any persons in the restaurant at that time? A No, sir.

Q And was Potter alone when you saw him? A Alone?

Q Yes, was he alone when you saw him? A No.

Q Well, were there any other persons with him when you saw him? A Well, there was three with him.

Q Three? A Yes, sir.

Q Well, now; what I want to get at is this. Did he enter your store with ~~four~~ three others? A Yes.

Q Now, did any others enter after those four? A Another four.

Q Another four? A Yes, sir.

Q And about what interval of time elapsed between the entrance of the first four and the entrance of the last four? A Oh, about two or three seconds.

Q And after the eight had got into the store, did any others follow in? A Four more.

Q And what interval of time elapsed between the entrance of the second four and the entrance of the third four? A To the best of my recollection it was about the same time.

Q About the same time? A Yes, sir; the same time; and two more came right behind the last four.

Q Now, had you seen any of these men between the time that you had been---that you had your store in 47th Street,

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and the time you opened your place in West End Avenue? A No, sir; I don't believe I did.

Q No? A No.

Q Had any of them been in the store? A No, sir.

Q From the time that you started to keep it, on West End Avenue? A No, sir.

Q And had you invited this party to your place, that night? A No, sir.

Q Well now, I want you to describe the store. Is there a counter in that store? A Yes, sir; on the left hand side going in.

Q On the left hand side going in? A No, I mean the right hand side going in.

Q On the right hand side going in? A Yes, sir.

Q Now, about how wide is the store? I am speaking of the store itself, where your patrons go to eat? A I should judge about 12 or 13 feet.

Q Wide? A Yes, sir.

Q And how deep is the restaurant, the store itself? A About 25 feet.

Q And how long is the counter? A Ten foot.

Q And does it run from the door into the store? A From the door into the store?

Q Yes. About what distance of space is there between the wall and the outside of the counter? A The outside?

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Q Yes, the outside of the counter? A Well, I should think about four feet.

Q Four feet? A Yes, sir.

Q Well, what width would you say the counter was? A About twenty or thirty inches.

Q And then the difference is made up in the space behind the counter; is that right? A Yes, and on the outside.

Q So that you would say it was about four feet; is that right? A Yes, sir.

Q Now, behind that counter is a range or fire of any kind? A A gas stove.

Q A gas stove? A Yes.

Q And do you cook anything there? A Yes, sir.

Q What? A Oysters.

Q For the people who come in? A For the people, yes.

Q Now, separating that space behind the counter from the store proper, is there any partition or gate or anything of that kind? A Yes, sir.

Q What is there? A A partition.

Q Well, I mean separating the space behind the counter? A Oh, no; there is no partition. There is a door at the end of the counter.

Q There is a door at the end of the counter? A Yes.

Q So that when you walk behind the counter, you have to open this door; is that right? A Yes, sir.

Q And does that door open out or in behind the coun.

A It opens from the outside.

Q So that when you are behind the counter, you just push the gate or door open as you walk out; is that right? A Yes, sir.

Q And how many tables were there in that restaurant, on the night of the 27th of July, 1913? A Four tables.

Q Four tables? A Yes, sir.

Q And how many chairs were at those four tables? A There were three tables and four chairs, and one table with two chairs.

Q I see. Now, was there any other furniture in the restaurant proper, on that night? A In the back of the restaurant was a bureau, a bread bureau.

Q And was that at the rear end of the store, up against the wall? A Not exactly against the wall, but about two foot from the wall.

Q Two feet from the wall? A From the partition, at least.

Q From the partition? A Yes, sir.

Q Now, that partition that you have referred to, can you go behind that partition? A Yes, the door is behind the bureau, almost behind the bureau, about half the door.

Q And what kind of a room is that? A It is my living room.

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Q You mean your bedroom? A Yes, sir; my bedroom and living room.

Q And is that the full width of the store? A The full width, or the full length of the store?

Q The full width of the store? A Yes.

Q And how deep is that room? A About twenty or twenty-two feet.

Q About 20 or 22 feet? A Yes, sir.

Q Now, back of that room, is there another room? A A kitchen.

Q And is that the width of the store? A That is the width of the store all the way through, except the hall. I believe it is the same width.

Q About how deep is that kitchen? A That kitchen is about, I should say, fifteen feet long by the same width.

Q Now, on this night, and before these men came in, had you any friends in any of the rooms back of the store?

MR. SIMPSON: I object. I object to the word "friends".

BY MR. PRESS:

Q Well, had you anyone? A I had five friends.

MR. SIMPSON: I move to strike out the word "friends".

THE COURT: No, I will let the answer stand.

MR. SIMPSON: Exception.

BY MR. PRESS:

Q And in which room were they? A They were in the

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kitchen.

Q In the kitchen? A Yes, sir.

Q And about what time did those friends arrive? A I couldn't say what time they did arrive, but they must have been there about --

MR. SIMPSON: I object to the "must have been".

THE COURT: Yes, don't speculate.

BY MR. PRESS:

Q Just give me approximately -- I am not asking for a definite time -- but how long had they been in the store prior to the arrival of the defendants? A Some of them had been there about an hour and a half, and some about an hour, and some less.

Q And what were they doing in the kitchen? A That night, if I remember rightly, we started in to play a game of cards.

Q Who participated in the game? Were you participating in the game yourself? A No, sir.

Q Now, at the time that these men arrived in the store, Potter and his friends, were these men in the kitchen? A In the kitchen.

Q Now, was your wife also in the kitchen? A Well, she was in the kitchen or in the back room.

Q I see. But at the time they entered, you have told us, there were no customers in the store? A No, sir; no cus-

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tomers in the place.

Q Now, I want you to tell his Honor and the jury just exactly what happened after these fourteen men got in there, particularly with reference to the defendant Potter? A Well, when them men came in, some of them were singing and some of them were dancing. Well, the defendant wasn't dancing. It seemed to me that he was a little under the influence, he was quiet enough. I didn't hear no noise from him.

BY THE COURT:

Q What is that? A He didn't make no noise, the same as the rest. He wasn't dancing or singing.

BY MR. PRESS:

Q And you say that he was a little under the influence?

MR. SIMPSON: Yes. That that was his belief.

A (Continued) And he went and sat down on the last table to the left, with, I believe, Reynolds on the same table.

BY MR. PRESS:

Q With Reynolds? A Yes, sir; Reynolds was there on the same table, or on the other side.

BY THE COURT:

Q You say that the defendant was sitting on the table?

A Yes, sir; on the last table.

Q Or at the table? A One foot on the floor, like, and sitting on the corner of the table (illustrating).

BY MR. PRESS:

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Q Yes, go right on. A And finally they began to sing and make signs to each other. Then when Curran was next to me, next to --

Q Did the defendant come in with Curran? A This I couldn't remember; this I don't remember.

BY THE COURT:

Q Don't you remember the going in of the defendant at all? A Yes, sir.

Q And you say that they came in in divisions of four? A Yes, sir.

Q And with whom did he come, or with what division? A I can't remember now, sir.

BY MR. PRESS:

Q Go ahead. A And then Curran was next to me, and then Lynch next to Curran, and they kept on singing and dancing, and I told them, "This is no place for anything like that," and finally Curran took a chair, and put it from the counter to the back bar.

Q That is, at the gate? A Yes, sir; so that I couldn't go out. And so I pushed this chair and I said, "What do you mean by this?" "This is no place for fun." As I pushed the chair, Curran hit me on the eye with his right hand, and, at the meantime, Lynch was next to him, and he hit me on the same eye.

BY THE COURT:

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Q With his hand? A With his hand.

Q Both of them? A Yes, sir. And Flood was right next, on the right hand side -- on the left hand side, at least -- in front of me, and he punched me right in the face.

And, of course, the whole bunch got up, and there was a scuffle there after that. Now, my eye was open and the other was almost closed, and I couldn't see very well after that. Everybody was hitting me, I don't know how many. Of course, there were so many in the scuffle, that you can't tell exactly.

After that I was beat up so bad by Lynch and Curran and Flood, and then the whole bunch was all in the scuffle.

As Flood hit me, I fell back on the counter, and I was bleeding so much that he went towards the door; and on the counter there was a big pot of flowers, there were five or six, and he grabbed one of them.

Q Who did? A Flood. And he grabbed that pot of flowers, and, when he started to throw it at me, I grabbed a big pan of grease, and I understand that there is three that was scalded, and two of them made no complaints, and I don't know who they were.

Q Well, what did the defendant do? A Well, of course, he was with several, sitting on the back table, and from that table to the end of the counter was about, about eight foot, anyway, and, when the rest of the bunch all got together, I saw

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him put his hand up. Of course, I was blind, I only had one eye; the only eye I could see from was this eye (indicating the left eye), and the skin was on top.

Q Well, what did you see Potter do? A I saw him fire a saucer, anyway.

Q You saw him fire a saucer, anyway? A Yes, a saucer or a plate, a small plate. That was on that table, a bread plate.

Q Were there any other saucers or plates there? A There was a lot of them, plenty of them.

Q About how many were smashed, that night, or thrown at you? A Oh, I couldn't say, but I know, the next morning that the front window glass and the door glass, it filled up over two barrels of stuff.

Q Is there a large window in the front of your store?
A Yes, sir.

Q A plate glass window? A Yes, sir. It was broken.

Q It was broken? A Yes, sir.

Q And is there a side window also? A There is a side window, at the side of the door.

Q Yes, of course there is. And was that broken? A No, that wasn't broken.

Q It wasn't? A No.

Q How were the chairs and tables disarranged? A They were all upside down.

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Q And there was a general smashing of all the crockery there, is that right? A Yes, sir; of the whole crockery. And even, when they went out --

Q Now, has this defendant spoken to you recently? A No, sir; I never saw him.

MR. SIMPSON : Now, pardon me. Don't answer. I object to the phraseology used by the District Attorney, "Now, has this defendant spoken to you recently," and I move your Honor to strike out that question and admonish the District Attorney to put his questions properly. "Recently" may convey a hundred different things.

THE COURT: Objection overruled.

MR. SIMPSON: Exception.

BY MR. PRESS:

Q Has he? A No, sir; He never spoke to me. I saw him twice since the time. He passed me on the street, but never spoke to me, or looked at me, and I never did.

Q Now, you say that you saw -- at the time Curran hit you, and the others were hitting you, was he still sitting on the table? A To the best of my belief, with the rest, he got up all together.

BY THE COURT:

Q Did you see him, Mr. Martin, in that crowd? A In the crowd, yes.

Q You saw him away from the table and in that crowd? A Yes.

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Q Are you sure about that? A Yes, I am sure he was in that crowd.

BY MR. PRESS:

Q And you are equally sure that you saw him throw a saucer? A A saucer or a plate; either one of the two.

Q Now, about how long were these men in your store? A Altogether, from the time they were singing and the time of the fight -- the fight only lasted about two minutes, you know, at the most.

Q Yes? A I presume they were in about fifteen or twenty minutes, all told.

Q Now, after you had been beaten and assaulted, and after you had thrown the grease, did these men stay in your store, or did they go out? A At that time when I throwed the grease, there was a couple behind Flood, and McGlynn was near the bureau, throwing stuff at me, and that's where he grabbed a big platter.

Q Now then, did they all go out? A They all run out, sure.

Q And when they ran out, where were you standing? A Behind the counter.

Q Behind the counter? A Yes. I was still firing the stuff at them, tea pot and coffee pot.

Q And after they left, were you still behind the counter? A Well, after they left, I went as far as the door of my

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counter, and I was half unconscious like, and I stood a little up against the back bar like that (illustrating).

Q Now, what time elapsed between the/last man went out and the policeman arrived, if they did arrive? A How long it elapsed between?

Q Yes, from the time the men left until the time the police came in, what time elapsed? A Oh, about two or three minutes, maybe.

Q Yes. And what police arrived? Do you know their names? A Yes, Levy and officer Wallace.

MR. PRESS: Levy and Wallace, are you in Court?

Stand up.

BY MR. PRESS:

Q Are these the two men? A Yes.

Q And were they in uniform at that time? A Yes, sir.

Q And when they came in, were they alone or accompanied by someone? A They had prisoners.

Q What prisoners did they have? A They had Potter, Reynolds and Flood.

Q Flood? A Yes, sir; and another prisoner that I don't know.

Q Now, when McGlynn left your store, what was your physical condition? A I was about unconscious, laying against the counter.

Q Well, you have told the jury that your eye -- that there

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was something the matter with your eye? A This eye, my left eye, (indicating), it was out from here to here, and the bottom part was on top of the eye, and I could see only from underneath.

Q And what was the matter with the top of your head? A I believe there was three or four stitches put in it.

Q Well, it was out; wasn't it? A Yes, sir.

Q And, when the officers came in, did they take you anywhere? A Yes, they took me over to the station house.

Q Where is the station house? A Around the corner, around the block, 38th Street.

Q And there did you see a physician? A Yes, sir.

Q And is this the physician that you saw (indicating a man in the audience) on that occasion? A Well, he was dressed all in white, and I was half blind, and I couldn't say exactly.

Q Well, what did the doctor do to you? A He put nine stitches in this here eye (indicating the left eye), and three or four in my head; I don't know how many; three or four, I was told.

Q And at the station house you saw Potter and Reynolds and Flood? A Yes, sir.

Q Is that right? A Yes, sir.

Q They were taken to the station house? A Yes, sir.

Q Now, before these men assaulted you, did you do anything whatever to them? A No, sir; never did, except good.

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Q Eh? A I never done anything to them except good ever since I knowed them.

MR. SIMPSON: I move to strike out the latter part of the witness's statement.

THE COURT: Well, it does not seem to be responsive.

MR. SIMPSON: And the jury told to disregard it.

THE COURT: Yes, the jury will disregard it. You will have other questions to ask of this witness?

MR. PRESS: Oh, yes, sir.

THE COURT: The recess hour has arrived and we will now adjourn.

(The Court admonishes the jury in accordance with section 415 of the Code of Criminal Procedure and takes a recess until two o'clock.)

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AFTER RECESS.

FREDERICK MARTIN, direct examination being continued, testified as follows:

BY MR. PRESS:

Q How long have you known this defendant while you had your place at 47th Street? A Well, from now, I know him for the last three years.

Q And during the time that you were in 47th Street, was he a patron of your place, was he a customer at your place?

A Very small.

BY THE COURT:

Q Occasionally he went to your place? A Yes; very small, very seldom.

Q And you have known him for three or four years? A Yes, sir.

Q It is the defendant you have known for three or four years, is it? A Yes, sir.

BY MR. PRESS:

Q Have you any place of business now? A No, sir; except around New York, with a wagon.

Q But you are not conducting a restaurant now? A No, sir; since that night. Not since that time, since the 27th of July last.

Q Did you ever have any quarrel with the defendant before this? A Some words.

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Q When? A About two years ago.

Q Was that while you were at 47th Street? A Yes, sir; in no fist fight, except words.

Q Exactly. Now, at about the time of this fight or argument, or whatever it was, took place in your place, on the night of the 27th of July, 1913, did any one of the men come out of the kitchen, and speak to you, or did you speak to them, just before it began? Yes or no? A There was one man, a porter, who was eating in my place.

Q Did you speak to him? A Yes.

Q And immediately after speaking to him, did he go out?

A He did go out.

Q Now, at the time, or just before this occurred, did the men who were playing cards in the kitchen leave? A At about that time.

Q Yes. They left, is that right? A Yes, sir.

Q So that at the time --

THE COURT: Mr. Press, I wish you would fix whether these men were in that room, playing cards, when these men or any portion of them came into the place the first time.

MR. PRESS: Yes.

BY MR. PRESS:

Q When the fourteen men came in -- when the defendant and the fourteen men that he came in with, and immediately after him,

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were these men that you refer to as friends of yours playing cards in the kitchen? A Yes, sir.

Q Did they come in to the restaurant at any time during this affair? A No.

Q Was there any means of getting out of your kitchen other than coming through the store? A Yes, through the side door.

Q And that side door leads into the hall? A Yes, sir.

Q And that is no part of the restaurant? A No, sir.

Q Now, at the time you were being assaulted who, if any persons, was on the premises other than yourself? A I didn't see anybody else.

Q You didn't see anybody else? A No.

Q Did you see your wife during this time? A No, sir; she was in the back room. She hides herself.

MR. SIMPSON: I object to that and move to strike it out.

MR. PRESS: Consented to.

THE COURT: Strike it out.

BY MR. PRESS:

Q Well, you didn't see her in the restaurant? A She never come in the restaurant.

Q Now, did this defendant or any of the men who were there request you to give them any food? A No, sir.

Q And this pan of hot fat, was that on your range at the

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time they came in? A Always there.

Q Awaiting customers? A Yes, sir.

MR. SIMPSON: Now, pardon me. I object to the manner of the District Attorney: "Awaiting customers", as a leading question. Witness can describe.

THE COURT: Yes, strike that out.

THE WITNESS: It was always ready.

BY MR. PRESS:

Q And the restaurant was open for business?

MR. SIMPSON: I move to strike out that it was always ready.

BY MR. PRESS:

Q Well, was your restaurant open for business on the night that the defendant and his companions came in? A Yes, sir; it was.

MR. PRESS: You may examine.

CROSS EXAMINATION BY MR. SIMPSON:

Q Now, Mr. Martin, speak up loud so that the last juror can hear what you have got to say. Will you swear that this defendant, John A. Potter, was with the fourteen men? A Yes.

MR. PRESS: One moment. All right. Go ahead.

THE WITNESS: Yes.

MR. PRESS: Now, I object to the form of the question. The man is under oath, and he is swearing.

MR. SIMPSON : Well, if you make any objection to it,

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I will not use the word "swear."

THE COURT: Yes, everything that he is saying, he is saying under oath.

MR. SIMPSON: Sure, we know that.

BY MR. SIMPSON :

Q The store premises that you have described to this jury is about 12 or 13 foot in width, by about 25 foot in depth?

A Right.

Q And you have a store counter, about eight feet in length? A Ten.

Q About ten feet in length? A Yes, sir.

Q Is that right? A Yes.

Q Will you tell the jury whether the tables between the store counter and the southerly walls -- whether they are between the store counter and the southerly wall, or between the counter and the northerly wall? A They are at the further end of the store.

Q That is where those four tables were? A Yes, sir.

Q How big a space would you say to the jury that there is between the partition and the westerly part of the store?

A (No answer.)

Q Now, to make myself a little clearer, if I can. You are between 66th and 67th Street, or between 67th and 68th?

A 67th and 68th.

Q And what is the avenue, what avenue is that? A West End.

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Q And that is a continuation of Eleventh Avenue is it not? A Yes, sir.

Q Are you on the westerly side or the easterly side?

A On the east side of the way.

Q On the east side? A Yes, sir.

Q How far from the corner of 68th Street? A It is the second store from the corner.

Q 68th Street station house is around the corner? A In the next block.

Q In the next block? A Yes, sir.

Q Now, what side of the store is the corner on, the downtown side or uptown side? A The downtown side.

Q And it extends from the window into the building; isn't that right? A Yes.

Q About ten feet? A Yes, about ten feet.

Q So that you will say that you have about fifteen feet of space between the partition and the end of the counter? A About that. That's where the tables lays.

Q Were the tables on the same side as the counter was?

A Two on each side, against each wall.

Q Two on the northerly wall, and two on the southerly wall?

A Yes.

Q How close was the table -- one of the tables -- on the northerly wall to your gate, that led in behind the counter?

A Well, the first table near the counter, when I opened the

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door, it just touched the chair.

Q It would just about touch the chair? A Yes.

Q And so that the fact that this man Curran, the man you speak of, moved this chair over to that gate, would you say that he done that to keep you out? A I don't know the reason why he done it.

Q You don't why he done it? A No, why he done it.

Q And when these boys came into your place -- now, Mr. Martin, when this man McGlynn, you say, took a platter from the bureau -- the large stone platter, was it? A Yes, sir.

Q Anout what size would you say? A Well, I weighed the same platter, and it weighed exactly four and a quarter pounds.

Q And with that McGlynn struck you over the head? A Yes, sir.

Q Now, tell the Court and Jury, just before you were struck with the platter, what, if anything, had happened to cause McGlynn to hit you on the head with the platter, without any words spoken? A Well, I was beaten to death nearly there; I was half unconscious then.

Q You were unconscious? A No, half unconscious, and was leaning against my back bar.

BY THE COURT:

Q That was the end of the proceeding; was it not? A Yes, sir.

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MR. SIMPSON: Well, I thought it was the beginning of it, your Honor. I want to get at the beginning of it.

BY MR. SIMPSON:

Q Now, these boys came in four by four, you say? A Yes, sir.

Q And can you tell in what section Potter came in, and with whom? A That I can't say.

Q Before anything happened, did you see Potter do anything or say anything? A No, he didn't say nothing that I know of.

Q When you got into your place, what was the first thing that happened, if anything? A They began to sing and dance.

Q They began to sing and dance? A Yes, sir.

Q And when they were singing and dancing, while that was going on, in the kitchen or living room of your place, in the rear of your store, were these five friends of yours playing cards? A As soon as they heard them singing and dancing, they just left. They expected there was going to be trouble, when that bunch came in.

Q Now, let me see if I can go along with you from the time the boys began to sing and dance. You were behind the counter, were you? A Yes.

Q Now, there is a partition in the rear of that store? A Yes, sir.

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Q And behind that partition is your living quarters?

A Yes, sir.

Q And you say those living quarters are fifteen by twenty? A Some where around there.

Q And there is a partition between the kitchen and the living room? A Yes, sir.

Q On what side of the partition is the first door? A Right side.

Q Right side? A Yes, sir.

Q The same side with your counter? A No, sir; the same side with the front door.

Q What side, if there be a door, is the door that leads into the kitchen, from your living room? A The same side. Three doors start from the front of the store there.

Q On what side of the kitchen were these men playing cards at? A Right by the door, on the kitchen table.

Q Right in the doorway leading from your living room into the kitchen? A Yes; and there was a window next to the door, that they could see also through.

Q Well, before anything was done, did you see these men whom you described as your friends, playing cards?

A Before they did come?

Q Yes? A Why, certainly.

Q Now, before anything was done, or you were struck, or anything, were these men still playing cards? Yes or no?

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You can answer that question. A Well, they were playing cards at the time they come in, and as soon as they started singing and dancing, they all left.

Q Ah. We'll come to that in a moment. Did these men leave your place before you were struck? A I don't know.

Q Now, you were there? A I was in the front of the store and there are two partitions between me and the men.

Q I am not talking of the policemen. A I am not talking of the policemen. I am talking of the men that were playing cards.

Q I am talking of the time the boys were in your place and they were singing and dancing. Had these men, friends of yours, that were in the back room playing cards, left the premises? A They were in the back room at the time they come in, yes.

Q And were they in the back room at the time the boys were dancing and singing? A That I couldn't see because there were two partitions between me and them and all that I could do was to watch them, because some of them wanted to steal pies out of the pie box.

MR. SIMPSON: I object to that and move to strike that out as irresponsible.

THE COURT: Yes, strike that out.

BY MR. SIMPSON:

Q Just take the question and answer it. While you

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were being struck, as you have testified to, did you see any of your friends in the rear room, who had been playing poker or cards? A No, sir; I couldn't see them. It was impossible to see them, as I told you.

Q Do you know a man by the name of Glass? A No, I don't.

Q Are you sure that you don't know a man by the name of Glass? A No, I don't; I'm sure I don't.

Q Don't you know, as a fact, that Glass was one of the friends who were playing cards in your rear establishment? A No, sir; I never knewed a man named Glass that came into my place.

Q Well, what were the names of those five friends of yours in that back room? A Well, I know the names of some of them. There was a man named Holmer.

Q Yes? A He lived next door to me and he's gone away now. I don't know where he's gone.

Q Never mind what happened to him. Go ahead. A And the man that used to work for him.

Q What is his name? A I don't know.

Q All right. Go ahead. A And there was two men that worked around the garage, that eatd in my place all the time. I know one man's name is Eddie. I don't know his last name.

Q Well, now, the next one. A Another one, his name was Charlie.

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Q Charlie? A Yes. I believe that was all. There might have been one more, but I believe that was all, to the best of my recollection.

Q Now, isn't that one more this man Glass? A No, sir; there was never a man named Glass that came in my place, that I know of.

Q Did you ever hear of or see a man named Glass? A No, sir.

Q Now, let me see if I can refresh your recollection. On the night of the arrest, how many boys were arrested? A On that night?

Q Yes? A There were four.

Q Who were the four? A There was Potter,

Q Yes? A Flood.

Q Yes? A And Reynolds.

Q That's three. Now, give me that fourth one's name?

A Well, the man that the policemen brought in. His coat was all full of lard, and he asked me if that man was one of the men.

Q Was that man taken to the police station? A I don't think so, no; may be he was. I don't know. I can't say for sure whether he was taken or not.

Q Don't you know that that man was arrested with the other three that you have mentioned, and taken to the police station, locked up for the night and taken before the Judge in

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the morning, and then you failed to identify him; is that right? A I think you are right.

Q Eh? A You're right. I want to tell you the truth. That happened a year ago, and there are lots of things I might have forgot about it. But I didn't know that man, otherwise I might have had him arrested, if I know him. He don't belong to that bunch. I told the cop he don't belong to that bunch and I didn't know him and never seen him before.

Q Now, you saw the man's coat covered with the lard, which you admit you threw at Flood? A I threw it at the whole bunch that was there.

Q Well, then, how can you account for this man who was arrested, and whom you can't identify, being in this place with this crowd, and you hadn't seen that man, hadn't seen him come in---you didn't see him come in your store? A No, I didn't---I don't believe I seen him come in, because there was some that I didn't know comes with them. I didn't know them all. I knew ~~him~~ some. There were some new hands there that I didn't know before.

Q Now, isn't it a fact that that man was one of the five men which you say were playing cards in the rear of your place? A No, sir.

Q Now, isn't it a fact that while the young men were in your place, singing and dancing, that that man came from the back room, that man Glass---I'll tell you his name is Glas

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because that's the name that he gave at the time.

MR. PRESS: Now, I object to that question.

THE COURT: Sustained.

BY MR. SIMPSON:

Q Do you remember hearing of a man by the name of Glass?

A I don't remember a man by the name of Glass.

Q Do you remember the name of the man, whom you caused to be arrested, and whose coat was covered with lard, do you know what his name was? A No, I don't.

Q Now, isn't it a fact that, while the boys were singing and dancing, some of the boys said to you, "Martin, or "Fred", come on and serve us.", or "Fred, come and serve us"?

MR. PRESS: I object to the form of the question, if you Honor please.

THE COURT: You may answer that question.

BY MR. SIMPSON:

Q Isn't it a fact that, while the boys were singing and dancing, as you describe it, this man Glass came from the rear of your apartment or store, and commenced to quarrel with Curran, and say to Curran, "You boys had better stop dancing and singing, how the hell do you think we can play cards?" A No, sir.

Q Were any words like that spoken? A No, sir.

Q And isn't it a fact, also, that these five men, after Green---after Glass---

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THE COURT: Now, Mr. Simpson, hasn't the witness said that he doesn't know any such person?

MR. SIMPSON: Well, suppose I designate him as the man whose coat was covered with lard?

MR. PRESS: Produce him.

THE COURT: And he repudiates knowing any man by that name.

MR. SIMPSON: Well, I'll go over that again with him.

MR. PRESS: I object.

THE COURT: Sustained. You have been over that, all about Glass, and he says that he knows no one by that name, and he says that he did not identify the man with the grease on his coat as one of the party that came into his restaurant. I only complain of the use of the word "Glass" in your question.

MR. SIMPSON: Your Honor objects to that?

THE COURT: I do, because the witness repudiated it.

MR. SIMPSON: But this is cross examination.

THE COURT: Yes, but it must be proper cross examination.

MR. SIMPSON: I am trying to enlighten this witness, if I can.

THE COURT: Yes. Go ahead.

BY MR. SIMPSON:

Q Now, you had Berger there in the back room, and Eddie and Charlie? A Yes, sir.

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Q And what was the name of the fourth man, if you remember? A I don't remember if there was a fourth man or not. I don't remember now if there was a fourth man there.

Q Haven't you told this jury that there were five of them, Friends, in the rear room, playing cards? A I must have said four or five, something like that.

Q Something like that? A Yes, sir.

Q Four or five? A Yes, sir.

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

Q Now, what time did they come there to play cards?

A Well, they came there somewhere about one hour and a half and some two hours, because I remember we started in to play pinochle, and a friend of mine, somewhere about nine or ten o'clock.

Q Were you playing in this game with the other five?

A No.

Q Now, when did you get out of the game? A Well, I played for a while and I got tired of it and I quit.

Q Well, what time did you quit? A I don't know. I didn't look at the time.

BY THE COURT:

Q Had you been playing with these men at all, Eddie, or Charlie or Begger? A No, sir; with one of them, playing second hand poker---pinochle.

BY MR. SIMPSON:

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Q And was there any dispute at the poker table about money? A No, there was no money in the game.

Q What were they? Chips? A Chips.

Q And weren't you the banker? A No, sir.

Q Who sold the chips to them? A There was no selling chips at all. Those that win, they were paying something to eat and drink with chips. I never run no game.

Q I know. I am going to absolve you of keeping a gambling house. You had a quite game at the back? A Yes.

Q And the men that sat in that game of chips---A Not for me.

Q No, of course not. You didn't take part in the game where the chips were? A No, I was playing pinochle.

Q And what table did you play pinochle at? A In the kitchen.

Q How many tables were in the kitchen? A One.

Q What table were these men playing poker on?

BY THE COURT:

Q With whom were you playing pinochle? A I think I was playing the man named Eddie.

BY MR. SIMPSON:

Q Yes, how long do you know Eddie? A I believe about a year and a half or two years.

Q And do you know where Eddie lives? A I don't know where he lives, no, sir. I could find it out.

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Q Are you sure that you played pinochle with Eddie that night? A I think it is him, because I generally play almost every night with him.

Q Well, not every night, but that night, who did you play with? A Well, I played pinochle with him three or four nights a week.

Q You don't know the other two? A Yes.

Q Berger, Eddie and Charlie---and you don't know the names of the other two? A I don't know Berger's first name.

Q And you don't know the other two? A Well, there might be five, but I don't know. I don't remember if there was any other man there. There might have been five, though.

Q Well, when did they begin to play poker? A Well, during the night, during the time they was there. I don't know what time it was. There was no time for me to keep there of such things.

Q Now, you have told this jury that the boys were in there, singing and dancing, and, all of a sudden, in about two minutes, the whole thing was over; about your being beat and hit with the platter, and firing dishes at you? A Yes, about two or three minutes.

Q About two or three minutes? A Yes.

Q Now, isn't it a fact. Pay attention to what I am saying to you---that the boys came into your place, some of the

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boys wanted you to wait on them; some of the boys commenced to dance and sing; one or two--one, anyway, from the crowd, came out and commenced to remonstrate--or I will use another word--commenced to tell these boys that if they didn't stop making a noise there would be trouble, a mix-up? A No, sir.

Q And didn't you then say, "Never mind, you fellows stop, don't make any more noise there?" A I may have said, when they were dancing, they have got to cut it out, that that was no place to dance and sing.

Q And isn't it a fact that the man or men came from the back room and said, "You had better cut this out, and if you don't cut it out, we'll make you fellows cut it out?" A No, sir; that man never said a word. I sent him ~~to~~ out to get the cop.

Q What is his name? A McGarry.

Q Was he in the poker game? A No, sir; he's an automobile washer, and he was just coming in for his supper at eleven o'clock. ~~XXXXX~~ He generally comes for his supper between eleven and twelve because that's his supper time, because he works all night.

Q And it was McGarry that you sent after the cops? A Yes.

Q Where is he now? A I don't know. I believe he's working around there yet. He lives in that neighborhood yet, somewhere. I haven't been around there.

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Q Isn't it a fact that some of the boys got into a
muss with one or two of the poker fellows, that there was a
general mix-up, and that you asked them to stop, and, the first
time you knew plates began to fly that then you picked up a
pan of grease, before anything happened to you, and threw
that pan of boiling grease, and covered Flood with it? A
Not before, not before. When I threw the pan of grease, my
eye was open and I was beaten, and the only thing that I had
there to defend myself was that pan of grease. And no-
body ever came from the back to the front.

Q Well, was McGarry in the back? A No, he was just
in the back, and I went to the back and called him to the first
door, the first partition there, and called him over, and
sent him out of the side door to get the cop.

Q Why, didn't you tell the Court and Jury that your
way was blocked, and that you could not get out? A After
the chair was put across the counter, I couldn't get out,
certainly not.

Q Well, that was put across the counter before you did
anything, wasn't it? A I went from behind the counter,
and told McGarry to get the cop and came back behind the
counter, and then Curran took the chair and put it across.

Q But before the chair was put there you told McGarry
to go out for the cop? A Yes, because I knew the bunch for
four years, and I knew there was going to be trouble because

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they were singing and dancing and cutting up.

Q Did Potter ever assault or beat you? A No, he didn't.

Q Did you see Potter---now, pay attention to the question that I am going to put to you. Are you positive that Potter took up a plate, as you have described, and deliberately threw it at you and struck you? A I know he threw a plate.

Q Do you know whether it struck you? A There was so many flying around, I don't know whether it was the plate he threw, or one of the others. At that time my sight was so I couldn't see. My eye was swelled up.

Q I understand that. Now, what I want to get at is as to whether you saw Potter with a plate in his hand---you don't know whether it was a plate or a saucer?

A It was a saucer, or a small plate.

Q You don't know whether he fired it at you, do you?

A He fired it, but I don't know whether he hit me or not, because there was so many in the scuffle there, that they came from different directions.

Q Well, Mr. Marshall, you were behind the counter? A Yes, sir.

Q And you were behind the counter? A That's that.

Q (Question repeated) To attack you? A There was one man named Charles John. He came in, he came in, and opened my door,

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and tried to open my pie case, to steal some pies. I suppose he was doing that, because he was trying to open the door of the pie case, and that's the time I went to the back to get McGarry to go for the cop.

Q Well, the boys were pretty jovial when they first came in? A Yes, sir.

Q And they didn't threaten you with any trouble? A No, sir; but that's the usual way they do. They come in singing and dancing, and they use some language that nobody will stand for. The house in which I was living wouldn't stand for anything like that.

Q Well, the boys were jovial, singing and dancing? A Well, if you call it that way, have your own way.

BY THE COURT:

Q Did you see this plate or saucer thrown by the defendant? A Yes, sir.

Q Did you see the direction in which he threw it? A He threw it at me, but I couldn't swear that it hit me.

Q He threw it in your direction? A Yes, sir.

BY MR. SIMPSON:

Q Now, let's see, Mr. Martin. There were fourteen people, you say, in there at the time, and yourself, that is fifteen, in that little shop, up to the time that you saw Curran behind your counter, had you been struck? A No, not yet.

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Q You have also told the jury that, when you saw Potter, he was quiet, seated at the last table, and that he said nothing to you nor did you say anything to him; is that right?

A That's what I said.

Q Then something happened and you were struck? A Yes, sir.

Q Well, who was it that struck that first blow, if you can remember? A Curran.

Q Curran? A Yes, sir.

Q Did Potter say or do anything at that time? A He was sitting on that table yet, at the time he struck me.

Q When Curran struck you? A Yes, sir.

Q Then who is the second person that struck you? A Lynch.

Q Lynch? A Yes, sir.

Q Now, the first blow you say you got in the eye? A Yes, sir.

Q And that came from Curran? A Yes, sir.

Q Had you said anything to Curran, or Curran said anything to you before Curran had struck you? A I told him, when he put that chair across, I said, "Take that chair away from there. What are you fellows looking for? Trouble? Did you come here to beat me?" And I pushed the chair away, and I got it. (Illustrating a blow in the eye.)

Q As soon as you pushed the chair away? A Yes, sir.

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Q And that was the chair he was sitting on? A No, the chair which he put across.

Q I know, but the chair he had been sitting on before?
A No, he didn't sit down at all. He was standing up all the time.

Q He was standing up all the time? A Yes, sir.

Q And, as I understand it, these men came in and sat down at the four tables? A Some sat on the tables, and some in chairs, and Lynch and Curran stood right up at the end of my counter. They didn't sit down at all, as I saw.

Q Well, when did Curran put the chair across my counter?
A Well, when I went to tell that man to get the cop, I said, "I had a fight with these people before, and they have come up from 47th Street to do me up and break the place up. Go ~~xxx~~ and get the cop."

MR. SIMPSON: I object to that and I move to strike it out.

THE COURT: Motion granted. Strike it out.

BY MR. SIMPSON:

Q Before any blow was struck, had any threat been made to do you up? A I knew it.

MR. SIMPSON: I object to that and move to strike that out.

THE COURT: Motion granted. Strike it out.

BY MR. SIMPSON:

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Q Now, you said something about telling them to cut something out? A Yes, their noise.

Q To whom was that addressed? A To all of them.

Q Well, was Potter making any noise? A No, sir; he was sitting on the table with his hand like that. (Illustrating) And looking around.

Q Had he said a word, that you recollect--Potter? A I don't recollect hearing him say a word, no.

Q Well, after Curran had struck you then you say Lynch struck you? A Yes.

Q Where were you when Lynch struck you? A They were standing side by side, and the moment Curran struck me, like this (Illustrating) Lynch did, at the same time, too.

Q In the same place? A Yes, in the same place.

Q Where was that? A I was right behind my counter, inside my door. The door was about that high. (Illustrating).

Q Where was Potter at that time? A The best I can recollect he was sitting on the table yet.

Q Now, when Lynch and Curran had struck you, did you fall down? A No, sir.

Q Was it a severe blow?

MR. PRESS: Oh, I object, if your Honor please, as calling for a conclusion on the part of the witness.

BY MR. SIMPSON:

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Q Well, was it a blow such as to make you unconscious?

A No, but it cut me up.

THE COURT: I would like to have you fix, Mr. Simpson, if you can, when the defendant threw the saucer in the direction of Martin, the order of the proceeding itself.

MR. SIMPSON: That's just what I am leading up to, your Honor.

THE COURT: Very well.

BY MR. SIMPSON:

Q And you were behind the counter when you were struck by Lynch and Curran? A Yes, sir.

Q And who was the next person that struck you? A Flood, as far as I can remember; because as soon as I got the first punch in the eye and the second one, that blinded me for that eye, and all that I could see, all that I could see, was that way (Illustrating).

Q And you say the blow that you received kind of dazed you and closed your eye? A Yes, it kind of dazed me.

Q And were you bleeding? A Yes, sir.

Q And did Lynch hit you in the other eye? A No. Flood hit me in the other eye. Flood was standing in front of me.

Q Now, who was alongside of Flood, if you know? A I don't think there was anybody alongside of him, ~~xx you know~~ at that time.

Q Well, where were you---after Flood had struck you, what

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if anything happened? A Then the scuffle started; we scuffled all around.

Q Well, when was it that you grasped the handle of the pan that contained the grease? A When was it?

Q When was it? yes. After Flood had hit you? A After Flood hit me, certainly.

Q Yes, after Flood had struck you? A Yes, sir.

Q And, now that I have it, and the Court and Jury have it, that Curran and Lynch were behind the counter and they had already struck you? A No, not behind the counter. They wasn't behind the counter. I was behind the counter. They were on the side of the ~~xxxxx~~ counter, on the side of the wall.

Q Where the gate was? A Yes, sir; right behind the gate when it opened.

Q And how near the gate were you? A Right against the gate.

Q So that we have the counter ten feet long, and you were at the end of the ten feet from the door? A Yes, sir.

Q Now, where was Flood? A Where was Flood?

Q Yes? A He was punching me with them, at that time.

Q He was in with Curran and Lynch? A Yes, sir.

Q And then he, Flood, struck you in the eye? A Yes, sir.

Q And he, Flood, was in front of the counter and you were

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behind the counter? A No, Flood wasn't in front of the counter at all. He was standing at the end of the counter, next to Curran and Lynch, but he was about opposite me.

Q Well, you say there was about four foot space behind the inside of your counter and the northerly wall? A Well, it must have been about four or five feet. I never measured it. Somewhere around there.

Q But Curran and Lynch were where the gate was, and Flood was just at the side of them? A He was right opposite of me, at the counter.

Q Was he outside of the counter? A Yes, Flood was outside.

Q And that's just what I'm asking you, and who was alongside of Flood? A I told you just now that there was nobody but him, that I know of. They were all sitting on chairs and tables, and Potter, he was sitting at the last table, with one foot on the floor, and may be he changed his position, but that was the last time I seen him, sitting on that table.

Q After Flood had struck you, did you then grasp the pan of grease and throw the contents at Flood? A I didn't throw it only at Flood; I throwed it at the whole bunch, because there was one behind the counter hitting me---I don't know who it was, because I was half blind---and I backed up behind the counter, and the first thing I took was that pan

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of lard, and I grabbed the lard and throwed it right after him.

Q Now, the man that had the grease on his coat, was he one of the party that came in? A I think so; I heard so afterwards.

MR. SIMPSON: I move to strike that out.

THE COURT: Motion granted.

BY MR. SIMPSON:

Q Now, at the time you grabbed the grease, did you see the defendant fire anything at you? A Well, I told you before, all that I can remember is that he fired that plate during the scuffle.

Q But you don't know who he was firing it at? A No, sir, only I think he was firing it at me.

BY THE COURT:

Q How close to the throwing of the fat did this plate leave the hand of the defendant; how long after that? A That I threw the fat?

Q Yes? A That was in the mean time, at the time of the scuffle.

Q Just after it or before? A Just at the time/ just about that time, they were hitting me and I had to defend myself.

Q And it was some time before you were struck by McGlynn? A Yes, sir; it was, because they all ran out that

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time.

Q And it was just shortly after the time you threw the fat, is that it? A That McGlynn hit me?

Q No. Was the saucer or plate thrown by the defendant shortly after you threw the pan of fat? A No, that was before. He threw the plate before I threw the fat.

Q I see. And let me ask you. Was it before Flood hit you with the flowerpot? A It was at the mean time that he threw the flowerpot at me that he got the lard.

Q But I am referring to the throwing by the defendant, was his throwing before or after Flood hit you with the flowerpot? A He threw the plate before I was hit with the flowerpot.

BY MR. SIMPSON:

Q I take it---my memory may be at fault---Curran had hit you, Lynch had hit you, Curran and Lynch hit you in the eye with their fists. No, when did Flood throw the flowerpot? A When they were bleeding---

MR. SIMPSON: I am going to strike that out.

THE COURT: Strike that out.

BY THE COURT:

Q How long after you were struck by Flood with his fist, did he throw the flowerpot? A He hit me, and then threw the flowerpot and I threw the lard.

BY MR. SIMPSON:

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Q And you say all this happened in about two or three minutes? A Well, I should think so; not longer than that, I think.

MR. SIMPSON: Now, I wish you jurors would take your watches, and we will see your conception of two minutes. Now, when I tell you to get ready, what you think was the time for this whole trouble to take place.

THE COURT: From the beginning?

MR. SIMPSON: From the time he was struck by Curran until the time he saw the defendant fire a plate or throw a plate in his hand.

THE WITNESS: I don't tell you that I didn't keep no time about that; but I simply make the best that it took what time.

MR. SIMPSON:

Q Now, Mr. Marshall, I want you to give your best recollection of how long it took for the striking by Curran, until you saw the plate or the defendant's hand? A I can't make that out.

Q Just a second, now, think. A I couldn't answer your question, because I don't know.

Q Well, can you describe it by clapping your hands, how long it took for this whole thing that you have described, from the time Curran struck you until the time you saw the defendant with a plate in his hand?

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MR. PRESS: Oh, I object, your Honor.

THE COURT: Well, if he can do it, he may.

BY THE COURT:

Q Can you tell? A I can't tell.

BY MR. SIMPSON:

Q Well, try now? A Well, he fired the plate at the time the scuffle was going on.

Q And the whole thing took a very short time; did it? A Yes, not more than three minutes.

Q Now, raise your hand, and let's see what you figure three minutes, to the best of your recollection? A I ain't no expert.

Q Well, put your hands together like this, please, and take your time, and tell us when we have reached the time that you think elapsed at the time of the assault; put your hands together like that. (Shows his hands).

MR. PRESS: I object.

THE COURT: Well, I don't think the witness understands it.

MR. SIMPSON: I don't think so, either.

THE COURT: Well, he says he is not able to do it, and does not seem to be anxious to do it, but, if he can do it, he may.

BY THE COURT:

Q What Mr. Simpson wants is to have you start from the

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first blow of Curran, and indicate that, and then, keeping the defendant in mind, and when he had the plate in his hands and threw it at you, then clap your hands together so that the counsel and jury may have an idea of the time. Do you understand that question? A Yes, sir.

Q Well, will you do that? A Well, I think I can give the proper answer, that, as soon as I was hit, they all got up to fire stuff at me and I saw him at that time firing stuff at me too. That's the best I could give.

THE COURT: And no one else can't do any better than that, Mr. Simpson.

BY THE COURT:

Q One thing followed another very quickly? A Yes; and, as soon as they broke all the windows and everything, they all ran.

BY MR. SIMPSON:

Q Now, isn't it a fact, that, as soon as Flood struck you, you grabbed the pan of grease and threw it? A No, I was struck already by him.

Q I am speaking of Flood now, not of Curran or Lynch?
A That's my answer.

Q Do you understand that? A I do understand it.

Q Now, how soon after Flood had struck you in the eye was it that you took this pan of grease? A Well, the first punch he gave me in the eye, I don't know how long it

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took for him to give me the last one. I know he gave me three or four punches, and, when I was being beat up, I took a pot there and fired that at somebody, and then I took up the pan of lard. I don't know what he done, whether he tried to come at me again, but then he grapped the flowerpot and then he got the man of lard (illustrating).

Q You had the pan of grease in your hand? A Yes, sir.

Q And when Flood fired the flowerpot, at the pan, or towards you---A At me.

Q It was all like that---just as quick as that? (Snaps his fingers) A Well, I don't know how you understand it was done.

Q But when you had the pan of grease in your hand, and as you were delivering it, throwing it, this flowerpot that you say Flood had grabbed came at you? A Yes, in the meantime.

Q And as that came at you, the grease came out of your hands? A Yes. And dishes came from all directions. In the mean time the fight was going on there, there was a war there, and I was defending myself as well as I could with pots and spoons and everything that I could reach.

Q And that all lasted only three minutes, and not five minutes? A Yes, about that. If it had lasted five minutes they would have destroyed the store entirely.

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BY THE COURT:

Q And what were the other men doing at the time you say you saw the defendant throw this plate or saucer? A They were throwing glasses and plates and saucers.

Q Were they all doing it? A I couldn't say all of them, but some of them, anyway, because I was half blinded at the time.

Q You didn't know these other eight men? A I knew some of them. I knew a couple by sight, but I wasn't sure if they did do anything, a couple that I knew by sight only.

BY MR. SIMPSON:

Q They were former customers of yours in 47th Street, weren't they? A Two or three of them, I think, were, but the others I didn't recognize as customers of my place in 47th Street.

Q And Potter had been a customer of yours, had been in your shop in 47th Street? A Yes, sir.

Q And you keep a little fish store there, don't you? A Yes.

Q A sort of all night restaurant? A Yes, sir.

Q And you fix up fish and cysters and crabs and lob. A Yes.

Q And you do quite a business around twelve o'clock at night, when people come along? A Yes.

Q Have you an opening in your window in the West

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End Avenue place? A No, sir; it wasn't an open window.

Q And so that, if anybody wanted anything to eat, they had to come into your place? A Yes, they had to come in.

Q Again I ask you, Mr. Martin, would you say positively that the saucer which you saw in the hand of Potter was thrown at you, in the same struggle?

MR. PRESS: Now, I object to that as already answered several times.

THE COURT: He may answer.

A Well, it was thrown in a direction.

MR. SIMPSON:

Q Would you swear that saucer had struck you? A No, I could not swear it; to tell you the truth I couldn't swear to it. There was so many of them I couldn't swear whether that one hit me or not. But if they did hit me, I know that.

MR. SIMPSON: That's all, Mr. Martin.

THE NINTH JUROR: Your Honor please, I would like to ask a question.

THE COURT: What is your question?

THE JUROR: I understand that these men had not been served with anything to eat or drink. Is that right?

THE WITNESS: Yes, sir.

BY THE NINTH JUROR:

Q And where did they get their cups and saucers to throw?

A They were left on the tables from customers that had been in

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there before, and on the top of the bureau, in the back of the store; there was a bureau there in the back of the store with plates and saucers and platters on it.

Q And if a man sitting at a table wanted to throw a cup or saucer at you he would have to go to that bureau to get it, would he? A Yes, if there was none on the table.

BY MR. SIMPSON:

Q Now, Mr. Martin, don't you know, as a matter of fact, that you had served some of the boys before any trouble took place? A No, sir.

Q You are positive about that? A No, sir; positive. They never asked for anything to eat.

Q Now, when was it that these customers that had fed left your place? A They were washers from the garage around the corner.

Q How many washers were there? A There was generally three or four, at eleven o'clock.

Q No, I mean that night? A Yes, that night.

Q How many washers, that night, were there in your restaurant before these boys came in, that you had served? A I believe there was five, sure, may be six.

Q And what time was it before these boys had come in that they had been served? A Some of them was gone about five minutes, ten minutes, or half an hour, and there was one that wasn't gone yet, Mr. McGarry. He was the last customer

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er that come in.

Q And he was at the table and he wasn't finished? A Yes, he was finished, and he was at the back when they come in.

Q Was McGarry one of the poker players? A No, sir.

Q Well, then, McGarry had finished, but he didn't go out yet? A No, he didn't go out yet.

Q Well, we will have it that these five men or three men that you described, after having given their orders, some an hour before and some five minutes before,---had they had a large supper, requiring a large number of plates? A Well, most of them eat sirloin steaks, most of them do, and it takes a platter for a sirloin steak at least twelve inches long.

Q Did you serve a sirloin steak five minutes before these young men came in? A About five minutes before.

Q And how many did you serve? A I couldn't remember. I served two, anyway.

Q And you said when these men came in there wasn't a soul in the store? A No.

Q Except you? A Yes.

Q And some people had been there about an hour before, and you hadn't cleaned up the table? A Well, I didn't clean up all the tables, no, sir.

Q Well, you had only four tables? A Yes.

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Q And they were very close together? A Yes.

Q And you hadn't taken off the dishes that these men had used? A No, I had left them there.

Q They were laying there? A Yes.

Q Is that right? A Yes, I think there was one table cleaned.

Q And three tables filled with dishes? A Yes.

Q Is that the table that Potter was sitting at? A The table that Potter was sitting at, I don't believe there was any dishes on.

MR. SIMPSON: That's all, Mr. Martin.

RE-DIRECT EXAMINATION BY MR. PRESS:

Q Just a second. You have told us that, from the end of the bar to the partition is about fifteen feet; isn't that correct? A Yes, about fifteen.

Q And this bureau that you speak of was about two feet from the wall, from the partition wall? A About eighteen inches.

Q What is that? A About eighteen inches.

Q About eighteen inches? A Yes, sir.

Q So that the distance from the bar---and about what width is this bureau that you speak of, about what width, how wide is it, or, rather, how deep is it? A The width, it must have been about four and a half feet.

Q Do you mean in length? (Illustrating) A Yes, in length.

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Q And how wide was it? A About eighteen inches, I believe, something like that.

Q And that is about three feet from the partition wall to the front of it? A Yes, sir.

Q So that from the end of the bar we have about 12 feet to that bureau, is that right? A Yes, sir.

Q Now, the table at which this defendant was seated was how far---you say that from the end of the counter to the front of the bureau was about twelve feet? A Yes, sir.

Q How far was the table at which the defendant was seated from the bureau? A About two feet.

Q About two feet? A Yes.

Q And he was seated on that table? A Yes, sir.

Q And you say on this bureau were plates and saucers and cups? A Yes, sir.

Q Is that right? A Yes, sir; and platters and all kinds of glass.

Q So that there was no difficulty to lift those things from where he was seated, is that right?

MR. SIMPSON: I object to that.

THE COURT: Sustained.

BY MR. PRESS:

Q Well, was there anything between that table and that bureau, any obstacle, any partition or anything which would prevent a person from lifting those, who was seated at that

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table.

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MR. SIMPSON: Objected to.

THE COURT: Sustained.

BY MR. PRESS:

Q Was there any partition between the table that this defendant was seated on and the bureau? A No, sir.

Q Was there any obstacle of any kind? A Chairs, that's all, two chairs.

Q And they were at the table, were they not? A Yes, sir.

Q But the chairs weren't in the way of going to the bureau? A Between the bureau and the table.

Q That is all? A Yes.

Q And you say there were plates and other dishes on three tables; is that correct? A Yes, three of the tables.

Q Now, were there any dishes behind the counter with you, where you were? A No, not behind the counter.

Q Did you throw any dishes at them? A I didn't have any to throw.

Q Did you throw any dishes at the defendant or the others? A No, I threw coffee pots and kitchen utensils.

Q That is when you were attacked? A Yes, when I was attacked, to defend myself.

MR. SIMPSON: I object to the leading questions.

THE COURT: Well, you have been very quiet about it.

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You haven't objected. It has been answered.

MR. SIMPSON: It was answered so quick. I was up as quick as I could.

THE COURT: No, I think the question was rather deliberately put, and you might have objected to it. Perhaps you will object to the continuation of this line?

MR. SIMPSON: I do object.

THE COURT: Then perhaps we will let it stand that way.

BY MR. PRESS:

Q Did you see any dishes come out of the room adjoining the restaurant? A No, sir.

Q Did you see any come out of that doorway that leads in? A No, sir.

Q You have stated in your direct examination, I believe, that the door that leads to your room is behind the sideboard, am I correct? A Yes.

Q So that, if any dishes came out of that doorway, they would have to come over the top of the bureau, wouldn't they?

MR. SIMPSON: Objected to.

THE COURT: Sustained.

BY MR. PRESS:

Q Well, how high was the bureau? A It must have been about sevenfoot high.

Q And it is a high bureau? A Yes, a high head.

Q About how high is the door behind it? A About six

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foot.

Q That was immediately behind the bureau, you said?

A Yes, eighteen inches behind the bureau.

Q And about how wide is the door? A Well, the regular size of door, about two and a half feet, I guess.

Q And you say the bureau was four feet wide, is that right? A Yes, four or five feet wide.

Q Now, answer this question. Was the bureau directly in front of that door? A Yes.

Q And about eighteen inches, you say, out from the door? A Yes.

Q Is that correct? A Yes.

Q Now, of these fourteen men who entered your place, how many of them did you know by name? A I knew Potter---

MR. SIMPSON: I object to all this. This is not now matter brought out by me, your Honor.

THE COURT: Overruled.

MR. SIMPSON: Exception.

BY MR. PRESS:

Q You knew Potter? A Yes, sir.

Q Who else? A Lynch.

Q Yes? A McGlynn.

Q Go on? A Curran. Reynolds.

Q Who else? A And there were some others that I knew by sight.

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Q But did you know them by name? A I don't think I knew any one else by name.

Q So that of the fourteen that were there, you knew only five by name, Potter, Lynch, McGlynn, Curran and Reynolds?

A Yes, I think that's all I knew by name.

Q Did you recognize any man in that crowd as a man by the name of Glass? A No, sir; I never knew a man by the name of Glass.

Q Now this man Berger that you have spoken of on the cross examination, where did he reside? A Next door to me.

Q And these two men, Eddie and Charlie, I believe you said were from a garage? A Yes, working in a garage.

Q And where is that garage? A 68th Street, between West End Avenue and Amsterdam.

Q And did those men eat at your place? A All the time, every day.

Q Now, you didn't know who the other man was that was in there? A Well, I knew them by sight, but not by name.

Q Well, the man that you sent out for the police, you say his name was---A McGarry.

Q McGarry? A Yes.

Q And he returned to your place before the police? A No, sir.

Q Did he come to your place after the police, do you know? A I don't remember.

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

Q As a matter of fact you went to the Police Station immediately after the police came in; is that right? A As soon as the police came in, they arrested the men and we went over to the police station, and the first I seen of McGarry, he was standing outside of the garage door, the time I was going to the police station.

Q Now, at the time that you threw the grease, or about that time, did you know who that had come in, the fourteen men, sitting at the tables, or standing? A They were all right there the time I threw the grease.

Q And how close were they to you? A They were on top of us mostly, all those that could get at us.

Q But there were none of them seated at the tables?

A Well, as soon as the light started they got up, of course, and they all started to fight.

Q And did they come towards you? A Yes, certainly.

Q All of them? A Yes, all of them, towards me, right away.

MR. PRESS: All right; that's all.

CROSS EXAMINATION BY MR. JEFFERSON:

Q You have told the Court and jury, no ever, that you saw him, this defendant, seated at a table, when you saw him have a saucer in his hand. Did he come towards you, this defendant?

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MR. PRESSE: I object to that. He hasn't said so.

THE COURT: Objection sustained.

BY MR. SIMPSON:

Q Well, did you see this defendant come towards you with a plate in his hand? A That's a year ago. I can't remember exactly; only I can say that I saw the plate fly, that's all.

Q Now, you made a complaint in the Police Court, did you not? A Yes, sir.

MR. SIMPSON: Will your Honor give me the first indictment, please?

THE COURT: The Clerk has it. I have it.

BY MR. SIMPSON:

I show you---

MR. PRESSE: That is all right.

MR. SIMPSON: No, now, I want no concession. I'll try my case.

BY MR. SIMPSON:

Q Now, look at that paper and say whether your signature is at the bottom of that paper.

(No answer).

Q Answer it. A It looks like it.

Q Well, what is it? A It looks like it.

Q Well, look at it once. A It looks like my signature.

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Q Did you write that signature there? A I don't know. It's my name, and it looks like my writing, too.

Q Would you say that that was not your signature? A Well, I'm no expert in that, but it looks very much like my signature.

Q Would you say that you had not seen that paper in your hand now? A No, I wouldn't. I would say that I had seen it. I saw it somewhere in the West 54th Street Police Court that day, when I came to the office of the District Attorney.

Q When you saw it, was it on a piece of paper? A Yes, it was on a piece of paper. It looked very much like my signature.

Q Well, did you write it? A I don't know as it is the same as mine. I remember I wrote mine.

MR. ST. PIERRE: Well, will you concede that this is his signature?

MR. BREWER: Absolutely, as I said at the beginning.

MR. ST. PIERRE: No, then, I offer the complaint in the Police Court in evidence.

MR. BREWER: No objection.

THE COURT: Received.

(It is marked D as Exhibit 1.)

BY MR. STURGEON:

Q You were taken before the Judge in the West 54th St.

Court? A Yes.

Q And before being taken before the Judge in the West 54th Street Court, you were taken into the complaint room, were you not? A Yes.

Q And there you were asked by the Clerk who had assaulted you, weren't you? A He must, I guess. I think so. I don't know. He must.

Q You told the clerk every person who had assaulted you, did you not? A No. He didn't ask me such a question as that. He simply called their prisoners over to him and the clerk insisted on making a complaint of disorderly conduct and the officer who made the arrest---

Q Now, you have answered my question fully.

MR. SIMPSON: I move to strike out the answer as irresponsible.

MR. PRESS: And I object. I think it is responsive.

THE COURT: It doesn't seem to me responsive, and I will strike it out.

MR. SIMPSON:

Did you tell the clerk in the Police Court or the Police Officer that McGlynn had hit you over the head with a platter? Yes or no? A I didn't tell the clerk, no.

Q Did you tell the police officer? A Yes, the very same night, and gave them his name on a piece of paper, too.

MR. SIMPSON: I will read this exhibit to the jury.

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(Reads)

BY MR. SIMPSON:

Q Now, you swore to that in the Police Court, did you not? A I must have.

Q That was your complaint, isn't that the fact? A Well, it must be, if you say so, if it is there.

Q Now, you said in your complaint that John Potter--- that is this defendant---did strike you a violent blow on the face with his clenched fist. How do you reconcile your statement of your complaint, sworn to by you in the West 94th Street Court, when your mind was fresh and clear, to the statement that you have narrated to this jury that Potter didn't strike you; that all that you saw Potter do was to take a plate or saucer in his hand, that he was sitting at or standing at a table, and that he threw it in your direction. Yes. Now, if you will let me explain to you I will explain to you. At the time of that fight, I saw Potter in amongst the bunch with his hand up (Illustrating) and I was told after that time that Potter didn't hit me, but he was trying to get the people out.

Q Mr. Potter didn't hit you, but was trying to get the people out? A Yes, but he had his hand up thatway. (Illustrating)

Q And you were told that? A Yes, I was told that afterwards.

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MR. SIMPSON: That is all.

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BY MR. PRESS:

Q You told your story, that morning, to the clerk, when the three defendants were there? A Yes.

Q And the clerk wrote out the complaint? A Yes, he was writing there.

Q Did he show you the complaint he wrote it, he read it to you? A I don't know, but I know he wanted to make out a disorderly conduct complaint.

Q And you signed the complaint, is that right? A Yes.

Q That is all.

MR. SIMPSON: That is all.

BY THE COURT:

Q Now Mr. Martin, there was nobody seated at the table you asked him to get a policeman? A He was in the kitchen.

Q Did he talk to any men? A No, sir, with the men that were playing cards.

Q With the men he was playing cards? A Yes, sir.

Q And you asked him to go out and get a policeman, because you thought that was going to be some trouble, did you? A Yes.

Q Now, didn't you ask those men to stay and give you a hand and help you, the way in the other room? What do you say to the jury about that? A I didn't say nothing

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to them.

Q I say, what do you now say to the jury about that?

A I didn't ask them for any help.

Q Why didn't you? They were there in your rooms, playing cards, and you asked one of them to go and get a policeman; why didn't you ask those men to stay and help you, because you thought you were in danger, and perhaps your property? A Well, I thought the best way was to get a policeman, because I didn't want no fight in the place.

THE COURT: Is there anything else?

MR. SIMPSON: No, sir.

MR. PRESS: No, sir.

BY MR. PRESS:

Q That is your explanation; that you thought it best to get a policeman? A Yes, because I didn't want no fight in the place.

BY THE COURT:

Q Have you seen those men that were in your rear room, playing cards, since that night? A Which men?

Q The men who were playing cards in your place; have you seen them since? A Ch, yes; I have seen them different times.

BY MR. PRESS:

Q Since that time? A Yes, I've seen them since that time.

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J O H N J W A L L A C E , of the 43rd Precinct, a witness called on behalf of the People, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. PRESS:

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

Q And have been for how long? A Seven and a half years.

Q Do you remember the night of the 27th of July, 1913?

A I do.

Q And on that night were you on duty in the City and County of New York? A Yes, sir.

Q At about twelve o'clock on that night, what was your post? A On West End Avenue, between 64th and 67th Streets, to 71st Street.

Q And were you a fixed post at that hour? A No, sir; on patrol.

Q Now, while you were---at what hour were you in the vicinity of 172 West End Avenue? A Between twelve and one o'clock.

Q Was your attention attracted to that place? A Yes, sir.

Q How? A By a crash of glass.

Q And about how far were you from the entrance to that place at that time? A About a hundred and twenty-five feet.

Q And when you heard the crash of glass, what did you do? A I ran towards the place, and I saw two men running

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from it, and I followed them through 68th Street. They ran around the corner into 68th Street towards Amsterdam Avenue. They ran about three hundred feet, and I rapped my night stick several times, and called upon them to halt, and they ran in a doorway.

Q Did you call to them, do you say? A Yes, several times.

Q Did they stop when you called? A No, sir.

Q Were you in uniform? A Yes, sir.

Q Then they ran, you say, about three hundred feet?

A Yes, sir.

Q And then subsequently you said they stopped in a doorway? A Ran in a doorway.

Q Now, who were those two men? A John Potter and James Reynolds.

Q And had you a brother officer on that post with you, that night? A Yes, sir.

Q His name? A Levy, Officer Levy.

Q Officer Levy? A Yes, sir.

Q Did he, if you know, follow those two men also? A Yes sir.

Q And did you or he go up to them in the doorway first? A I did.

Q And when you came up to them in the doorway did you say anything to Potter and the other man? A Yes.

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Q What did you say to Potter? A I said to Potter, "What's the trouble down there? What did you do? And he says, "There was a fight there, and we run out.

Q And how about the other man? A We brought the two defendants---

Q Now, wait a minute. Did the other man say anything to you? A No, sir.

Q Now, were there any marks on this defendant? A No, sir.

Q I mean any marks on his face, indicating that he had been struck by anything?

MR. SIMPSON: I object to that. There is no such evidence here that he had been struck or beaten by anything or anybody.

MR. PRESS: My object in that is to show whether this man was assaulted, the defendant Potter.

THE COURT: Yes.

A There were a few marks on his clothing.

BY MR. PRESS:

Q What kind of marks were there? A Blood stains.

Q On his coat? A On his shirt.

Q On his shirt? A Yes, sir.

Q What part of his shirt? A On the front part, the front part of his shirt.

Q Had he a vest on at that time? A No, sir.

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Q This was on the 27th of July, 1913? A Yes.

Q Now, what did you and Officer Levy do with the two defendants? A Brought them back to 172 West End Avenue.

Q When you got to 172 West End Avenue, what condition did you find that place in? A The tables and chairs upside down and a lot of crockery broken on the floor, and everything in disorder.

Q And the plate glass window in front, how about that? A All smashed in.

Q And where did you find the complaining witness when you entered? A In front of the counter, half lying on it and half standing. And he was cut on the head and under the eye, and he seemed to be doubled up with pain in the back, or something of the kind.

Q Any contusions of the jaw? A No, under the eye only; that's all.

Q Was he bleeding? A Yes.

Q Now, did you see a man there of the name of Flood? A Yes. A

Q Where did you pick him up or where did you find him? A He was standing in the doorway, leaning in the doorway.

Q And what was his physical condition? A Well, he was burned about the face, neck and hands.

Q Could you see with what? A Only what he told me.

Q Well, he said he was burned by fat or grease didn't he?

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A Yes, sir.

Q Well, what did he tell you? A He said he was burned by fat or grease.

Q Now, what did you do immediately after that? A Took them to the station house.

Q Whom did you take to the station house? A Potter, Reynolds and Flood.

Q And what about the complaining witness? A Took him also.

Q And did you send for an ambulance? A Yes.

Q And did an ambulance come? A Yes.

MR. PRESS: Stand up, Doctor.

BY MR. PRESS:

Q Is this the doctor who came with the ambulance? A Yes, I know him well.

MR. PRESS: (Addressing the Doctor) And your name, Doctor?

THE DOCTOR: Dr. Schoenberg.

BY MR. PRESS:

Q And did you see him do anything to the complaining witness? A Sew up his eye and head.

Q And that was on the night of the 27th of July, 1913?

A On the morning.

BY THE COURT:

Q Pardon me, did he give any attention to Flood, the Doc-

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tor? A Yes, sir.

Q He gave him attention also? A Yes, sir.

BY MR. PRESE:

Q Now, at what hour was the doctor there? A Well, about one o'clock.

Q Now, what station house was that? A 150 West 68th Street.

Q Now, did you have any further conversation with this defendant on that day? A No, sir.

Q Did you say anything to him as to why he ran? A No, sir.

MR. PRESE: You may examine.

CROSS EXAMINATION BY MR. SIMPSON:

Q Now, how many men were arrested? A Four.

Q And as---you only got two; is that right? A I ran after two and brought two back.

Q Now, who got the other man? A Flood was so badly burned he stood in the doorway, and I got him, too.

Q He was so badly burned that he was standing in the doorway of this restaurant? A Yes, sir.

Q The restaurant where this thing had happened? A Yes sir.

Q Flood was there? A Yes, he was there.

Q And where did you get the other man, if you got him at all? A He was inside of the place when I got there.

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Q He was inside of the place? A Yes, sir.

Q Did the complainant direct you to arrest him also?

A I asked him if he was one of the men that assaulted him, and he wasn't quite sure about it, and I questioned this man, and asked him how he got in there, and he said he heard the racket of the fight, and walked in there, and several police officers came there and wouldn't let him out, held him there until I came.

Q And that was before you brought him in, yes, sir.

Q And that was the time taken to get him out, was he out of there?

A Yes, sir; was he not?

Q And brought into the police court, the next morning? Yes.

Q And the complainant then called him out, calling him as being one of the men? A Right.

Q Did he save the---I'll withdraw that question. Was there anything about this other man---by the way, did you know his name? What name did he give? A He gave the name of William Davis.

BY THE COURT:

Q Who, the man that was brought in, was discharged in Court the next day? A Yes, sir; he was in the place at the time.

Q That is, in the oyster house? A Yes, sir; he was

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inside when I got there.

BY MR. SIMPSON:

Q He was inside when you got there? A Yes, sir.

Q And what was his condition as to his clothing, or face, or anything? A Apparently all right.

Q All right? A Yes.

Q Well, did he have any evidence of any grease or lard on his clothes? A I saw none.

Q Did you take the four prisoners to the West 68th Street Station house? A With the assistance of officer--

Q With the assistance of Officer Levy? A Yes, sir; and several other officers. It was about the time the men were reliving each other, and several officers were going in and out, may be twenty.

Q Well, on whose complaint was this man Glass locked up for the night; do you know? A On Martin's complaint.

Q Martin made the complaint? A Yes, at the Police Station he said he wasn't sure whether he was one of them or not, but he was in there, and he couldn't give me a good account of his being in there at the time, and so I arrested him.

BY MR. PRECS:

Q He couldn't give you a good account? A No, sir.

BY MR. SIMPSON:

Q But, in the morning, before the complaint clerk, he

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eliminated Glass? A Well, he wasn't sure whether he done the assaulting or done the damage in the restaurant, or not; he wasn't quite sure.

Q Now, let's see, officer. Before you had reached the Magistrate with the defendants, you, necessarily, went into the complaint room; is that right? A Yes, sir.

Q And at the time you went into the complaint room, there were four persons under arrest for this crime; were there not? A Yes.

Q And after you had gone into the complaint room, and the complaint was being drawn, was it being drawn from statements made by the complainant to the clerk? A Yes.

Q Did he mention Glass's name at all? A No.

Q Well, then you got outside before the magistrate, and after the complaint had been drawn and signed by the complainant, you arraigned the four men before the magistrate, that's right, is it not? A Yes, that's right.

Q However, the complaint only recited a crime, or an alleged crime against three; isn't that so? A Yes, sir.

Q And those three were Potter, Flood and Reynolds? A Yes, sir.

Q Taking it from your own lips---I wasn't there---at whose request was Glass discharged? A Martin's.

Q On Martin's request? A Yes, sir.

Q Now, you know of nothing that occurred on the inside

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of that place until you heard the crash of glass? ⁸⁰ A I do not.

Q Reynolds made no statements to you? A No, sir.

Q Flood's condition was that of a person having been burned? A Yes, sir.

Q Was he in pain, or did he show any pain? A He was in pain.

Q Did you see any persons in the rear room, or did you make a search of those premises? A I made a search, but there was nobody there. I saw no one.

Q Now, behind the partition, at the entrance part of the store, did you see any table, with cards on it? A I did not.

Q You don't know? A I don't remember, no.

Q Now, when you got back into the kitchen was there any person there? A I saw no one.

Q Was there a woman there? A Not at that time, no.

Q There has been something testified to here about a dishcloset or a bureau; did you see that in the premises that night? A Yes, there was a bureau there in the store.

Q In the store? A Yes.

Q In the store proper? A Yes.

Q Did that guard or overcome an entrance, the door leading into the rear?

MR. PRESS: I object to the word "overcome". I don't know what is meant by it.

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THE COURT: Yes, sustained.

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BY MR. SIMPSON:

Q Did that bureau in height and width, shut out from view a doorway leading to the rear of the premises? A I don't remember that.

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

MR. SIMPSON: That's all.

RE-DIRECT EXAMINATION BY MR. PRESS

Q Officer, when you got there, with the prisoners, were there any other police officers in front of the premises? A Several.

Q They had preceded you to the restaurant? A Yes, sir.

Q And this man who gave his name as Glass was inside?

A Yes, sir.

Q And do I understand you to say that the officers wouldn't let him out? A Yes, sir.

Q So that, when you arrived there, you asked him what he had to do with the thing? A Yes, sir; I did.

Q And it was then that he told you he had heard the fighting and had come in to see what was going on? A Yes, sir.

Q That's the explanation that Glass gave you? A Yes sir.

Q And then, as I understand it, the complaining witness said that he was not sure about him? A Yes, sir.

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Q And subsequently he was discharged? A Yes, sir.

MR. PRESS: That's all.

BY THE COURT:

Q Mr. Wallace, this oyster house in on your beat? A Yes, sir.

Q Was Levy, the other officer, on that beat? A Yes, sir; my side partner.

Q You both patrolled that beat? A Yes, sir; after ten o'clock. There is always two men out after ten o'clock, and we relieve each other every hour.

Q Now, during this time the two officers on the beat were Levy and yourself? A Yes, sir.

Q And when you heard this crash that attracted your attention for the first time, how far were Levy and you from the oyster house? A I was about a hundred and twenty-five feet away and he was just one block away, well, pretty near a block.

Q Did you see McGarry that night? A No, I don't remember seeing him, that night.

Q Do you know him? A Yes, I do.

Q He is an automobile washer? A Yes, I know him?

Q And he didn't speak to you or Levy, the only policemen on that beat that night? A No, sir.

Q Or at that time? A No, sir.

Q Now, you say that, on Martin's request, Glass was dis-

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charged. I would like to have you state what he said that led you to say that it was at Martin's request that Glass was discharged. What did he say to Judge Duell? A Well, as far as I can remember, your Honor, this man wasn't quite sure if he was one of the party or not at the time the fight occurred. At the time the fight occurred this man was very much confused and he couldn't say whether he done any of the assaulting or not.

Q Did he ask the magistrate to discharge Glass? A I believe that Glass, your Honor, had a few men there to prove that he was in the store next door, and he ran in when the crash of glass came, and they proved an alibi for him.

Q Was that what you meant when you said "At Martin's request he was discharged?" A Well, there was no complaint drawn up against Glass, your Honor.

BY MR. PREESE:

Q Well, did he ask the Magistrate to discharge him? A No, sir; not directly, but no complaint was made against Glass.

Q And Glass did bring witnesses there to establish an alibi? A Yes, sir; he did.

MR. SIMPSON: I object to that as leading.

THE COURT: He has already said it. It is on the record.

RE-CROSS EXAMINATION BY MR. SIMPSON:

Q Have you seen Glass since then? A No, sir.

Q And did the men that he brought there to establish

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his innocence---have you seen them since? A No, sir. 84

Q The men that he brought there to establish his alibi?

A No, sir.

Q And you don't know whether they are friends of Martin's, do you? A No, sir; I couldn't say.

Q U S LE V Y , of the 31st Precinct, a witness called on behalf of the People, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. PRESS:

Q Officer Levy, do you remember the night of the 27th of July, 1913? A I do.

Q Were you on post on that night in the City and County of New York? A I was.

Q And you saw the last witness who was on the stand here? A I did.

Q Were you on the same post with him? A I was.

Q Now, at about ten minutes past twelve, were you on fixed post or patrolling? A On fixed post.

Q And how far were you from the premises 172 West End Avenue? A I was standing on the fixed post at 69th Street and West End Avenue.

Q Did you hear any noise about that time? A I did.

Q Can you fix the hour at which you heard that noise? A It must have been seven or eight minutes after twelve.

Q And what did you do when you heard that noise, or what

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ever kind of a noise it was? A I heard the smash of glass
and a yell of "Police".

Q And what did you immediately do? A I ran down to-
wards the place.

Q And what did you see as you did? A I seen two
men running around the corner.

Q Yes. Did you see any other men coming out? A I did
not.

Q Yes, and what did you do? A I followed those two
men that ran around the corner.

Q Yes? A And Officer Wallace was a little ahead of
me; he was running after them also.

When we got up near Amsterdam Avenue, the two men stop-
ped, after we hollered to them to stop and they saw the
other policemen coming from Amsterdam Avenue.

MR. SIMPSON: I object to that and I move to strike it
out.

MR. PRESS: Consented to.

THE COURT: Strike it out.

BY MR. PRESS:

Q At the time when you were following them, when you
started around the corner after them, did you call to both
of them to stop? A I did.

Q Were you in uniform? A I was.

Q And did you keep on in pursuit of them? A I did.

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Q And did you hear any night stick strike on the ground? A I did.

Q And did you yourself rap your night stick? A I did.

Q And while you were still pursuing them, did you see down ahead of them any police officers coming? A I did.

Q And did they stop? A They stopped, yes, sir.

Q And these police officers were coming from what avenue into the street? A Amsterdam Avenue.

Q And then what did the two defendants do? Did they stand in the street or go in a doorway or what did they do? A They stood in the doorway of Butler's stables.

Q And did you and your brother officer go up there?

A No did.

Q And did you say anything to either of the defendants?

A I did not; not to this defendant, but I spoke to the other defendant.

Q I see. And was that in the presence and hearing of this defendant? A Well, when I spoke, it was a little later, when he walked away with them, he spoke to the other man.

Q And your fixed post is where? A 69th Street and West End Avenue.

Q And when you heard the crash of glass, you ran down towards the place? A Yes, sir.

Q Now, what street was it that these two men that you saw leave the store ran through? A West Sixty-eighth

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Street.

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Q And how far is the store from West 68th Street? A From fifty to seventy-five feet.

Q And between the time you heard the crash of glass, and looked in that direction, what time elapsed until you saw these two men run out? A About two seconds.

Q And about how long did it take them to turn the corner and for you to turn the corner? A Well, it took them about two and a half seconds to turn the corner.

And you? A About eight.

Q And you were in full pursuit of them? A I was.

Q And when you were pursuing them, were you looking at the store or at them? A I was looking at them.

Q Now, I will ask you this question. After you arrested your car and this defendant was taken with him, where did you go? A Went back to 172 West End Avenue.

Q And what kind of a place was that? A It was a restaurant.

Q And has it got a plate glass window in front? A It has.

Q And was that intact or broken? A That was broken and the glass was all out.

Q All out? A Yes, sir; with the exception of the bottom piece there.

Q And did you enter that store? A I did.

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Q And did you find some officers there ahead of you?

A I did not, no.

Q Well, were you ahead of the other officer? A I led the way back.

Q You led the way back? A Yes.

Q Now, you reached the restaurant first? A I did.

Q And about how long after was it that your associate came? A Wallace was about six feet in back of me.

Q Six feet back of you? A Yes, sir.

Q Now, when you entered the place, in what condition was it? A Well, the front window, the show window, was broke. The door was broke, the crockery was all over the floor. The tables were upturned and the chairs, and I noticed, in particular, a big bowl with shredded wheat biscuits, one of these big advertising bowls, was down on the floor, smashed to pieces.

Q Now, when you got back there, where did you see, if you did see, Martin? A He was sort of leaning over the counter. (Illustrating).

Q And what was his physical condition? A Well, I noticed the blood coming out of his head, and the left eye was cut open, I should judge about an inch and a half, or an inch and three quarters, and was bleeding. He was all full of blood, from head to foot.

Q And then where did you go after that? A Well, we

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left the store and went up to the station house.

Q And the station house is where? A At 150 West 68th Street, that's between Amsterdam and Broadway.

Q Well, there did you send in a call for an ambulance?

A Yes, sir.

Q And did it arrive? A It did.

MR. PRESS: Stand up, Doctor?

MR. SIMPSON: I will concede on the record, to save everything, that the doctor did come to the 68th Street station house, and treated the complainant, and the complainant did suffer from whatever he suffered from.

MR. PRESS: And we don't know yet what he did suffer from.

BY MR. PRESS:

Q That is the doctor, Dr. Schoenberg? (Indicating)

A Yes, sir.

Q And I presume you were present when the defendants were arraigned in Court? A No, sir; I only took them as far as the Court. I left, that morning, Wallace took charge of the rest.

Q Now, did you find another man in the store when you got there? A Yes; this other man seemed to come in the place when we were in the store,---

Q And do you know his name? A Glass.

Q And was he placed under arrest? A Yes, he was placed

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under arrest.

Q And he was discharged in the Police Court; is that correct? A Well, I don't know. It's just what Wallace told me.

Q Well, you don't know what happened to him? A No, sir.

Q Well, did you see a man named Flood there? A Yes, he was there.

Q Well, where did you see him first? A He was standing in the entrance to the doorway, suffering from pain and burns.

Q He was leaning there (Illustrating).

MR. PRESS: That's all.

BY THE COURT:

Q The Martin Oyster House at 172 West End Avenue, is in the County of New York? A Yes, sir.

(The Court then admonished the jury in accordance with Section 415 of the Code of Criminal Procedure, and adjourned the further trial of the case until Thursday morning, June 18th, 1914, at 10:30 o'clock.)

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CASE #1914

THE PEOPLE VS. POTTER et al.

TRIAL RESUMED.

New York, June 18th, 1914.

THE COURT: Gentlemen of the Jury, I will ask you not to talk about this case with any one, and not to form or express any opinion about it until it is finally submitted to you by the Court for your determination. I will ask you now to retire, and not return here until five minutes past eleven.

AFTER RECESS.

G U S L E V Y , his direct examination being continued, testified as follows:

DIRECT EXAMINATION (Continued) BY MR. PRESS:

I don't know whether I asked you this question or not, Officer. But do you remember when Fred Martin was taken to the station house and the ambulance surgeon was attending him? Do you remember that incident? A Yes, sir.

Q Do you see that surgeon here? A Yes, sir.

MR. SIMPSON: You asked him about that yesterday and he identified him.

MR. PRESS: Oh, I did? Then that's all right. That's all, Officer.

MR. SIMPSON: That's all, Officer.

H E R M A N B . S C H O E N B E R G , of the Polyclinic Hospital, a witness called on behalf of the People, being duly

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sworn, testified as follows:

DIRECT EXAMINATION BY MR. PRESS:

Q Doctor, you are a duly licensed medical practitioner, under the laws of the State of New York? A I am.

Q On the 27th day of July, 1913, were you connected with any hospital in the City of New York? A The Polyclinic Hospital.

Q And what were your duties there? A Ambulance surgeon.

Q Did you, on the morning of July 27th, 1913, between twelve and one o'clock, go to 150 West 68th Street, the station house? A Yes, sir.

Q The 28th Precinct Station house? A Yes, sir.

Q And did you there treat two men? A One I remember only.

Q One? A Yes, sir.

Q And was the name of that man Frederick Martin? A It was, yes, sir.

Q Now, I ask you to state what his physical condition was at the time you arrived there? A He was suffering from a laceration on the face and on the scalp.

Q And where was the laceration on his face? A It was below one of his eyes; I don't know which one.

Q Below one of his eyes? A Yes, sir.

Q And where was the laceration on his scalp? A I don't know the exact location.

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Q Well, did you do anything with respect to either of those wounds? A I sutured both of them.

Q What? A I sewed both of them.

Q And bandaged them up; is that correct? A Yes, sir.

MR. PRESS: That is all.

MR. SIMPSON: No questions, doctor.

MR. PRESS: The People rest, if your Honor please.

MR. SIMPSON: I ask your Honor to direct an acquittal here, upon the ground that the People have failed to sustain facts to constitute the crime in the indictment, first.

And, secondly, upon the further ground that the variance between the witness's testimony and the complaint in this case.

THE COURT: Motion denied.

MR. SIMPSON: I respectfully except. I ask your Honor to direct this jury---to say to this jury that your Honor's denial of my motion is not to be considered by them as an expression of opinion of the Court as to the guilt or innocence of this defendant.

THE COURT: Gentlemen, I can say to you that it is not my business to pass upon any question of fact, and a legal question has been presented by counsel, and I have passed upon it, and, in the state of the proof, I have denied the motion. Whatever opinion I may have upon the facts, I should not express it, and, if I did express it, I advise you at

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once to disregard it, because it is your business, and not mine, to pass upon all questions of fact, and I shall try not to encroach upon your domain, and you will not encroach upon mine, which is questions of law, advising you as to how to take up the consideration of the proof. Go ahead.

MR. SIMPSON: The defendant rests.

MR. PRESS: The People rest.

MR. SIMPSON: I now renew my motion, made at the close of the People's case, that the People have failed to sustain facts sufficient to constitute the crime in the indictment, and, on the further ground that the facts stated by the complaining witness prove no crime.

THE COURT: Motion denied.

MR. SIMPSON: The defendant respectfully excepts.

THE COURT: Go to the jury.

(Mr. Simpson sums up for the defense and Mr. Press closes the case for the People).

MR. SIMPSON: Your Honor has made a direction, during the summing up of the District Attorney, something unusual in my twenty-three years' experience, that I might place upon paper that which I wanted to object to, misstatements of alleged evidence coming from the lips of the District Attorney.

MR. PRESS: Your Honor, I object to this.

THE COURT: Oh, go ahead and put anything that you want

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on the record, Mr. Simpson.

MR. SIMPSON: I except to the statement of the Attorney to the jury that the defendant spoke to any of party that were in that place.

I except to the statement of the District Attorney that this defendant joined in the crowd, as not being in evidence.

And I object to the statement of the District Attorney that the men in the poker room, or who were in that room, according to the witness, the complaining witness, went out of the hall side door of that place. And your Honor gives me an exception?

THE COURT: You take an exception to those matters?

MR. SIMPSON: Yes, sir.

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THE COURT'S CHARGE:

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MALONE, J.:

Gentlemen of the Jury:

I shall be able to be brief in this case on account of the fact that counsel have traversed the proof submitted pretty thoroughly. My duty is to advise you as to what the law of the case is, and your duty is to determine all the facts, and then reach a judgment which you will return in the form of a verdict, which will be a declaration of the truth with respect to the issue here.

The defendant, John Potter, is charged, with others, with committing assault in the second degree, on the 27th day of July of last year, in this County, and it is laid in the indictment that, on that day, he committed the offense against the Statute of the State, and the peace, and law and dignity of the State.

He denies that he is guilty of the offense, and goes to you for his delivery.

The offense charged here is that he wilfully and wrongfully wounded or inflicted grievous bodily harm upon Frederick Martin. . The Statute provides that, if a person does that, either with or without a weapon, he commits the offense of assault in the second degree.

The counsel for the State maintains that this defendant, with others, committed feloniously this assault,

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and invokes the definition of a principal. I will read it to you in the language of the lawmakers:

"A person concerned in the commission of a crime, whether he directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent, and a person who directly or indirectly counsels, commands, induces or procures another to commit a crime, is a principal."

That definition is a comprehensive one, and, if you give your attention to the language of the statute, I think you will have a fair appreciation of what it covers. There may be several persons guilty of an offense, one performing one part of it and another performing another part of it, either by physical acts or by moral suasion or assistance.

There is no limitation placed upon the number, providing the proof brings them fairly and squarely within the scope of the definition, that is, a person who aided and assisted in the doing of an offense, or directly or indirectly counseled, commanded or induced another to commit it.

Your duty is to decide this case between the two parties here. One party is the People of the State of New York, and the other party is the defendant. Each of these parties is entitled to even-handed treatment from you. You are not to favor one more than you do the other. You are not to be influenced by any zeal in the interests of the public, be-

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cause it is a criminal prosecution in the interests of peace, law and order. You are not to be affected by considerations of the heart, matters of tenderness and sympathy for a person charged with a crime. Divest yourselves of any such notions, and get yourselves to what you are about, and what your oaths require of you.

Every person who is charged with the commission of a crime is presumed to be innocent of it, until his guilt has been brought home to him by proof of it beyond a reasonable doubt. That presumption is in a case from the beginning of it until the end of the jury's labors, until they have reached a conclusion, and made up a verdict.

If the proof be not satisfactory in its quality or in its quantity, the presumption of innocence demands an immediate acquittal. That burden of proving the case rests upon the District Attorney, the People of the State of New York, from the beginning to the end. The defendant has no duty to the jury and the Court but the burden falls upon the person who accuses or charges the individual with the commission of a crime. That burden never shifts from the State. Get that well into your minds.

The State has brought witnesses here that you have listened to, and you have heard their testimony under examination and cross examination, and you will sift it out, and determine what the real facts are, and the motives, if you

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find any, actuating their conduct as witnesses.

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You may reach the conclusion that assault in the second degree was committed upon Frederick Martin, and still find the defendant not guilty. Others are charged with the commission of the offense, and each case stands upon its own bottom, to be determined separately by the jury.

Did this defendant commit this offense? Did he consciously, knowingly, aid and assist in the violent, felonious assault upon Frederick Martin? It is for you to say.

Did these matters that occurred, occur by plan or arrangement, or was it a development from matters and things that arose at that oysterhouse at 172 West End Avenue, on the 27th day of July of last year? It is for you to say.

I know of no evidence in the case that the defendant struck Martin. Martin himself has testified that he cannot say that this defendant struck him. He has told you that he came to the oyster house with thirteen others, and that he was rather tight, and took a seat at some table in the rear; and that, during the confusion and trouble, he saw the defendant fire a saucer or a plate in his direction.

You will, therefore, pass upon the question whether the State has satisfied you by proof, according to the requirements of the law, that this defendant was a conscious part of that assault upon Frederick Martin, if you find that Martin was assaulted.

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You have heard some testimony as to other persons who were there, other than those who were in that party of fourteen, and the learned counsel for the defendant argued that something from them would have been illuminating to you.

Well, you have evidence that, when these men entered the place, Berger was there, and Berger's man, who used to work for him, and that two other men "Eddie" and "Charlie", were there, and that one McGarry, an automobile washer, was there, and that he was sent by Martin to secure the assistance and help of the police.

There is some testimony that the police officers who were on that post did not see McGarry and that their attention was attracted to the trouble by hearing a crash of glass.

Now, would this have been helpful? The learned counsel for the State argues that these persons were not there at the time that the trouble took place, and that, for that reason, their testimony would not have been helpful. There is a conflict between counsel on that subject, as to the help that might have been had by the calling of these witnesses.

Something has been said about the duties and responsibilities of counsel, gentlemen. This is a public case, brought to the attention of the learned counsel for the People, and with witnesses called to his attention. Did he owe a further duty, or has he done everything that the case requires?

He takes the burden, and must prove his case, and he must

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prove it not by the help of the defendant, but by evidence that will satisfy and control the judgment and consciences of the jury.

Do not travel outside of the case, gentlemen. Do not permit matters of clamor or popular prejudice to get into your consideration. Hold the State to the strict requirements of the law. Have they satisfied you here, beyond a reasonable doubt, that this defendant committed this assault in the second degree, on the person of Frederick Martin?

The form of your verdict will be either guilty or not guilty of assault in the second degree.

Is there something that you would like to have me charge the jury?

MR. SIMPSON: No, your Honor. He is either guilty of assault in the second degree or nothing. And, in addition to that, I ask your Honor will your Honor direct the jury more in terms, about the matter of failure to take the stand?

THE COURT: Well, I have, perhaps, indirectly covered that. But I will now charge you, gentlemen, that the fact that the defendant does not take the stand must not come into your deliberations, as any evidence of anything. The burden rests upon the State. The State must satisfy you by proof beyond a reasonable doubt, and the failure of the defendant to go upon the witness stand must not have the slightest weight with you in determining this question. He has the

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right to do it or to refuse to do it, and he has chosen to stand upon his legal rights here, and his counsel argues that the proof submitted, would not justify you, under the law, to find a verdict against him, beyond a reasonable doubt. That question is now with you.

MR. PRESS: I ask your Honor to charge the jury that the two elements in this case are, first, did this defendant assault this man, or, two, did he aid and abet in the assault upon him?

THE COURT: In either aspect, if it is clearly established by the proof, the defendant would be guilty. But the jury will stick closely to what the evidence is, and the evidence is that he was seen to have a plate or saucer in his hand, and that he threw it in the direction of the complaining witness. There is no evidence that he hit him.

You will not speculate or guess about the matter, gentlemen, but apply yourselves closely to that inquiry, which is limited. I think that covers it as well as I can do it for you?

MR. PRESS: Yes, sir.

THE COURT: You may retire, gentlemen.

(The jury retired at 1:20 P. M.)

(The Jury returned at 3:40 P. M.)

(The jury found the defendant guilty of assault in the second degree.)

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MR. SIMPSON: Will your Honor remand the defendant to the 23rd?

THE COURT: That will be next Tuesday?

MR. SIMPSON: Yes, sir.

THE COURT: Yes, I will remand him until Tuesday next, and you may make your motions at that time, if you prefer.

MR. SIMPSON: Yes, sir; I will make my motions then.

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