

178-407 1648
Record No. 2429

In the
Supreme Court of Appeals of Virginia
at Richmond

T. R. MITCHELL

v.

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF CAMPBELL COUNTY.

RULE 14.

¶5. **NUMBER OF COPIES TO BE FILED AND DELIVERED TO OPPOSING COUNSEL.** Twenty copies of each brief shall be filed with the clerk of the court, and at least two copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

¶6. **SIZE AND TYPE.** Briefs shall be printed in type not less in size than small pica, and shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed records. The record number of the case shall be printed on all briefs.

The foregoing is printed in small pica type for the information of counsel.

M. B. WATTS, Clerk.

NOTICE TO COUNSEL

This case probably will be called at the session of
court to be held

JUN

1941

You will be advised later more definitely as to the
date.

Print names of counsel on front cover of briefs.

M. B. WATTS, Clerk.

CLERK
SUPREME COURT OF APPEALS



RICHMOND, VIRGINIA

INDEX TO PETITION.

(Record No. 2429)

	Page
Statement of facts	1*
Assignment of Errors	1*-2*
Statement of Facts	2*-5*
Instructions	11*-12*-13*-14*-15*
Argument	5*-22*

Citations

<i>Montgomery v. Comth.</i> , 98 Va. 841	6*
Wharton's Evidence, Tenth Edition, 575-6	9*
92 Va. 609	10*
<i>Covington v. Comth.</i> , 136 Va. 665	12*
Jackson's Case, 96 Va. 108	14*
Sim's Case, 134 Va. 736	14*
<i>Stone v. Comth.</i> , 11 S. E., Second Series 728	19*
Wilkins Case, 11 S. E., Second Series 653	20*
Byrd's Case, 89 Va. 536	20*
Read's Case, 22 Grat. 924	20*
<i>Brown v. Comth.</i> , 136 Va. 807	20*
Pott's Case, 113 Va. 732	22*
Linton's Case, 101 Va., page 833	22*

IN THE
Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 2429

T. R. MITCHELL,

versus

COMMONWEALTH OF VIRGINIA.

*To the Honorable Judges of the Supreme Court of Appeals
of Virginia:*

Your Petitioner, T. R. Mitchell, respectfully represents that he is aggrieved by a final judgment entered against him in favor of the Commonwealth of Virginia, in the Circuit Court of Campbell County, on the 11th day of November, 1940. A Transcript of the Record is presented herewith and as a part of this petition.

STATEMENT OF THE CASE.

The Petitioner was indicted for the murder of R. W. De-Priest, Jr., and was tried therefor on the 23rd day of October, 1940, when the jury returned a verdict of guilty of voluntary manslaughter, and fixed his punishment at five years in the penitentiary. Motion for a new trial was made on the various grounds hereinafter set forth, the Court overruled the said motion and entered judgment on the verdict.

ASSIGNMENTS OF ERROR.

First, the Court erred in overruling the motion of counsel for defendant to set aside the verdict as being *con-
2* trary to the law and the evidence.

Second, the Court erred in granting certain instructions offered by the Commonwealth over the objection of the defendant.

Third, the Court erred in refusing to grant certain instructions offered by the defendant.

Fourth, the Court erred in amending such instructions offered by the defendant.

Fifth, the Court erred in refusing to admit such evidence offered by the defendant.

Sixth, the Court erred in admitting such evidence offered for the Commonwealth over the objection of the defendant.

THE FACTS.

On the 16th day of August, 1940, the defendant, Thomas R. Mitchell, went to the home of the decedent, Robert W. DePriest, Jr., to get his brother and his brother's car. His brother had been there drinking for some time and DePriest, DePriest's daughter and son-in-law had been riding around the country while intoxicated in the accused's brother's automobile. The decedent was an uncle-in-law of the accused and there had been no grudge or hard feelings existing between them prior to the shooting. In fact, they were on unusual good terms. The defendant first went to George Lindsay's home looking for his brother and his brother's car, and he was told that the Lindsays had gone to Mr. DePriest's home. George Lindsay was a son-in-law of the decedent. Upon obtaining this information, the defendant then went to the home of the decedent. Mr. Elliott and two small twin boys of the accused were in the car. It was about half-past

7 o'clock (when they arrived at the home of Mr. De-
3* Priest). *The accused found his brother in the front room on a couch in Mr. DePriest's house and he woke him up and told him to come on and get his hat and go home. The accused's brother went to look for his keys and found out that George Lindsay had his keys and that George Lindsay refused to give him his keys to his car. The defendant's brother, Harvey Mitchell, said he didn't want to go home and leave his car there. The defendant told George Lindsay that he would carry him home if he wanted to and to please give him the keys which George Lindsay absolutely refused to do. Harvey Mitchell told his brother to take the distributor off of his car in order that no one could use it, and the defendant proceeded to do so. Thereupon George Lindsay's wife, who was a daughter of the decedent, ran up and caught hold of the arm of the accused, the accused see-

ing that it might be trouble shoved her out of the way and walked on to his own car. George Lindsay was drunk and so was his wife. At that stage Harvey Mitchell told the accused to go home and get his other keys to the car, which the accused did. John Goodman accompanied the accused on the trip to the accused's home to get the keys and returned to DePriest's house with the accused. The deceased, Mr. DePriest, had not in any way taken part in the altercation between the aforesaid parties. The accused's brother had been with the DePriests and Lindsays on a party for two or three days and all of them were under the influence of whiskey during the entire time. Therefore the accused was anxious to have his brother home to look after his work. The accused obtained the keys and brought them back to his brother, Harvey Mitchell, at the DePriest home. The accused drove up and gave his brother Harvey his keys. As soon as the accused handed his brother the keys to the car, George Lindsay, who was drunk at the time, started towards the accused and his wife caught him and wouldn't 4* let him come. As she did so, George Lindsay turned around and faced the decedent, Robert DePriest, and said "kill the damn son of a bitch" and then DePriest, who was also highly intoxicated, started towards the accused. Up to that time the deceased, Robert W. DePriest, had not said one word to the accused and the accused had said nothing to him. The accused had said nothing to George Lindsay but all at once George Lindsay flew into a rage and began cursing and threatening the accused. As soon as George Lindsay hollered out to the deceased, Robert W. DePriest, the said DePriest started towards the accused cursing, abusing and threatening the life of the accused, with a drawn knife, and all the while George Lindsay was aiding and abetting his said father-in-law, DePriest. The accused had not in any way said or done anything to Lindsay or DePriest to warrant any such actions on their part. As soon as the accused saw DePriest in this drunken condition, with a drawn knife, cursing, abusing and threatening him, he hollered out and said "Uncle Rob (meaning Robert W. DePriest, Jr., the deceased), I didn't come over here after any fuss". Then George Lindsay hollered out "kill him", and the said DePriest continued to advance upon the accused, with a drawn knife, cursing, abusing and threatening the accused's life. The accused pleaded with him not to come to him and backed all the way around the automobile trying to get out of the decedent's way, and he continued to back and plead with the decedent not to come on him, and when the accused got all

the way around the car he could go no farther on account of some obstruction there, and the decedent had him hemmed in and the accused reached in his automobile and took a gun out of the pocket of his automobile, and still begging the decedent not to come to him but the decedent continued to come.

Then the accused shot down to the ground thinking possibly that would stop the decedent from *coming on him and said "Rob, please don't come no further" but the decedent continued to come and when the decedent was right on him, the accused shot him once, while the decedent was right on him with a drawn knife in his raised hand and cursing, abusing and threatening his life. All the while George Lindsay was egging his father-in-law on and using abusive, indecent, and threatening language. The accused had not at any time addressed any of his remarks to the decedent, and had not at any time said or done anything to George Lindsay to warrant any such action on the part of Lindsay or DePriest. Mr. DePriest, George Lindsay, Annie Lindsay, George Lindsay's wife, and Mrs. DePriest, were all drunk. The eyewitnesses to all of this were Fulton Elliott, Harvey Mitchell and John Goodman.

ARGUMENT.

We respectfully submit that there are many errors in this case and even if the "Judas Iscariot Doctrine" is invoked there is no evidence here warranting the jury in bringing in the verdict of voluntary manslaughter. The defendant, his brother, Harvey Mitchell and two disinterested witnesses testified that the accused had not at any time addressed any remarks whatever, good, bad or indifferent, to the decedent, and that he, the defendant, had not at any time said or done anything to George Lindsay, who was aiding and abetting the decedent, R. W. DePriest, Jr., in his attack on the accused; that the accused begged and pleaded with the decedent, while the decedent was advancing upon him with a drawn knife holding the same high in the air and threatening his life with all kinds of vile and indecent threats, not to come to him, and in addition thereto the defendant continued to retreat and did retreat as far as he could and then 6* *even shot down to the ground thinking that it would deter the decedent. Of course, George Lindsay and his wife, who were both drunk, and admitted that they had been drinking and did not deny that they had purchased a gallon of wine, denied this in part but the alleged dying declaration of the decedent corroborated the statement of the accused

and the aforesaid defendant's witnesses in that he, the decedent, was advancing on the accused with a knife in his hand.

The accused was not in any sense a trespasser, and even if he had been a trespasser, *ab initio*, it is well settled law that the accused had a perfect right to defend himself and to meet force with force. This doctrine is clearly laid down in the Montgomery case. *Montgomery v. The Commonwealth*, 98 Va. 841.

A sane and sober man always has a motive for what he does. There is no evidence here that the accused was insane or under the influence of an intoxicant and there is absolutely no motive whatever disclosed by the record in this case attributed to the defendant for committing such an act. All the parties had been on good terms theretofore and were closely related. The DePriests and the Lindsays were the aggressors from the beginning and continued to be up to and until the time the accused defended himself. This case is a stronger case for the defendant than the Montgomery case. The dying declaration admitted that the decedent was advancing on the accused with a knife, but curious to say this alleged dying declaration was in the handwriting of two different parties, a Lynchburg Detective and the Commonwealth's Attorney and not even signed by the declarant. There was an insertion in the handwriting of the Commonwealth's Attorney in the part of the declaration written by the Detective to this effect "the knife was not open". The witness,

Mr. D. S. Withers, testified that he did not see the decedent make his mark to the declaration and it was not read to him until after he had witnessed it and that he, the witness, did not even hear it read to him. We cannot conceive of any man being desirous of committing a cold blooded murder without any motive, without any cause or without any reason as testified to by George Lindsay and his wife, Annie. The Courts are not required to stultify themselves in believing the unreasonable especially when the witnesses were highly intoxicated at the time of the alleged occurrence.

If there was no former grudge, and even if the defendant was a trespasser, and he did not bring on the difficulty and though he did not retreat, and the decedent was the aggressor, the defendant should not have been convicted.

In the instant case there was absolutely no grudge, the decedent was the aggressor and the accused retreated time and time again and finally shot down to the ground in order to deter the decedent. Furthermore, the accused hadn't

spoken a word to the decedent or made any motion toward him. In fact, what the accused did say, which was not out of the way, was said to George Lindsay, and George Lindsay was cursing, abusing and threatening the accused and called out to the decedent, with vile language, to go after the accused and kill him. The accused certainly had a right to reasonably apprehend his life was in danger. With two men on him, abusing, cursing, threatening, the accused had the right to defend himself. The evidence in this case doesn't even warrant a conviction of involuntary manslaughter much less voluntary manslaughter. There is no evidence in this case that Mitchell did anything or said anything to provoke or bring about any trouble or assault upon himself. It is to be expected that one assaulted would do what appears to be necessary to defend himself. The rule laid down in the case of Wilkins against the Commonwealth absolutely controls this case. The testimony in this case shows plainly that the accused did everything within his power to
8* avoid the trouble and *as a last resort defended himself and was justifiable.

The record in this case has been unnecessarily encumbered on account of the irrelevant questions propounded to various witnesses, time and time again, by counsel for the Commonwealth. Therefore, I shall not comment on that part of the evidence.

DYING DECLARATION.

The alleged dying declaration of the decedent, R. W. DePriest, Jr., introduced in this case was a very unusual one, to say the least of it. The testimony of Sheriff J. L. Miles referred to on page 298 of the transcript was highly prejudicial to the interest of the accused. The same was allowed over the objection of the defendant, and we submit that the submission thereof was highly improper and illegal because there was no evidence to the effect that the declarant thought that death was imminent and impending. The statements made by Mr. Miles were not proper evidence in this case for the reasons just stated.

The so-called written dying declaration of the decedent was introduced in this case over the objection of the defendant and upon inspection thereof presents a very unusual and peculiar situation. The declarant had many perforations in his intestines, had been cut open by the surgeon, sewed up and left to die. Of course, they necessarily kept him under the influence of opiates, and therefore, he could not have

possibly been in his right mind at the time this supposed declaration was made. This needs no argument. Then, again, the testimony discloses that a detective named Deaner of Lynchburg, Virginia, called to see Mr. DePriest and wrote out in his own handwriting a part of the so-called declaration. This was about 11 A. M. for some reason, not stated, the matter was held in abeyance until the afternoon, 9* *when Mr. Thompson, the Commonwealth's Attorney, arrived about 3 o'clock P. M., and then Mr. Thompson completes the same in his own handwriting, couched in language unknown to the declarant. Furthermore, an insertion in the part written by Mr. Deaner, seemingly in the handwriting of Mr. Thompson in the following words "but it was not open", speaking of the knife in the hands of Mr. DePriest at the time Mr. DePriest was following the accused and threatening the life of the accused.

This so-called dying declaration was not signed by Mr. DePriest, the declarant, but a mark was made. The testimony does not disclose who made that mark or even when it was made. The witness, D. S. Withers, Deputy Sheriff, testified that he didn't see Mr. DePriest sign it although he, Mr. Withers, appears to have witnessed it. Mr. Withers doesn't even remember whether it was read to Mr. DePriest before Mr. DePriest signed it or after it. See pages 39 and 40 of the transcript.

The introduction of the dying declaration places the defendant in a very difficult position for the reason that he does not have an opportunity to cross-examine the decedent.

The statements when offered as dying declarations must not relate to anything beyond *corpus delicti*.

They were not offered as dying declarations and not as a part of the *res gestae*. Therefore, under the law they were not admissible. See Wharton's Evidence, Tenth Edition, pages 575-6. It is a well settled principle of law if the declarant hasn't the capacity to make any such statement then the statements should not be allowed to go to the jury for obvious reasons. We submit that the declarant was not in such a condition at the time as aforesaid and could not have possibly had his faculties with him when the same was alleged to have taken place.

One of the rules for a proper test for the competency 10* *of a dying declaration is that "they must have been the utterances of a sane mind".

In 92 Va. 609, the Court uses the following language: When it appears that the declarant was suffering severely from shock and was under the influence of large doses of

morphine or narcotics and the statements in the declaration are disconnected and irrational, the declaration should not be admitted.

We respectfully submit that the evidence of T. R. Mitchell, the defendant, found on page 205 of the transcript corroborated by the testimony of Harvey Mitchell, page 177 of the transcript, John Goodman, page 132 of the transcript and Fulton Elliott, page 106 of the transcript, shows conclusively that the verdict of the jury in this case was not warranted by the evidence. All of the parties were eye-witnesses from the beginning to the end. The alleged dying declaration fully corroborates the evidence of the aforesaid parties in that the declarant, R. W. DePriest, Jr., stated that he did advance on the accused with a knife. Witnesses Elliott and Goodman were disinterested parties and not related to either side. The aforesaid witnesses testified that the decedent, R. W. DePriest, Jr., was intoxicated and this is corroborated by Dr. Bowers, a witness for the Commonwealth whose evidence is shown on page 103 of the transcript. George Lindsay, a witness for the Commonwealth, page 47 of the transcript, admitted that he had been drinking and that he had an altercation with the accused. Upon reading the evidence of George Lindsay, his wife, Annie Lindsay, and Mrs. DePriest, you are bound to come to the conclusion that they were attempting to gang up on the accused.

R. W. DePriest, Jr., in his dying declaration, differs materially with the testimony of his daughter, wife and son-in-law. The straightforwardness of the defendant's testimony is very noticeable and in striking contrast to the unreasonable testimony of the Commonwealth's witnesses.

INSTRUCTIONS.

We earnestly submit that the Court erred in refusing defendant's instruction C, which reads as follows: "The Court instructs the jury that if they should have *any reasonable doubt as to any fact necessary* to convict the accused of the offense charged, then they are to give the accused the benefit of any doubt whether the accused had wilfully, deliberately and meditatively killed Robert DePriest, they ought to find him not guilty as charged in the indictment." We submit that this instruction was given in the case of *Honestly* against the Commonwealth, 81 Va. 291.

We submit that the Court erred in making changes in said instruction; that the amendments thereto made the instruc-

tion erroneous in law. It is misleading to the jury and it is prejudicial to the defendant. It centers attention upon murder in the first degree. We submit that the Court erred in refusing defendant's instruction L. This instruction L is a proper statement of law and is applicable to the instant case. No other instruction was granted which adequately or fairly stated the principles therein involved. The error in refusing this instruction is not cured by the instruction No. O, given by the Court on its own motion.

The accused is entitled to have the jury told positively and unequivocally that there is no burden of proof on him to prove that he acted in self-defense; all that is necessary is that the evidence as a whole should leave a reasonable doubt in the minds of the jury as to whether he acted in self-^{12*} defense or not. This *instruction L as offered by the defendant and refused by the Court reads as follows: "The Court instructs the jury that the burden of proof is *not on the defendant* to prove that he acted in self-defense but that if after considering all the testimony, a reasonable doubt remains as to whether the assault was in self-defense, then the jury must find the defendant not guilty." Page 313 of the transcript.

The instant case and the Covington case were very similar. The Covington case arose in Pittsylvania County and is found in 136 Va. 665. It is still the law of the land and especially in Virginia. The Court said in the Covington case on page 671 that the lower Court erred in giving instruction No. 3 and that the additional instructions did not cure the error. Instruction No. 3 in the Covington case reads as follows: "The Court instructs the jury that the law of self-defense is the law of necessity; and before the accused can be justified on the ground of self-defense he must prove to the satisfaction of the jury that he had reason to believe, and in fact did believe, that he was in danger of death or serious bodily injury at the hands of the deceased; and that the means resorted to by him were reasonably necessary under the circumstances as they appeared to him to save himself from death or serious bodily harm."

On the subject of burden of proof resting upon the accused in order to sustain his claim of self-defense, the Court said that the burden was not on the defendant to prove that he acted in self-defense.

Covington was found guilty of murder in the second degree,—*the evidence was conflicting*. Yet, the Court reversed the lower Court on the grounds that instruction No. 3 was erroneous and not a proper statement of the law.

We respectfully submit that the Court erred in refusing to grant defendant's instruction M which instruction 13* reads as follows: "The Court further instructs the jury in this case that as a matter of law, they are entitled to consider the declarations of the deceased in the light of all the evidence in this case, the absence of opportunity for cross examination of the mental condition of the declarant, and all the circumstances under which they are made."

The above is a correct statement of the law and is applicable to the instant case.

The Court erred in refusing to grant defendant's instruction N which instruction reads as follows: "The Court further instructs the jury that the law does not regard the declarations of the deceased, R. W. DePriest, as of the same weight and value as the testimony of a witness given in open Court under the safeguards provided for the discovery of the truth; that the testimony of the witness, where he is seen, heard, and cross-examined, is of greater weight than the statements of a dying man, whose condition the jury could not observe and whose statement was not subjected to the corrective and explanatory test of cross examination."

Especially is it true that these instructions M and N should have been granted because, as aforesaid, the conditions and circumstances surrounding the alleged dying declaration were very peculiar, to say the least of it.

We submit that the Court erred in refusing to grant defendant's instruction P which instruction reads as follows: "The Court further instructs the jury in this case that the question for the jury in this case is not whether the killing of the said DePriest might have been safely avoided, but whether the defendant, Mitchell, under the circumstances in which he was placed, might reasonably have believed it necessary to use the means he did which resulted in the killing of said DePriest, either to save his own life or to avoid serious bodily harm to himself". We cannot conceive how anyone could say that the above instruction is not a correct statement of the law. This instruction was not cured by any other instruction given in this case.

We submit that the Court erred in refusing to grant defendant's instruction S which instruction reads as follows: "The Court further instructs the jury that where a person is assaulted, and is guilty of no unlawful act, and reasonably apprehends that his assailant will do him bodily harm, has a right to repel the assault by all the force he deems necessary, and is not compelled to retreat from his assailant, but

may, in turn, become the assailant inflicting bodily wounds until his person is out of danger." This instruction is a correct statement of the law, and was a very material one. Doubtless the verdict of the jury would have been different if the same had been given. It enunciates a well-known principle of law repeatedly decided by the Supreme Court of Appeals of Virginia in numerous cases. *Montgomery's case*, 98 Va. 841-52; *Jackson's case*, 96 Va. 108.

As to the granting of the Commonwealth's instructions in this case, we respectfully submit that the Court erred in granting Commonwealth's instruction No. 4 found on page 304 of the transcript. The grounds for said objection are that this instruction is not applicable to the instant case, and upon the further ground that it imposes upon the prisoner the duty of showing extenuating circumstances, where, under the law, there is not such duty on him, and the evidence of the Commonwealth itself might raise such doubt as to the circumstances as to entitle the prisoner to an acquittal without the prisoner showing anything. In *Simm's case*, 134 Va. 736, it is stated "A prisoner is entitled to the benefit of a reasonable doubt arising from the evidence of the Commonwealth as well as from his own evidence."

We earnestly submit that the Court erred in granting 15 ing the Commonwealth's instruction No. 5, on the grounds that it is not a correct statement of the law. This instruction is found on page 305 of the transcript. It imposes a wrongful burden upon the prisoner in regard to the evidence, especially as he is under this required to show existence of a state of facts from the evidence that he acted lawfully when in truth he may have acted unlawfully in a slight degree and be entitled to an acquittal on the ground of excusable homicide as contrasted with justifiable homicide.

We are of the opinion that the Court erred in granting the Commonwealth's instruction No. 9 which instruction is found on page 308 of the transcript. The ground for the objection of this instruction is because it permits the jury to reach conclusions therein mentioned by mere belief from the evidence of the existence of the facts set forth without requiring that they believe the same *beyond a reasonable doubt*. Further, this instruction requires that the jury believe that he in good faith declined from the combat and indicated his intention to withdraw from combat and retreated as far as he could with safety to himself, when if the jury had any reasonable doubt of any one of these elements it would be their duty to acquit him. Again, this instruction also is very confusing and misleading, especially in the light of the other instructions given in the case.

We further submit that counsel for the defendant offered instruction H which reads as follows: "The Court instructs the jury that if they believe from the evidence in this case that the deceased, R. W. DePriest, advanced on the accused, with a drawn knife, while threatening the accused's life or with bodily harm, and that the deceased was the aggressor from the beginning of the altercation between the said deceased and accused then *they must find the accused not 16* guilty." This instruction was granted after amendments. But, in some way, it was not read to the jury and the jury did not have an opportunity to see the same. Please see note on page 312 of the transcript. This instruction is highly proper and is taken from the Montgomery case 98 Va. 856.

A further objection is made to the granting of Commonwealth's instruction No. 4 on the grounds that it is not applicable to the instant case and not predicated upon the facts in the case. There is absolutely no evidence to the effect that the accused had a deadly weapon in his previous possession. The accused and two witnesses testified that he did not, and it was not contradicted by any of the Commonwealth's witnesses.

THE VERDICT WAS CONTRARY TO THE LAW AND TO THE EVIDENCE.

We submit that the verdict of the jury in this case was contrary to the law and evidence. It is patent on the face of the record that the accused was not given the benefit of a reasonable doubt. The straightforward and cogent testimony of the accused, corroborated in detail by three eyewitnesses and corroborated, in a very material phase of the case, by the dying declaration of the deceased, R. W. DePriest, will in our opinion preclude the application of the "Judas Iscariot Doctrine". It is stated in the dying declaration by the declarant that he, the declarant, advanced on the accused, with a knife, and that the accused kept backing away from him and the accused asked the decedent not to come on him. This statement corroborates the testimony of the accused and the three eyewitnesses. Taking this in consideration, the instructions of the Court, on this particular point, it is plain that the jury did not pay any attention *whatever to 17* the facts or the instructions. The accused was not the aggressor, had not said a word or committed a single act towards the decedent but, on the other hand, had begged and pleaded with the deceased not to come on him and had retreated as far as he possibly could, under the circumstances,

and finally shot down to the ground, hoping that shooting to the ground would deter the decedent—all the time the decedent was advancing on him with a drawn knife and threatening him and his life with vile epithets. We submit that if this was not justifiable homicide, then, we respectfully ask what is justifiable homicide?

We respectfully submit that the testimony of the Commonwealth's witnesses contradict each other. It is patent on the face of the record that George Lindsay is not worthy of belief. As will be seen from an inspection of the record, George Lindsay was the cause of all the trouble. Seeking to justify himself, he went a little too far, to say the least of it, in his testimony. The dying declaration of Mr. DePriest contradicts the testimony of George Lindsay, the star witness for the Commonwealth. Mr. DePriest stated in his dying declaration that he was the one following the accused and that the accused retreated; that he had a knife in his hand, but George Lindsay says that he, George Lindsay, was following Mitchell, the accused, and that he didn't see any knife. George Lindsay first said that there was not a minute between the two shots, and then after the Commonwealth's Attorney had led him time and time again he changed his testimony. George Lindsay first said that Mitchell shot at DePriest the first time but on page 61 of the transcript he says "he shot down at the ground and at his feet and then raised it up and shot". This corroborates the testimony of the accused and three witnesses for the defense. On page 65 of the transcript, Lindsay admits that he hit Mitchell. Now on page 68 of the transcript, George Lindsay says that he was following up Mitchell, and Mitchell was *backing away from him. Doesn't 18* it seem very strange that Mitchell didn't shoot Lindsay instead of DePriest? It is very noticeable that all of Lindsay's answers to material questions were very evasive. On page 69 of the transcript Lindsay says that Mr. DePriest did not advance on Mitchell but in Mr. DePriest's dying declaration, he said that he did. On pages 69 and 70 of the transcript, Lindsay contradicts himself. The Commonwealth asked Lindsay this question on page 69, "Did you see Tom retreating from him while he was coming on him?" A. "No, sir, I did not." Q. "Did you see Tom shoot down to the ground?" A. "Yes, sir." Q. "And then did DePriest continue to come on him?" A. "Yes." Lindsay had just said theretofore that he was the man coming on Mitchell and not DePriest.

Now on page 74 of the transcript, Annie Lindsay, the wife of George Lindsay, contradicts her husband, George Lindsay. She says that her father was following up Tom Mitchell, the

accused, whereas George Lindsay says that the accused was following him. Both of them admit that they were drinking. On page 77, Mrs. Lindsay corroborates the testimony of the accused and the defendant's witnesses. She says that Tom Mitchell shot down to the ground after telling her father not to come to him. She says on page 79 of the transcript that there was no previous grudge and that her father, Mr. DePriest, and the accused were on good terms.

In this case if the "Judas Iscariot Doctrine" should be invoked, the accused should have been either acquitted or convicted of murder.

The principle that an accused cannot complain of being convicted of a lesser offense than he was indicted for, is not in any way applicable to the instant case. There was no grudge, no possible motive, retreated as far as possible and farther than most people would have done under the circumstances and therefore *there was nothing else for him 19* to do but to defend himself.

It is very significant that the testimony of the Commonwealth in this case creates and raises a reasonable doubt as to the guilt of the accused.

The Courts have repeatedly held that it is reversible error for the lower Court to refuse an instruction of the defendant where the instruction states the correct principle of law applicable to the case and likewise reversible where the Commonwealth's instructions are misleading, confusing and incorrect statements of the law.

The accused testified that he felt that he was in imminent danger of being killed, and the circumstances and conditions fully supported his feelings in the matter, as well as the evidence of the witnesses. The jury was so instructed but they paid no attention to the instruction. *The Montgomery case was reversed twice on this very point.*

Witnesses for the prosecution testified that the decedent was not drinking. These witnesses for the Commonwealth were relatives of the decedent. Disinterested parties testified that he was fully under the influence of whiskey and this was corroborated by Dr. Bowers who attended him directly after the shooting. The Commonwealth is bound by the dying declaration. It corroborates the defendant's testimony as well as the three witnesses for the defendant. This in itself will certainly create a reasonable doubt.

In a recent case—*Stone* against *the Commonwealth* decided November 25, 1940, 11 S. E., Second Series 728, the Court used this language "although Appellate Court is reluctant to disturb jury's verdict which has been approved by the Trial Court, in prosecution for larceny where, even when all

conflicts in evidence were resolved in favor of the Commonwealth, such evidence failed to prove the guilt of the accused to the exclusion of every *reasonable doubt, a judgment 20* entered on jury's verdict of guilty was reversed". We submit that, to our minds, this doctrine laid down so recently is clearly applicable to the instant case.

Some of the errors committed by the Court referred to above might be considered harmless. Taking the case as a whole, we earnestly believe and submit that the verdict would have been different if the Court had not erred in granting the instructions of the Commonwealth complained of and refusing to grant instructions of the defendant. In the recent case of *Wilkins* against *the Commonwealth* decided November 25, 1940, 11 S. E. Second Series 653, the Court reversed the lower Court although the *evidence was conflicting*. The Court said "the contention of the Commonwealth is that Wilkins, during the progress of the trial, relied upon self-defense but that the evidence did not support the contention. Wilkins said that he was sorry for what he had done but he thought he had to do it". The plea of self-defense and of passion, engendered by an unprovoked assault are not in conflict with each other—*Richardson* against *the Commonwealth*, 128 Va. 691. It is to be expected that one assaulted with the provocation will do what appears to be necessary to defend himself. We submit that the circumstances and conditions, as far as this particular point is concerned, in this Wilkins case, is exactly like the instant, Mitchell, case, and therefore, should be reversed in accordance with the decisions of the Supreme Court heretofore cited.

It has long been said that where a homicide is committed in the course of sudden quarrel, or mutual combat and without any previous grudge, if the killing be done in the commission of some lawful act such as justifiable self-defense, it is not voluntary manslaughter. Byrd's case, 89 Va. 536; Read's case, 22 Grat. 924 and *Wilkins* against *the Commonwealth*, *supra*; *Brown* against *the Commonwealth*, 138 Va. 807.

In the instant case there was not a scintilla of *evidence to the effect that there was any grudge, any motive, 21* sudden quarrel or mutual combat. The accused simply defended himself in order to save his life. He did everything that could be required of anyone under the circumstances. There was not even sudden heat or passion on the part of the accused. He simply protected himself from this unlawful and malicious assault on the part of DePriest and DePriest's son-in-law, George Lindsay.

In conclusion, we again respectfully call to the attention of the Court the principles of law laid down in the Covington case, 136 Va. 665, which in our opinion show conclusively that the refusal of the Court to grant defendant's instruction "L" which instruction reads as follows: The Court instructs the jury that the burden of proof is *not* on the defendant to prove that he acted in self-defense but that if after considering all of the testimony, a reasonable doubt remains as to whether the assault was in self-defense, then the jury must find the defendant not guilty", was reversible error, and if this instruction had been granted the verdict of the jury would have been different.

In the Covington case the lower Court granted the Commonwealth's instruction No. 3, which instruction read as follows: "The Court instructs the jury that the law of self-defense is the law of necessity; and before the accused can be justified on the ground of self-defense he must prove to the satisfaction of the jury that he had reason to believe, and in fact did believe, that he was in danger of death or serious bodily injury at the hands of the deceased; and that the means resorted to by him were reasonably necessary under the circumstances as they appeared to him, to save himself from death or serious bodily harm."

The Court held in that case that the instruction was erroneous and was not cured by any other instruction. The Supreme Court reversed the lower Court.

We submit that the proposition of law which is *applicable to the instant case embodied in defendant's instruction 22* "L" was not embodied in any other instruction given in the instant case. It can be readily seen that the refusal to give this instruction No. "L" was highly prejudicial to the defendant and we believe that the verdict would have been different if the same had been granted. The evidence in the Covington case was *conflicting* but the Court reversed the decision of the lower Court for reasons just stated. 113 Va. 732; Linton 101 Va. 833; Pott's case 113 Va. 732. We respectfully submit that on account of the aforesaid errors committed by the lower Court and for the reasons above stated, the judgment of the Circuit Court of Campbell County, Virginia should have been reversed.

Your Petitioner therefore prays that a writ of error and *supersedas* may be awarded him and that the judgment may be reviewed and reversed.

Respectfully submitted,

THOMAS R. MITCHELL,
By R. I. OVERBEY, Counsel.

I, R. I. Overbey, an Attorney At Law practicing in the Supreme Court of Appeals of Virginia; do hereby certify that in my opinion the judgment of the Circuit Court of Campbell County, Virginia, in the case of Commonwealth *against* Thomas R. Mitchell, should be reviewed by the Supreme Court of Appeals of Virginia; and I do further certify that I have this day delivered a copy of this petition to S. J. Thompson, Commonwealth's Attorney of Campbell County, Virginia, who prosecuted this case in said Court, and advised him that I would immediately file the said petition with the Honorable Justice Herbert B. Gregory, at Roanoke, Virginia, a Justice of the Supreme Court of Appeals of Virginia, 23* *that I desire to state orally the reasons for reviewing the aforesaid judgment and that in the event a writ of error is allowed I shall use the aforesaid petition as my opening brief in the argument of the said case in the Supreme Court of Appeals of Virginia.

Given under my hand this 20th day of January, 1941.

R. I. OVERBEY,
Attorney for the Petitioner,
Rustburg, Virginia.

February 19, 1941, writ of error and *supersedeas* awarded by the court. No bond.

M. B. W.

RECORD

VIRGINIA:

Pleas before the Honorable Charles E. Burks, Judge of the Circuit Court of Campbell County, at the Courthouse of said County, on the 11th day of November, 1940, in the 165 year of the Commonwealth.

Be it remembered that heretofore, to-wit:

In the Circuit Court of said County on the 9th day of September, 1940, the Grand Jury for said County, presented in said Court an indictment of the Commonwealth of Virginia against T. R. Mitchell for murder, which said indictment is in the words and figures following, to-wit:

Commonwealth of Virginia,
County of Campbell, to-wit:

In the Circuit Court of Campbell County.

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the County of Campbell, and now attending the Circuit Court of the said County, upon their oaths present that T. R. Mitchell, on the 16th day of August, 1940, in the said County, did, about the hour of 9:00 o'clock P. M. of that day, unlawfully, feloniously, maliciously, deliberately and of his malice aforethought, make an assault in and upon the body of one Robert W. DePriest, Jr., and that the said T. R. Mitchell a certain loaded pistol, then and there had and held and then and there feloniously, unlawfully, and of his malice aforethought, did discharge and shoot off to, against and upon the said Robert W. DePriest, Jr., and that the said T. R. Mitchell, with the shot discharged from said pistol, then and there feloniously, wilfully and of his malice
page 2 } aforethought, did strike, penetrate and wound the said Robert W. DePriest, Jr., in and upon the body of the said Robert W. DePriest, Jr., and did then and there give the said Robert W. DePriest, Jr., a mortal wound, of which said mortal wound the said Robert W. DePriest, Jr., did languish and die on the 18th day of August, 1940; against the peace and dignity of the Commonwealth of Virginia.

Endorsement on indictment.

"A True Bill, (signed) Paul W. Tyree, Foreman."

page 3 } In the Circuit Court of Campbell County, October
23, 1940.

Commonwealth of Virginia

v.

T. R. Mitchell.

UPON AN INDICTMENT FOR MURDER.

This day came the Attorney for the Commonwealth and his assistant as well as the accused and his attorneys, and said T. R. Mitchell being arraigned, pleaded not guilty as charged in the indictment; and thereupon came a jury of twelve summoned and selected as provided by law, to-wit, E. P. Tweedy, G. C. Rudder, H. P. Evans, J. E. Scott, B. J. Davenport, M. E. Wood, A. W. Wheeler, F. W. Rosser, J. W.

Arthur, E. H. Barksdale, Collins Clark and D. G. Barricks, who were sworn the truth of and upon the premises to speak, and having partly heard the evidence, were adjourned over until tomorrow morning at nine o'clock, and were delivered into the custody of Jack L. Miles, Sheriff, and D. S. Withers, Deputy Sheriff of Campbell County, to whom was administered the following oath, "You swear that you will well and truly keep this jury together and neither speak to them yourself nor permit any one to speak to them touching any matter relative to this trial and bring them into Court tomorrow morning at nine o'clock, so help you God."

page 4 } In the Circuit Court of Campbell County, the 24th day of October, 1940.

Commonwealth of Virginia

v.

T. R. Mitchell.

UPON AN INDICTMENT FOR MURDER.

This day came the Attorney for the Commonwealth as well as the defendant, T. R. Mitchell, and his attorneys, and the jury sworn on yesterday returned into Court pursuant to their adjournment, and having fully heard the evidence, were adjourned over until tomorrow morning at nine thirty o'clock, and were given in charge of Jack L. Miles, Sheriff, and D. S. Withers, Deputy Sheriff, of Campbell County to whom was administered the following oath: "You swear that you will well and truly keep this jury together and neither speak to them yourself nor permit any other person to speak to them touching any matter relative to this trial and bring them into Court tomorrow morning at nine thirty o'clock, S. Help You God."

page 5 } In the Circuit Court of Campbell County, October 25, 1940.

Commonwealth of Virginia

v.

T. R. Mitchell.

UPON AN INDICTMENT FOR MURDER.

This day came again the Attorney for the Commonwealth and his assistant as well as the defendant and his attorneys, and the Jury returned into Court in the charge of the Sheriff

and Deputy Sheriff, pursuant to their adjournment on yesterday, and having received the instructions of the Court and heard the argument of counsel, retired to their room to consider their verdict, and after some time returned into Court and rendered the following verdict: "We the jury find the defendant, T. R. Mitchell, guilty of voluntary manslaughter and fix his punishment at confinement in the Penitentiary for a term of (5) five years, (signed) Collins Clark, Foreman." And thereupon, the defendant by his attorneys moved the Court to set aside the verdict of the jury and grant him a new trial herein, on the following grounds: that said verdict is contrary to the law and the evidence in this case; that the Court erred in admitting certain evidence for the Commonwealth over the objection of the defendant; that the Court erred in refusing to admit certain evidence offered by the defendant, that the Court erred in giving certain instructions offered by the Commonwealth and in refusing to give certain instructions asked for by the defendant, and that the Court erred in amending instructions offered by the defendant, and the Court not being advised of its judgment on said motion, takes time to consider the same, and this case is continued.

page 6 } In the Circuit Court of Campbell County, November 11, 1940.

Commonwealth of Virginia

v.

T. R. Mitchell.

UPON AN INDICTMENT FOR MURDER.

This day came the Attorney for the Commonwealth as well as the defendant and his attorneys; and the Court having maturely considered the motion heretofore made to set aside the verdict of the jury in this case and grant a new trial herein, overruled said motion; and to the action of the Court in overruling said motion, the said defendant excepted and on his motion he is given sixty days within which to prepare and tender his bill or bills of exceptions. And thereupon, it being demanded of said T. R. Mitchell if anything for himself he had or knew to say why the Court should not pronounce judgment against him according to law, and nothing being offered or alleged in delay thereof, it is therefore ordered that said T. R. Mitchell be and he is hereby sentenced to confinement in the Penitentiary of the State of Virginia for a term of five years, the period by the jurors in their verdict ascertained; and the defendant having indicated his

Dr. H. H. Hurt.

intention to take an appeal, execution is suspended for sixty days in order to enable the said defendant to apply to the Supreme Court of Appeals of Virginia, for a writ of error and *supersedeas*. The defendant was bailed in the sum of Ten Thousand Dollars, with Earl T. Mitchell, his surety, conditioned for his appearance before the Judge of this Court on the 31st day of January, 1941, to answer the said charge in this case and the judgment of the Court, and to appear at such other time or times as this case may be continued to until finally disposed of.

Virginia:

In the Circuit Court of Campbell County.

Commonwealth of Virginia

v.

T. R. Mitchell.

RECORD.

Stenographic report of the testimony, together with the motions, objections and exceptions on the part of the respective parties, the action of the court, in respect thereto, the instructions offered, granted, amended and refused, and the exceptions thereto, and other incidents of the trial of the case of Commonwealth of Virginia *against* T. R. Mitchell tried at Rustburg, Virginia, on October 23rd, 24th and 25th, 1940, before Honorable Charles E. Burks and Jury, in the Circuit Court of Campbell County, Virginia.

Present: Messrs. S. J. Thompson and W. T. Spencer, Jr., attorneys for the Commonwealth; Messrs. R. I. Overbey and S. DuVal Martin, attorneys for the defendant.

Reported by: C. R. McCarthy, Court Reporter, Lynchburg, Virginia.

page 2 }

DR. H. H. HURT,

having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Thompson:

Q. Dr. Hurt, I believe about the 16th of August you were a practising physician in the City of Lynchburg, a surgeon there.

Dr. H. H. Hurt.

A. Yes, sir.

Q. Were you called to Memorial Hospital to attend Mr. R. W. DePriest, Jr.?

A. Yes, sir.

Q. Please tell the jury what his condition was when you arrived at the hospital.

A. Mr. DePriest was suffering from a bullet wound in his abdomen.

Q. Will you indicate to the jury where the bullet entered?

A. The bullet entered in the right lower quadrant of the abdomen, that is, in the abdomen on the right side about the point where you take out an appendix.

Q. Did the bullet go through his body?

A. It went into his abdomen, perforated the intestines about a dozen places, and I don't know where it stopped. The bullet was not found.

Q. Did you operate on him, Doctor?

A. I did.

Q. Then did you see him after that from time to time?

A. Yes, sir.

Q. What caused his death, Doctor?

page 3 } A. Peritonitis from the bullet wound.

Q. Did you inform him of his condition?

By Mr. Martin: (interposing) One minute. We object to that or to where it is leading. We ask that the questions in connection with that be heard first by the court to determine their relevancy.

By the Court: What have you to say, Mr. Thompson?

By Mr. Thompson: My purpose in asking that question is to lay the foundation for the introduction later on of a dying declaration made by Mr. DePriest.

By the Court: I take it, gentlemen, that it is the duty of the court to pass upon the admissibility of a dying declaration and I suppose you gentlemen would want the evidence on that question heard in the absence of the jury.

By Mr. Martin: That, if it please the court, is the customary and usual practice.

By the Court: Do you gentlemen move that the evidence laying the foundation for the dying declaration be heard in chambers?

page 4 } By Mr. Martin: Yes, sir, we would make that motion.

By the Court: Very well, we will retire to chambers.

Dr. H. H. Hurt.

IN CHAMBERS.

By Mr. Thompson:

Q. Dr. Hurt, did you inform him of his condition on Saturday afternoon, August 17th, about 2:00 o'clock?

A. I did.

Q. Do you think he was mentally capable at that time of making a statement with regard to how he was injured, and so forth?

A. Yes, sir.

Q. Do you think he realized his condition at that time?

A. I think he did. I would say that he did.

By the Court:

Q. What did you tell him?

A. I told him that I didn't think he was going to get well; that we were going to work over him but I didn't think he was going to get well, and he said, "I don't think so either".

By Mr. Thompson: I think that is sufficient on that point and that is all we propose to ask him at this time. I think it is perfectly admissible.

By the Court: Mr. Overbey, do you all have any questions you want to ask him?

page 5 } By Mr. Martin:

Q. Doctor, all you told him was that you didn't think he was going to get well?

A. That is correct.

Q. Did you, in any way, indicate to the deceased at that time that death was imminent, impending, and that he was *in extremis* and would, in your opinion, die shortly?

A. Mr. Martin, my recollection is that Mr. Thompson called me that morning and I was very busy and he asked me to come to the hospital. I made an appointment to meet him there at 2:00 o'clock. I went over to the hospital and went into the room to see Mr. DePriest. While I was in there Mr. Thompson came in and it was then I told him I did not think he was going to get well. He said, "I don't think so either". I asked Mr. Thompson if that was all I was needed for and I left.

Q. Then I take it you mean to say that you did not inform him he was about to die.

A. I told you what I told him.

Q. Did you tell him anything else?

Dr. H. H. Hurt.

A. No, sir.

Q. Did you expressly tell the man that he was *in extremis* or that death was immediately impending or anything to indicate to the man that his death would likely occur at any moment or in a short while?

A. I told him exactly what I have just told you that I told him. How would you take that?

Q. In other words, you don't want to answer my page 6 } question, do you?

A. I have answered your question.

By Mr. Spencer: I think counsel for the Commonwealth has a right to interpose an objection. This is merely a part of the evidence, the doctor having told the man in his judgment he was not going to get well, and the question is one for the jury as to credibility and whether that man did make the statement under the fear of impending death. Now, whether he told him he was *in extremis*, that it was going to happen now or three days from now, will be totally irrelevant and certainly Dr. Hurt wasn't called on to use any such highfaluten terms as Mr. Martin has insisted on putting in his mouth.

By Mr. Martin: It happens that our view of the law is very important on that question. I can't understand why an unbiased, frank witness would refuse to answer a question which at least, we think, is directly important to develop specifically as to whether anything was said about the matters that I have asked him.

By the Court: Do you wish to ask him any further question, Mr. Martin?

By Mr. Martin:

Q. I will repeat my question: Did you expressly page 7 } tell the man that he was *in extremis*, or that death was immediately impending, or anything to indicate to the man that his death would likely occur at any moment, or in a short while?

A. I told him exactly what I have said; that I didn't think he was going to get well. If somebody was to tell me that it would scare the hell out of me.

Q. He told you that he didn't think so either?

A. Yes, sir.

Q. Did he make a declaration as to the cause of his death?

A. I left immediately after I had my little say. I left the room immediately and went back to town.

Dr. H. H. Hurt.

By the Court:

Q. When you left do you think that he did think that he was going to die?

A. Yes, sir.

Q. Do you think that he had given up all hope of getting well?

A. He told me he didn't think he was going to get well.

Q. And that is all you know about it?

A. Yes, sir.

By Mr. Martin:

Q. Did you tell him you were going to work on him?

A. Yes, sir.

Q. And did he ask for any prayers?

A. No, sir.

Q. Did he make any mention of his relatives or ask that anybody be sent for?

page 8 } A. Not to me, no, sir.

Q. Did he call for any preachers?

A. No, sir.

Q. Did he say anything about disposing of his worldly affairs?

A. No, sir.

Q. And nothing was said by you to indicate to him in any way that death would likely occur in a very short while?

A. I didn't say it in so many words, Mr. Martin.

Q. You only told him that you didn't think he would get well?

A. That is it.

Q. But that you were going to keep working on him?

A. Yes, sir.

Q. Under your directions hadn't he been doped with morphine or similar drugs?

A. He had enough morphine to relieve pain.

Q. About what quantities had been given him?

A. I didn't go by the hospital to get the records and bring them over this morning because I didn't think it would be necessary, but he had an order for a quarter of grain of morphine every four hours. How many of those he got I couldn't say offhand. He probably got about a quarter of a grain every four hours, an average of that.

Q. A quarter of grain of morphine every four hours will dull a man's mentality, won't it?

A. It depends upon the man and depends upon how much pain he is in.

Dr. H. H. Hurt.

page 9 } Q. Well, this man.

A. I don't think this man's mentality was beyond making a statement, if that is what you are driving at.

Q. Would his mentality be as alert and quick as normal with that morphine in him?

A. No, sir.

By the Court:

Q. Doctor, was he rational at the time you left him?

A. Yes, sir.

Q. Was his conversation connected and logical?

A. Yes, sir.

Q. You think he knew what he was talking about?

A. Yes, sir.

By Mr. Martin:

Q. You were not present and know nothing about any statement that he may have made relating to this alleged trial?

A. I left immediately after I talked to him.

Q. And no question was asked him and no statement was made in your presence as related to this offense at all?

A. No, sir.

By the Court: Gentlemen, it is my understanding of the law that before the dying declaration is admissible it must first be shown that the party at the time he made the dying declaration had a sense of his impending death, and second, that he had abandoned all hope of recovery. The evidence

page 10 } given by Dr. Hurt tends to show those two conditions. Of course he was not present at the time the declaration was made, but this is certainly a link in the chain of the foundation and the court is of the opinion that it is relevant and material and competent and will overrule the objection to his evidence.

By Mr. Martin: I think it would be fair to the court to say to the court that our understanding of the law, supported by numerous Virginia decisions, is that that is not sufficient. In addition to that he has got to realize that he is *in extremis* and that death is going to occur shortly. Now, the fact that death may be actually postponed is immaterial, if he realizes at the time that death is imminent and has abandoned all hope of recovery and realizes that death is right there and then pending and likely to occur at any moment.

By the Court: The evidence is to the effect that he was

Dr. H. H. Hurt.

told that he wouldn't get well and he said he didn't think so, and I think the evidence is relevant.

By Mr. Martin: The defendant by counsel excepts to the ruling of the court as to the admissibility of the alleged dying declaration.

By Mr. Thompson: The dying declaration hasn't page 11 } been presented yet. The court has only ruled on the evidence of Dr. Hurt.

By the Court: I will rule on the other evidence when I get to it.

By Mr. Martin: I want to take an exception at each ruling of the court. At this point the court has ruled that that testimony is the foundation for the admission of the dying declaration and I want to take my exception to that ruling of the court at that point right after that ruling has been made and save the point.

By Mr. Spencer: May I suggest, as long as we are in chambers, that Mr. Deaner and the other witnesses on this point be called in here and examined. Of course you can see what happened. The doctor goes there at the request of the Commonwealth Attorney and tells the man that he can't get well and Mr. Deaner was there to take down his statement. Wouldn't it be well to call Mr. Deaner in here and question him?

By the Court: Bring on your other witnesses.

By Mr. Thompson: If your Honor please, the Sheriff of Campbell County was called the morning of August 17th, I believe by Dr. Hurt, and told that if he wished a dying statement from this man, Mr. DePriest, he had better get it.

By the Court: Are you testifying now?

page 12 } By Mr. Martin: It is all hearsay, if it please the court.

By Mr. Overbey: And Mr. Thompson hasn't been sworn, but I won't insist upon that.

Note: (At this point Mr. S. J. Thompson was sworn by the court.)

By Mr. Martin: We ask the court to strike out of the record every bit of that as hearsay.

By the Court: I strike out everything he has said up to now.

By Mr. Thompson: I think I will call Sheriff Miles at this point.

SHERIFF J. L. MILES,
having been first duly sworn, testifies, in chambers, as follows:

DIRECT EXAMINATION.

By Mr. Thompson:

Q. Mr. Miles, were you called on the morning of August 17th relative to the condition of Mr. DePriest while he was in the hospital?

A. Yes, sir.

Q. Who called you?

A. Dr. Hurt called me.

Q. Please state what he told you?

By Mr. Martin: We object. It is irrelevant and hearsay.

By the Court: I sustain the objection. You can page 13 } state what you know and what you found out when
you got there and what you went for.

A. I went over there, and you want me to tell about going in the man's room?

By Mr. Thompson:

Q. Tell what you told me.

By the Court:

Q. Did you see Mr. DePriest at the hospital?

A. Yes, sir.

Q. What date was that?

A. The next morning after he was shot.

Q. Was that the day he died?

A. Yes, sir.

Q. Did he make a statement as to the cause of his death or relative to the cause of his death while you were there?

A. Yes, sir.

Q. What time of day was it?

A. I reckon it was about 11:00 o'clock that day.

Q. Who was present when he made the statement?

A. Dr. Hurt and the nurse.

Q. Who was the nurse?

A. Mrs. DePriest.

Q. And you were present?

A. Yes, sir.

Q. Was Mr. Thompson present?

A. No, sir.

Sheriff J. L. Miles.

Q. Did he make a statement?

A. Yes, sir.

page 14 } Q. Was it written down?

A. No, sir.

Q. The statement wasn't written down?

A. No, sir.

By Mr. Martin: Now, if your Honor please, we now object to any statement that he may have made at 11:00 o'clock on that day as the evidence before the court is only that the man was advised that the doctor thought he wasn't going to get well at 2:00 o'clock.

By the Court:

Q. Was Dr. Hurt there at the time you arrived at the time he made the statement?

A. Yes, sir.

Q. What was his condition at the time?

A. Well, he seemed to be suffering right much but he could talk all right.

Q. What did he say with reference to whether he was going to get well or not?

A. He said he didn't think he could get well.

Q. He said that?

A. Yes, sir.

Q. DePriest said that?

A. Yes, sir.

Q. Did he say anything about whether he was going to die or not?

A. No, he said, "I can't get well".

page 15 } Q. He said that?

A. Yes, sir.

Q. Then he made a statement?

A. Yes, sir.

Q. Then, what was the effect of that statement?

A. You want me to tell it?

Q. Yes, tell me.

A. Well, he said the night that he was shot that Earl Mitchell, and two or three more, were over at his house, not Earl but Harvey Mitchell, and in a few minutes Tom Mitchell came and Tom and his son-in-law, Mr. Lindsay, had an argument and he said that they were arguing out there and he went out there and got Tom by the arm and said to him "Go on home. I don't want no trouble around here." And he said they argued awhile and Tom got in his car and left, and he

Sheriff J. L. Miles.

was gone, he said, he reckoned around thirty minutes and Tom came back and Tom and Lindsay started arguing again, and he went out there and got between them and pushed Tom back and said, "I am not going to have this here at my house" and he said Tom shot him.

Q. That statement was made to you about 11:00 o'clock on Saturday, the 17th?

A. Yes, sir, that was the next morning after he was shot.

Q. When did he die?

A. About quarter of five Sunday morning.

Q. Now, state again who was present at the time he made that statement?

A. Dr. Hurt and the girl, Miss or Mrs. O'Brien
page 16 } —it is the lady who is here this morning,—and
Mrs. Robert DePriest.

Q. Did he talk rationally? Did he seem to know what he was talking about?

A. Yes, sir. He was suffering mightily but he knew everybody and everything.

By Mr. Thompson:

Q. Did you advise me about his condition and ask me to go to the hospital to get a statement?

A. Yes, sir.

By Mr. Martin:

Q. Was the prisoner himself present when you were holding that conversation with Mr. Thompson?

A. No, sir.

By Mr. Martin: We object to it.

By the Court: I sustain the objection.

Q. Did Mr. Thompson come later and take a written statement that you know of?

A. I know that he did.

Q. You know of your own personal knowledge that he did?

A. Yes, sir.

Q. But what you have just stated that he said was not taken down in writing at that time?

A. No, sir.

By Mr. Martin:

Q. Do you know whether or not Dr. Hurt had
page 17 } said anything to him about his condition and what
his prospects of recovery were?

S. J. Thompson.

A. He had not at the time that I was talking to him.

By Mr. Martin: Then we move that all that be stricken out.

By the Court:

Q. He did tell you he thought he couldn't get well and was going to die, is that the effect of it?

A. Mr. DePriest told me that.

By the Court: The motion is overruled.

By Mr. Martin:

Q. Do you know whether or not Mr. DePriest had a hope that he might get well?

A. He told me that he couldn't live. He said, "I can't get well. I can't live", and he was suffering with his stomach.

Q. That was just his own view?

A. Yes, sir.

Q. You don't know whether he had had any medical advice or not?

A. I don't know, no, sir.

Q. Do you know whether he thought his death was immediately pending?

A. No, sir.

By Mr. Martin: The defendant by counsel excepts to the court overruling our objection to the admissibility of the evidence of Sheriff Miles and saves the point.
page 18 } By Mr. Thompson: I want to testify next.

S. J. THOMPSON,
having been first duly sworn, testifies as follows:

Your Honor please, I went to the hospital about 12:00 o'clock on that day for the purpose of getting a dying declaration, if possible, from Mr. DePriest. I called Mr. C. O. Deaner before leaving Rustburg and asked him to meet me there at the hospital. He met me there, but from inquiry I found that Dr. Hurt had not informed Mr. DePriest that he was in a dying condition and couldn't get well. Mr. Deaner took this statement, the first part of it written here, at that time.

By Mr. Martin: May we have an opportunity to examine that statement before it is introduced?

S. J. Thompson.

By the Court: Yes, and I will let you cross examine the witness.

By Mr. Thompson: (continuing) I called Dr. Hurt. He told me he couldn't come to the hospital at that time and could only come at 2:00 o'clock. Mr. Deaner left to get some lunch and so did I, and at 2:00 o'clock I went back and Dr. Hurt was there and I heard Dr. Hurt tell Mr. DePriest that he couldn't get well, in his opinion, and Mr. DePriest said that he realized that he couldn't get well. Mr. Deaner had not gotten back at that time. I read this statement to Mr. De-

Priest and added the latter part, which is written page 19 } here in my handwriting on that, taking his words, and read the entire statement to him in the presence of Mr. D. S. Withers, Deputy Sheriff, and Mr. DePriest made his mark on this declaration.

By the Court:

Q. At the time he made his mark did he make that for the purpose of indicating that it was his statement with reference to how the shooting occurred?

A. Yes, sir.

Q. At the time he made that was he under any sense of impending death?

A. I think so, sir.

Q. Had he given up all hope of recovery?

A. Apparently from what he said I thought so.

Q. Was he rational at the time he made the statement? Did he know what he was doing?

A. I think so.

Q. And who was present at the time he made that statement?

A. Mr. D. S. Withers, Mrs. Bryant, a nurse, and Mrs. DePriest, his wife.

Q. And S. J. Thompson?

A. Yes, sir.

Q. Was C. O. Deaner present at the time?

A. Not at the time. I came out of the room and Mr. Deaner was outside and I handed him the statement and asked him to go back and verify that statement from Mr. DePriest, which he promptly did.

Q. Was that statement the statement that you page 20 } are proposing to offer, read over to him before he indicated his signature?

A. Yes, sir.

S. J. Thompson.

CROSS EXAMINATION.

By Mr. Martin:

Q. Mr. Thompson, did you write that statement?

A. I did not write the first part.

Q. Who wrote it?

A. Mr. Deaner.

Q. Where was it written?

A. In Mr. DePriest's room in the Memorial Hospital.

Q. Were you present when Deaner wrote this?

A. Yes, sir.

Q. Did you or Mr. Deaner ask Mr. DePriest various questions?

A. Mr. Deaner asked him all the questions about the first part.

Q. He did not write down the questions and answers that Mr. DePriest gave him, did he?

A. He wrote down what Mr. DePriest told him.

Q. But that telling was simply in response to questions that were asked.

A. To some extent it was, yes.

Q. And then from the questions asked and the answers given this was written up by Mr. Deaner?

A. That is right.

Q. And the latter part of it you added?

A. That is right.

page 21 } Q. And you read the completed entire statement to Mr. DePriest and asked him to sign it?

A. That is right.

Q. And he told you he couldn't write or was his condition such that he couldn't write?

A. His condition was such that I didn't think he could write.

Q. Were you present when Dr. Hurt visited Mr. DePriest at the hospital at around 2:00 o'clock?

A. Yes, sir.

Q. Did Dr. Hurt tell Mr. DePriest anything more than that he thought he wouldn't get well but that he was going to work on him?

A. My recollection is that Dr. Hurt said: "I don't think you are going to get well, Mr. DePriest," and Mr. DePriest replied: "I don't think so either."

Q. You have heard Dr. Hurt testify that he also told him he was going to continue to work on him?

S. J. Thompson.

A. I wouldn't say whether he did or didn't. I don't remember.

Q. Did you take down everything that the deceased said?

A. Yes, sir, as far as I know everything said was taken down.

Q. This is all he said?

A. So far as I recall that is everything that was said.

Q. He said nothing about what led up to the difficulty and was asked nothing about it further than just what page 22 } is here?

A. Just what is in there.

Q. He wasn't asked anything else?

A. No, sir.

By the Court: Read the statement, Mr. Thompson, that he made into the record.

By Mr. Thompson: "Statement of R. W. DePriest, Jr. August 17, 1940 Age 50 years. Residence—Campbell County, west of Winfall. States that he was shot by Tom Mitchell of Campbell County about 8 to 9 o'clock.

" 'Tom came up home fussing, and hit my daughter. This made me mad and I grabbed him in the collar but did not hit him. He then got into his car and left. Then he came back and was fussing around with George Lindsay. I did not hear this. I went out to where he was. He said for me not to come to him. When I kept coming and he backed up a ways I did not see the gun in his hand, as it was dark, but I seen the flash of the gun when it was fired. I had a knife in my hand when the first time Mitchell was there but it was not opened. But when he came back the second time I never taken my knife out of my pocket. The reason I was going to him was that I wanted to apologize for what had happened when he was at the house the first time. After I was shot Tom Mitchell jumped into his car and left. This is all that I remember.'

" 'I make this statement knowing that I am in a dying condition and that I will not survive, with the full knowledge of my condition.' Signed by his mark and witnessed by C. O. Deaner and D. S. Withers.

6/17/40, 2:00 P. M."

page 23 } By Mr. Martin:

Q. Was he asked anything about a shot being fired before he was shot?

A. So far as I recall he wasn't.

C. O. Deaner.

Q. Did you ask him and lead him into saying he knew he was in a dying condition or did he volunteer that?

A. I asked the question and he said he was.

The witness stands aside.

C. O. DEANER,
having been first duly sworn, testifies in chambers, as follows:

DIRECT EXAMINATION.

By Mr. Thompson:

Q. Mr. Deaner, were you called to Memorial Hospital on August 17th to take a statement from Mr. R. W. DePriest, Jr.?

A. Yes, sir.

Q. Please state whether or not this is the statement which you took.

A. Yes, sir, it is.

Q. Now, I believe the first part of that statement was written before noon.

A. About 11:30, I would say.

Q. All right, were you there again at 2:00 o'clock?

A. Yes, sir.

Q. Did you read this statement to Mr. DePriest?

A. Yes, sir.

Q. Did he state that that was a correct statement?

A. Yes, sir.

page 24 } Q. Why was it that that complete statement was not taken at 11:36, do you recall?

A. I wrote the statement, a portion of it. Mr. DePriest never voluntarily or definitely told me at the time that he was going to die. He never did voluntarily state that he was going to die.

Q. Why wasn't the complete statement taken at 11:30?

A. Well, one of the reasons was he was mighty sick and some of his people were there and, if I recall, at the direction of the Commonwealth Attorney we waited to get in touch with Dr. Hurt.

Q. At the time this statement was read to Mr. DePriest and he said that it was his statement had Dr. Hurt then talked to Mr. DePriest?

A. I don't know of my own knowledge that he had. Dr. Hurt was not at the hospital when I got there.

C. O. Deaner.

By the Court:

Q. Mr. Deaner, were you present when it was read over to him in its final form and when he indicated his signature?

A. I wasn't present when he signed it. I read the statement to him myself, however.

Q. You mean after it had been completed by the initiative of Mr. Thompson?

A. As the statement is now.

Q. At the time you read it over to him in its final form had Dr. Hurt talked to him?

page 25 } A. I was informed that he had, yes, sir.

Q. At the time you read it over to him in its final form did he seem to realize that death was impending?

A. I asked him when I went into the room did he realize his condition and he said, "I am pretty sick and I don't believe I can get well". That was the statement he made to me before I read this statement back to him and asked him if it was correct.

CROSS EXAMINATION.

By Mr. Martin:

Q. The only thing he said with reference to death was nothing relating to any impending death but simply when you asked him did he realize his condition he simply replied: I am mighty sick and don't believe I will get well."

A. Yes, sir.

Q. And that was all that was ever said in your presence by anybody as to his actual condition?

A. That was all that was ever said to me by him.

Q. And were you present when he signed it?

A. No, sir, I was not present when he signed it.

Q. But after it had been signed you went back and read it to him?

A. Yes, sir. I might qualify that statement, if you will allow me to. After I wrote this we had made arrangements for Dr. Hurt and the Commonwealth Attorney and myself to meet at the hospital at 2:00 o'clock. I got over there about three minutes to two and Dr. Hurt had already been there, I was informed. He got there and left ahead of me.

page 26 } By the Court:

Q. In other words, he had been there before you read it over the last time in its final form?

A. Yes, sir.

C. O. Deamer.

By Mr. Martin:

Q. That morning you didn't complete that statement because you said the man was mighty sick and his people were there?

A. Yes, sir.

Q. Did you see any medicines or drugs administered to him?

A. No, sir.

Q. Did you see any there?

A. I don't remember whether there was any in the room or not. I do remember there was a water glass with ice water in it and a tube. If I remember correctly he had a drink of water while I was talking to him.

By the Court:

Q. Was he rational at the time he made the statement? Did he seem to know what he was talking about?

A. He knew his name. He knew his age. He knew where he lived and he knew how he was injured.

Q. Was he talking out of his head or anything like that?

A. In my judgment he was perfectly rational.

By Mr. Martin:

Q. You don't know his condition at all at the time he signed the statement?

page 27 } A. No, sir, I wasn't there when the statement was signed.

Q. And you simply read it to him after it was all signed?

A. Yes, sir.

The witness stands aside.

By the Court: Gentlemen, the evidence offered here, as a whole, when connected up, tends to show that the declarant at the time he made the statement was living under a sense of impending death and that he had abandoned all hope of recovery. I am therefore of the opinion that the oral statement that he made to Sheriff Miles is admissible and also that the written statement is admissible. It certainly is, in the court's view, relevant testimony. The weight, however, is a question for the jury and you gentlemen representing the accused shall, of course, have the opportunity to cross examine the witnesses and offer any other evidence that may be relevant and material to attack the weight, but the dying

Dr. H. H. Hurt.

declaration and the oral statement made to Sheriff Miles will be admitted for what it may be worth.

By Mr. Martin: We except to the court's ruling in admitting the oral statement of the deceased and also in admitting in evidence the written statement, and we wish to save the point.

page 28 } By the Court: It is my understanding that all this evidence is proper to introduce before the jury. The jury is entitled to have brought before it all the evidence that has been introduced here.

Note: At this point the examination of the witness,

DR. H. H. HURT,
is resumed in the presence of the jury.

By Mr. Thompson:

Q. Dr. Hurt, did you, at the request of the Commonwealth Attorney, advise Mr. DePriest of his condition about 2:00 o'clock on the afternoon of the 17th?

A. I did.

Q. Will you please state to the jury just what you told Mr. DePriest?

A. I told Mr. DePriest that I did not think he would get well.

Q. What reply, if any, did Mr. DePriest make to you?

A. He said he didn't think he would either.

Q. Do you think at that time that Mr. DePriest was rational and knew what he was talking about?

A. Yes, sir.

Q. In your opinion, do you think at that time that Mr. DePriest believed that he was going to die?

A. Yes, sir, he told me so.

page 29 } CROSS EXAMINATION.

By Mr. Martin:

Q. Doctor, when you told him that you did not think he was going to get well did you not also tell him that you were going to keep working on him?

A. Yes, sir.

Q. And is it not true that all he said to you was: "I don't think I am either"?

A. Yes, sir.

Dr. H. H. Hurt.

Q. He didn't add any addition to that?

A. I don't recall anything else.

Q. And you did not add any additions to your statement; that you didn't think he would get well but you were going to keep working on him?

A. Nothing more than to pat him on the back and try to break the news as easily as I could.

Q. That is all you know about it, and that was approximately 2:00 o'clock?

A. Approximately 2:00 o'clock on Saturday, the 17th.

Q. Was he suffering considerably?

A. Yes, sir.

Q. To such an extent that you prescribed morphine for him?

A. Yes, sir.

Q. In doses of a quarter of grain every four hours?

A. Yes, sir.

Q. Did you leave any instructions to increase or give it with more rapidity if in the opinion of the nurse he needed it? Is that generally understood, or what is the procedure?

A. The usual procedure, and I think what was page 30 } done in this case—I do not have the hospital records with me—is to write the orders on the hospital chart and those orders are carried out. If, in the opinion of the nurse, the man is suffering and needs relief from pain, it may be given more often.

Q. You actually don't know how much was given him?

A. No, sir.

RE-DIRECT EXAMINATION.

By Mr. Thompson:

Q. Doctor, in the event that he should get in the condition that he would have to have more than a quarter of a grain every four hours isn't it necessary for the nurses to call you?

A. Yes, sir.

Q. And you were not called?

A. No, sir.

By the Court:

Q. Doctor, was Mr. DePriest rational when you left him?

A. Yes, sir.

Q. Did he give you the impression that he realized he was not going to live?

A. Yes, sir.

Q. That he had abandoned all hope of recovery?

Sheriff J. L. Miles.

A. I think so.

By Mr. Martin:

Q. You know nothing about this statement and were not present when it was made?

A. I was not there when it was made.

Q. And have no personal knowledge of it at all?
page 31 } A. No, sir.

Q. You know nothing about his condition at the time he made the statement?

A. No, sir.

By Mr. Thompson:

Q. Doctor, granting that a statement was taken immediately when you left do you think that Mr. DePriest was in condition to make a statement?

A. Yes, sir.

Q. Doctor, at the time you informed Mr. DePriest of his condition was I there at that time?

A. Yes, sir.

The witness stands aside.

SHERIFF J. L. MILES,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Thompson:

Q. Mr. Miles, did you go to the room of Mr. R. W. DePriest, Jr., at Memorial Hospital in Lynchburg on the morning of August 17th, along about 11:00 o'clock that day?

A. Yes, sir.

Q. Did Mr. DePriest at that time make a statement with regard to how he was injured?

A. Yes, sir.

Q. Who was present at the time that statement was made?

A. Mrs. DePriest and his nurse, I forget her
page 32 } name, and Dr. Hurt.

Q. Did Mr. DePriest appear to realize that he was in a dying condition?

A. Well, he told me that he couldn't get well. He said he was going to die.

Q. He told you he was going to die?

A. Yes, sir.

Sheriff J. L. Miles.

Q. Did he appear to be rational—that is, did he know what he was talking about at that time?

A. He seemed to know everything, yes, sir.

Q. Now, will you tell the jury and the court what Mr. DePriest told you at that time?

A. Well, he told me the night he got shot that Harvey Mitchell and several other youngsters were there at his house, and later Tom Mitchell came over and Tom Mitchell and his son-in-law, Mr. Lindsay, got in an argument, and he went out and told Tom that he didn't want any argument or fuss or disturbance around his home and if he couldn't do any better than that he would have to leave. He said that Tom got in his car and left and was gone he reckoned around thirty minutes. He came back, parked his car about the same place, and left the lights on and left the motor running and he and Lindsay, his son-in-law, got in an argument again and were arguing, and he went out there and took Tom by the arm and says, "Tom, I want you to get in your car and leave. I am not going to have this around here" and said Tom
page 33 } shot him.

CROSS EXAMINATION.

By Mr. Overbey:

Q. When he told you this please state what his condition was. Did he seem to be suffering or not?

A. He was suffering, suffering with his stomach.

Q. Did you see any medicine administered to him during the time you were there?

A. No, sir, I didn't see him take any medicine.

Q. Who did you say was there, you, the nurse and Mrs. DePriest were all that were in there?

A. Yes, sir.

Q. Why did you go there, Sheriff?

A. Well, I had the impression—I am not sure about this—that Dr. Hurt called me. That was about 10:00 o'clock Saturday morning and I went over there.

Q. When you first got there did Mr. DePriest say anything to you?

A. He spoke to me.

Q. Did he make this statement voluntarily or did you ask him about it?

A. Well, he looked like he wanted to tell me. I don't know just how it started. He spoke to me and he said, "Mr. Miles,

S. J. Thompson.

I am going to die. I can't live. I can't get well", and I might have asked him how he got shot—I won't say.

The witness stands aside.

page 34 }

S. J. THOMPSON,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Spencer:

Q. Mr. Thompson, as Commonwealth Attorney of Campbell County, did you go there in answer to a call about the middle of the day on the 17th of August in connection with the shooting of Mr. DePriest?

A. Yes, sir.

Q. Did you go to the hospital?

A. Yes, sir.

Q. About what time did you get there?

A. Around 11:30 or 12:00 o'clock, or somewhere in that neighborhood.

Q. For what purpose did you go?

A. I went to get a dying statement from Mr. DePriest if I could.

Q. Did you have information that he was going to die or was likely to die?

A. Yes, sir.

Q. And you went for the purpose of getting a statement if it could be gotten?

A. Yes, sir.

Q. I wish you would, in your own way, explain to the court and jury the exact chronological happening of events and exactly what happened.

A. Before leaving Rustburg I called up Mr. Deaner, who is a fingerprint expert in Lynchburg and who has assisted me a number of times in taking dying statements. I didn't personally want to take the statement and I called
page 35 } Mr. Deaner, thinking he could take it. He met me at Memorial Hospital. We went to Mr. DePriest's room and Mr. Deaner went in and in my presence talked to Mr. DePriest, and the first part of this statement, which will be presented to you gentlemen to see, was written by Mr. Deaner in my presence. We were informed that Dr. Hurt had not informed Mr. DePriest that he couldn't get well and that he was going to die, and I thought that it would be

S. J. Thompson.

better to have Dr. Hurt to tell this man about his condition before the final taking of the statement. I called Dr. Hurt and Dr. Hurt was busy and told me that he couldn't be there before 2:00 o'clock.

By Mr. Overbey: We object to what Dr. Hurt told him in any way. The particular question doesn't amount to so much but we don't want hearsay evidence.

By the Court: I sustain the objection as to what Dr. Hurt said. He can tell the facts as he found them.

By Mr. Spencer:

Q. Let's see if I can get you over that, Mr. Thompson. How long was it before you could get Dr. Hurt there?

A. 2:00 o'clock.

Q. You got him there at 2:00 o'clock. Did he then tell Mr. DePriest that in his judgment he could not get well?

By Mr. Martin: (Interposing) We object to the leading question.

By the Court: The question is leading. Just page 36 } ask him what Dr. Hurt said.

By Mr. Spencer:

Q. Mr. Thompson, will you please tell the court and jury what occurred when Dr. Hurt got there, if it took place in your presence and you heard it?

A. I met the doctor at the hospital and went in Mr. DePriest's room and Dr. Hurt told Mr. DePriest, in my presence, that he didn't think he was going to get well, and Mr. DePriest replied that he didn't think so either. After that Dr. Hurt stepped out and I had this partial statement with me and I completed the statement, which is in my handwriting at the bottom. I then read the complete statement to Mr. DePriest in the presence of Mr. Withers, Deputy Sheriff, and after reading it to him Mr. DePriest said that it was correct and made his mark at the bottom where it is signed here. About the time we had completed getting this statement and came out of the door Mr. Deaner had gotten back. Either Dr. Hurt was a little early or Mr. Deaner was a little bit late. I gave the statement to Mr. Deaner and asked that he verify this statement with Mr. DePriest, which he did do, and he will testify about that.

Q. Is that the statement that you have in your hand?

A. That is the statement.

S. J. Thompson.

Q. Mr. Thompson, from all you could judge from your conversation—how long were you at the hospital and with Mr. DePriest?

A. I was probably with Mr. DePriest, in his presence, 20 or 25 minutes all told, the first and second time.
page 37 }

Q. From your observation of his conversation, his appearance, and all that you could judge about him, was he rational and capable of making a statement and knowing what he was saying?

A. I think so.

Q. Did he ever give any appearance of being doped or not knowing what he was saying?

A. No, sir.

Q. As far as you could judge from what he said, and all the other things that you could observe, do you think that he made that statement in fear of impending death and in the full belief that he could not get well?

A. I think so.

Q. I will now ask you to offer that statement as an exhibit in the case.

A. Shall I read the statement?

Q. Yes, sir.

A. "Statement of R. W. DePriest, Jr., August 17th, 1940. Age 50 years, reside in Campbell County, west of Winfall; states that he was shot by Tom Mitchell of Campbell County about 8:00 or 9:00 o'clock. 'Tom came up home fussing and hit my daughter. This made me mad and I grabbed him in the collar but I did not hit him. He then got into his car and left. Then he came back and was fussing around with George Lindsay. I did not hear this. I went out to where he was. He said for me not to come to him. I kept coming and he backed up a ways. I did not see the gun in his hand as it was dark but I seen the flash of
page 38 } the gun when it was fired. I had a knife in my hand when the first time Mitchell was there but it was not opened, but when he came back the second time I never taken my knife out of my pocket. The reason I was going to him was that I wanted to apologize to him for what had happened when he was at the home the first time. After I was shot Tom Mitchell jumped in the car and left. This is all that I remember. I make this statement knowing that I am in a dying condition and that I will not survive, with the full knowledge of my condition.'

D. S. Withers.

Signed: "Robert DePriest, Jr.", with his mark.

Witness: "D. S. Withers" and "C. O. Deaner".

Note: (No cross examination.)

The witness stands aside.

Note: At this point a recess for lunch was taken from 1:00 o'clock P. M. until 2:00 o'clock P. M.

D. S. WITHERS,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Thompson:

Q. Mr. Withers, I believe you are Deputy Sheriff of Campbell County?

A. Yes, sir.

Q. Were you present at the Memorial Hospital in Lynchburg on the 17th of August last when Mr. R. W. DePriest made a statement?

A. Yes, sir, I was there when he made the statement. I don't remember exactly the date.

Q. But you were there when he made the statement?

A. Yes, sir.

Q. I hand you this statement and ask you if that is the statement that Mr. DePriest made in your presence and in my presence?

A. It is.

Q. At that time did Mr. DePriest appear to know what he was talking about?

A. Yes, sir, I think so.

Q. Did you hear Dr. Hurt tell him that he didn't think he was going to get well?

A. Yes, sir.

Q. Did you hear Mr. DePriest also tell Dr. Hurt that he didn't think so either?

A. Yes, sir.

Q. Did you think at that time that Mr. DePriest realized that he was not going to get well?

A. Mr. DePriest said that he realized that he would not get well.

D. S. Withers.

Q. Do you think that he did realize it?

A. Yes, sir.

CROSS EXAMINATION.

By Mr. Overbey:

Q. Did you hear this document read to Mr. DePriest?

A. Yes, sir.

Q. Was it signed by Mr. DePriest before it was read to him or afterwards?

page 40 } A. I don't remember.

Q. Did you see Mr. DePriest sign it?

A. No, sir. There were several of us around the bed there and I didn't see Mr. DePriest sign it but I heard him acknowledging it or heard it read to him and he said that was correct.

Q. You don't know whether it was signed by him before it was read or afterwards?

A. I don't remember.

Q. Would you say he had all of his faculties?

A. How is that?

Q. Did he have all of his faculties when it was read to him?

A. Yes, sir.

Q. Could he have signed his name to it?

A. I don't remember seeing Mr. DePriest sign it.

Q. Well, it appears to be signed by his mark and witnessed by you and you just said you don't know whether he signed it or not.

A. Well, I heard this read to Mr. DePriest and I was thinking at that time that I was witnessing what was read to him.

Q. But you didn't mean that signature under "Witness" to say that you saw him make his mark to this document?

A. No, sir, I didn't.

Q. In other words, you didn't see him make the mark?

A. There were several of us in the room and they were standing between myself and Mr. DePriest.

Q. Was he able to write out his own name if he
page 41 } had all of his faculties with him?

A. I don't know.

Q. He had the use of his hands, didn't he?

A. Yes, sir, he had the use of his hands. He seemed to be in right bad condition. Whether he could write his name or not I don't know.

The witness stands aside.

C. O. DEANER,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Thompson:

Q. Mr. Deaner, I believe you are a police officer in the City of Lynchburg.

A. Yes, sir.

Q. Were you called to Memorial Hospital on August 17th, last, by me for the purpose of taking a statement from Mr. R. W. DePriest, Jr.?

A. Yes, sir.

Q. I hand you herewith a statement purporting to be a statement made by Mr. DePriest and ask you whether or not a part of that statement was written by you and whether or not the entire statement was read to Mr. DePriest by you, and whether or not he acknowledged that as a true statement.

A. Yes, sir.

Q. Did Mr. DePriest at that time appear to understand what he was talking about?

A. Yes, sir.

Q. Do you know whether or not at that time page 42 } Mr. DePriest appeared to realize that he was going to die?

A. At the time that I wrote a portion of this statement?

Q. Yes, sir.

A. If he did he didn't indicate it much at that time.

Q. Did he afterwards say anything to you to indicate that?

A. Yes, sir. I wrote a portion of this statement about 11:30 in the morning on August 17th. I was back in the hospital at 2:00 o'clock. I read the statement back to Mr. DePriest at that time. Before I read it I asked him did he realize his condition.

Q. What did he tell you?

A. He said, "I am mighty sick and I don't think I can get well."

CROSS EXAMINATION.

By Mr. Martin:

Q. Mr. Deaner, did you see him sign that paper?

A. No, sir.

Q. And all he said was that he was mighty sick and didn't think he was going to get well?

A. Yes, sir.

Mrs. D. E. Bryant.

Q. That is all you know about his own knowledge of his condition?

A. Yes, sir.

Q. Just that one remark?

A. Yes, sir, that was his answer to my question.

Q. And you wrote out a part of that early in the day and then went back later in the day after somebody
page 43 } else had written some more on it and had gotten the man to sign it?

A. About two hours and a half difference between the time that I wrote the first portion and the time I went back and read it to him.

Q. You went down and wrote a portion of it. Then you left and then when you next saw him again somebody else had written some more on it and the man had signed it, all out of your presence?

A. Yes, sir, it had been signed out of my presence.

Q. And your reading it to him didn't occur until after his signature had been obtained to it by somebody else?

A. That is right.

RE-DIRECT EXAMINATION.

By Mr. Thompson:

Q. Did you read that statement to him there at 2:00 o'clock and did he acknowledge that as his statement?

A. Yes, sir.

The witness stands aside

MRS. D. E. BRYANT,
having been first duly sworn, testifies as follows.

DIRECT EXAMINATION.

By Mr. Thompson:

Q. Mrs. Bryant, were you a nurse for Mr. R. W. DePriest, Jr., last August when he was in the hospital?

A. Yes, sir.

Q. Were you present about 2:00 o'clock on the afternoon of August 17th when he made a statement to me and Mr. D. S. Withers, Deputy Sheriff?

A. Yes, sir.

page 44 } Q. Did you hear the conversation between Mr. DePriest and Dr. Hurt, what Dr. Hurt told him, and what he replied?

Mrs. D. E. Bryant.

A. Yes, sir.

Q. Will you tell the court and the jury what was said, what Dr. Hurt told him and what he said?

A. Well, Dr. Hurt told Mr. DePriest that although we always hoped for the best and we were doing everything we could for him he wanted him to realize that he couldn't get well.

Q. What did Mr. DePriest say then?

A. He said he realized it.

Q. Immediately thereafter was a statement made by Mr. DePriest to me in your presence and in the presence of Mr. Withers and Mrs. DePriest?

A. I don't know what you mean.

Q. Do you remember a statement being made there at that time that was written down?

A. Oh yes, I understand now. I didn't understand at first.

Q. At that time do you think Mr. DePriest realized his condition?

A. Yes, sir.

Q. You think he realized he couldn't get well and was going to die?

A. Yes, sir.

Q. Do you think he realized what he was saying and knew what he was saying and what he was doing?

A. Yes, sir.

Q. Do you remember seeing him make his mark page 45 } on a piece of paper there at that time?

A. Yes, sir.

CROSS EXAMINATION.

By Mr. Martin:

Q. Who made his mark for him?

A. Mr. Thompson might have.

Q. You say Mr. S. J. Thompson made his mark for him?

A. Yes, sir, I think so.

Q. Do you recall hearing Dr. Hurt simply tell this sick man that he thought he wouldn't get well but that he was keeping on working on him? Wasn't that the exact language that Dr. Hurt used?

A. I don't remember the exact words.

Q. Wasn't he suffering right much at that time?

A. No more than he had been suffering for two or three days.

Mrs. D. E. Bryant.

Q. Wasn't that right bad? Hadn't he been suffering intensely all that day?

A. He had been suffering right much.

Q. And you had administered morphine?

A. Yes, sir, at times.

Q. And had given him about a sixth of a grain every two hours?

A. That was his dose.

Q. Sixth of a grain every two hours?

A. Yes, sir.

Q. And that order was carried out?

A. Yes, sir.

page 46 } Q. Didn't that affect him some, affect his mentality some?

A. No.

Q. What were you giving it for? What was the object in giving it?

A. To ease the intense pain.

Q. Wouldn't the same effect that caused the easing of pain deaden his mentality?

A. It didn't.

Q. It didn't do any good?

A. It eased his pain some but it never did put him to sleep.

Q. Was he able to sign the statement himself?

A. You mean to do the actual writing?

Q. Yes, write his name.

A. Well, I don't know. I suppose he was. He signed by making his mark. I guess he was.

Q. Did you see him make his mark?

A. Yes.

Q. Did he have enough physical ability to have written his own name or was he so weak that he couldn't write his name?

A. I wouldn't be able to answer that because they didn't try it.

Q. They didn't offer it to him and ask him to go ahead and sign it by his own hand. They didn't do that?

A. I don't remember it.

Q. Did they read it to him after he signed it?

A. Yes, sir.

Q. Did they read it to him before he signed it?

page 47 } A. I don't remember.

Q. You were there in the room.

A. Yes, sir.

Q. And you know that after his signature had been made by a mark they read it back to him?

George Lindsay.

A. Yes.

Q. But you don't know anything about it having been read to him before his mark was put on there?

A. I don't remember it. I just don't remember it.

The witness stands aside.

GEORGE LINDSAY,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Spencer:

Q. Mr. Lindsay, you are a resident of Campbell County living out in the neighborhood of Winfall, about five miles west of Gladys, is that about right?

A. Yes, sir.

Q. What relationship did you bear, if any, to the deceased Mr. DePriest?

A. He was my father-in-law.

Q. You married his daughter?

A. Yes, sir.

Q. Did you live there on his farm?

A. No, sir, I didn't live there.

Q. How far did you live from his farm?

page 48 } A. I reckon about seven or eight miles.

Q. What business are you engaged in, Mr. Lindsay?

A. Sawmilling.

Q. And what business was he engaged in?

A. Farming.

Q. What kind of farming?

A. Tobacco and corn.

Q. On the early evening of August 16th were you over at your father-in-law's place?

A. Yes, sir.

Q. What time did you get over there?

A. I got there about three o'clock.

Q. Who did you go with?

A. Harvey Mitchell.

Q. What relationship does Harvey Mitchell bear to Tom Mitchell, if any?

A. His brother.

George Lindsay.

Q. And what relationship are both of them to you or to your wife?

A. My wife's first cousins.

Q. Will you explain to the jury how that relationship comes about?

A. I married their first cousin. That is all it is.

Q. Perhaps I shouldn't bother to go into the details about it but as I understand it, and I say it subject to correction by these gentlemen, the deceased, Mr. DePriest, was the father of your wife, and Mr. DePriest's wife was the sister of these boys' father.

A. Yes, sir.

Q. In other words, Mrs. DePriest, the widow of Mr. Robert DePriest, is the blood aunt of these boys.

A. That is right.

Q. Now, on the early evening in question I wish you would, in your own way, turn to the jury and tell them step by step just exactly how all this trouble came about.

A. Well, on Thursday night Harvey Mitchell come to my house, him and John Goodman and Millard Johnson, and ate supper and Harvey took us in the car and we four went to Brookneal to look at the high water. We stayed down there powerful late and come back and they stayed all night at my house, got up the next morning and eat breakfast and Harvey said, "I have got to go to Rustburg" and so he left my house and come to Rustburg. Somewhere about three o'clock in the evening he come back to my house, him and Millard Johnson, and my truck was mired up and I was trying to get it out to bring my wife up to her father's, so Harvey came down to the shed where I was working at. He said, "I am going up anyhow, you all come on and go with me and I will bring you all back tonight." I told him "all right" and I left my truck alone and got in the car with him and went on up there. I reckon it was around 3:00 o'clock when we got there.

Q. When you say you got there you mean you got to your father-in-law's home, Mr. DePriest's home?

A. Yes, sir, about 3:00 o'clock, and we stayed around there until about night and we come up to Winfall and brought Millard Johnson home and went back to Mr. DePriest's, and about, I will say, 7:30, Tom Mitchell come over there and me and Harvey and John Goodman were in the front room. Harvey was laying on the lounge and Tom come in and said, "What are you doing laying there? You better be up 'tending to your business." He was talking to Harvey, his own brother. He said, "I

George Lindsay.

was at Rustburg and John Mitchell filed a suit against you up there and I come up here after the title of your car and truck to save it for you." Harvey said, "I don't want to hear anything you have to say about it. I was in Rustburg myself this morning and know all about it." So him and Tom kept arguing and I got up out of the chair and went out on the back porch and sat down. I didn't want to hear any of it, so they argued for a few minutes and Tom come out on the porch where I was at. He said, "Have you got the keys to Harvey's car?" I said, "Yes, I have got them." He said, "I want them." I said, "Tom, I have been driving Harvey's car and he brought us up here and is going to carry us home and I ain't going to give you these keys." He said, "Yes you are going to give them to me" and I said, "No, I ain't". So he said, "I will take them." So him and me got in a little scrap right off the porch.

Q. Which porch?

A. Back porch.

Q. For the purpose of putting this layout in the record here and so that the court and jury can understand it let's stand up in front of the jury so all of them can page 51 } see this sketch and, unless these gentlemen object, I am going to lead you to some extent. This thing shows the highway. This is the highway running from Rustburg or in the general direction of Rustburg out past Mr. DePriest's place. Is that right?

A. That is right.

Q. Then there is a driveway turning in from the highway and running up probably to the front of his house something like 150 feet?

A. Yes, sir.

Q. Then up and into the back yard and all of this out here is the barn yard?

A. Yes, sir.

Q. The arrangement of the house shows a front porch running across the biggest portion of the front of the house and square with the road?

A. Yes, sir.

Q. From that porch you go into a hallway and as you turn to your right you go upstairs and to the second floor?

A. Yes, sir.

Q. As you turn to your left after entering the hallway you go into a front room, as indicated there. Is that right?

A. That is right.

George Lindsay.

Q. From that room there is a door leading into what is a back or side porch?

A. Side porch. We call it a back porch.

Q. This is a hallway going back to the kitchen?

A. Yes, sir.

Q. Is that about the way that thing lies there?

A. Yes, sir.

page 52 } Q. Show the jury where that bed was that you said Harvey Mitchell was lying on. Can you indicate that on there?

A. In this front room.

Q. And this is the front porch, and this is the front room, and this is the back porch, and a door from the front room on to the back porch?

A. That is right.

Q. I understand the first of this difficulty started in this front room.

A. In the front room.

Q. You said there was a bed.

A. A lounge right under the window in this front room.

Q. The window that opens out on the front porch?

A. Yes, sir.

Q. A day bed?

A. Yes, sir.

Q. Harvey was right under the window that opens on the front porch?

A. Yes, sir.

Q. His brother had come in and started questioning him about the car?

A. Yes, sir.

Q. You had gone out on the back porch?

A. I was on the back porch.

Q. Whereabouts on the back porch were you?

A. Right on the edge of it. There is a bench there and I was sitting on the edge of the porch.

Q. Past the kitchen door?

page 53 } A. Past the kitchen door.

Q. Now, for the purpose of clarifying your further testimony, there is indicated on here a well. Is that about the way the well sets?

A. Yes, sir.

Q. Do you remember about how far it is from that well down to where there is an old chestnut-oak?

A. It is 40 feet.

Q. About 40 feet?

George Lindsay.

A. Yes, sir, 40 feet.

Q. About how far is it from that chestnut-oak over to the porch?

A. Around 40 feet.

Q. About the same distance?

A. About the same distance.

Q. Indicate on here about where that Chestnut-oak would be.

A. Right along here.

Q. Sets off the driveway?

A. Yes, sir.

Q. A chestnut-oak about opposite the kitchen door?

A. Yes, sir.

Q. About how far from that is it to that doorway leading into the front room?

A. About 55 feet.

Q. Now, with that in mind, and if you want to use it to show the jury on that plat, proceed with your page 54 } story. I understood you to say you had gone out on the back porch. Robert came out and asked you for the key and you got in a scrap. Now, go ahead with your story.

A. We got in a scrap and were passing some licks, so my wife run in and sort of got a hold to me like and some way or another she got hit. Tom hitting at me struck her. She commenced hollering and crying she had done got hit. Tom had hold to me and I had hold to him. About that time Mr. DePriest run in and he separated us and told Tom, said, "Tom, if that is what you come here for, to raise a row and disturbance, you get away and stay away." He pushed me on the porch and Tom got in his car and left.

Q. Who left with him?

A. John Goodman.

Q. Was anybody in the car with him?

A. His little boy.

Q. About how old was his child?

A. I imagine about seven years old.

Q. His little boy about seven years old and John Goodman left there in the car with him?

A. Yes, sir, and so in about a half-hour or three-quarters he was back. I was in the room where Harvey was lying on the lounge and me and him and Hop Elliott was in there talking, and my wife come in and called me and told me she wanted me to come out and help her kill some chickens.

George Lindsay.

By Mr. Martin: We object to her statement to him.

By Mr. Spencer: That is merely explanatory of his immediate move. His wife asked him to come out and
page 55 } go some place, and that is simply to move him
some place. It has nothing to do with the actual
events. It explains where he went and his reason for going
there. Of course, I admit it is hearsay.

By the Court: It is hearsay and it is not admissible and I will have to sustain the objection. Now then, you can elicit the same information from another angle.

By Mr. Spencer:

Q. Then you moved to some part of the yard?

A. Yes, sir, I went to the kitchen and told her to come on; that I was ready to help her. I was standing on the back porch leaning up against the post when this car drove up and turned around.

Q. What car?

A. Tom Mitchell's car drove up and turned around and he left the lights on and left the motor running. I didn't even know who it was. I wasn't thinking about Tom coming back, so I was standing on the porch and he walked right up to me and threw a gun on me—said, "Do you believe I will shoot the blue hell out of you?" I said, "No, Tom, I don't. I haven't done anything to you to shoot me for." He said, "If you come off the porch I will kill you." So I stepped off and he kept backing back and kept telling me "If you come any further I am going to shoot you." He said it five or six times, and I kept following him. When he got up to the rear end of his car he stopped. I reckon I was within five or six
feet of him. Mr. DePriest came around and said,
page 56 } "Tom, ain't I told you to get away from here and
stay away from here?" He no more than got it
out of his mouth than Tom shot him. He missed him the first time and Mr. DePriest kind of grabbed at him and he fired the second time.

Q. What did Tom do?

A. Jumped in his automobile and left.

Q. Did he ever bend over him to look at him?

A. As soon as the second shot was fired he left.

Q. Did he leave slow or fast?

A. Well, I reached for Mr. DePriest and before I could raise him the car was turning in the road down there.

Q. Now, you indicated that there was a chestnut-oak that had been struck by lightning almost opposite the kitchen door.

George Lindsay.

A. Yes, sir.

Q. Will you indicate to the jury on this drawing the movements of his car when he came back there?

A. Well, he drove it up here in this yard and turned around and headed it back down this way.

Q. He entered up this entrance road and turned around?

A. Yes, sir.

Q. Drove on up into the back lot?

A. Yes, sir.

Q. And then turned around and headed back?

A. Yes, sir.

Q. About where was it when he stopped?

A. About right along there. (indicating on diagram)

Q. In other words, it was setting along just
page 57 } above that chestnut oak?

A. Yes, sir, somewhere around near that chestnut oak.

Q. Was there a sawdust pile or place where you had been cutting wood out there?

A. Yes, sir.

Q. Indicate where that was.

A. Right out here on the other side of the driveway.

Q. Will you indicate with the pencil about where it is?

A. About right along there, just across the road.

Q. Across from the chestnut oak?

A. Yes, sir.

Q. And the car, as I understand it, according to your recollection, was just above the chestnut oak?

A. Yes, sir, and headed down toward the highway.

Q. Did he cut the motor off?

A. No, sir, the motor was running and lights were on.

Q. He left the lights on?

A. Yes, sir.

Q. Was anybody in the car with him when he came back?

A. John Goodman.

Q. Was the little boy in there?

A. If he was I didn't see him. If he was in there he was in the back seat where I couldn't see him.

Q. You say the best you could tell it was some 35 or 40 minutes later after he had been ordered away by Mr. DePriest that he came back and this took place?

A. Yes, sir.

page 58 } Q. Do you know where Harvey Mitchell was at the time?

A. He was laying on the lounge the last time I saw him.

George Lindsay.

Q. You mean the same day bed you have spoken of under this window?

A. Yes, sir, when I come out he was laying there.

Q. Was anybody else there at the time except you, Mr. DePriest, John Goodman in the car, and this accused here?

A. No, sir.

Q. They are the only persons you saw there?

A. Yes, sir.

Q. Have you described to the court and the jury, as accurately as you could, the exact way this thing happened?

A. Well, it just seemed that he was after me more than anybody else but I reckon he took his spite out on Mr. DePriest.

Q. I am talking about this last time when the shooting occurred.

A. He just come there and shot him and left.

Q. Did Mr. DePriest shoot anybody?

A. No, sir.

Q. You mean this man here had it in for you more than he did for Mr. DePriest?

A. Yes, sir, it seemed like it.

Q. Had you been drinking anything? It has been alleged in the opening statement that you were drinking and all of you were drinking and this was the result of a drunken fight in which you were assaulting this man with a knife.

page 59 } Did you assault him with a knife?

A. No, sir.

Q. Had you been drinking?

A. I had drank several drinks that evening.

Q. What were you drinking?

A. Wine.

Q. Were you drunk?

A. No, sir.

Q. Was this man here drinking?

A. He was drinking some, it looked like.

Q. What was he drinking?

A. I just couldn't say what he was drinking because I don't know.

Q. Did he offer you anything to drink?

A. No, sir.

Q. Did you see him offer anybody else anything to drink?

A. No, sir.

Q. Had there ever been any hard feelings between him and you before?

A. None that I ever heard of.

George Lindsay.

Q. Had there been any between him and Mr. DePriest before?

A. No, sir.

Q. Had he been at liberty to come to that place at any time he chose?

A. Yes, sir.

Q. Did you see any weapon in Mr. DePriest's hand at or before the time he was shot?

A. No, sir.

Q. Did you find any knife in his hands or around page 60 } him when you picked him up?

A. No, sir.

Q. Did you find a knife in his clothes after you got to the hospital?

A. Yes, sir, Wesley Kerr found a knife in his pocket.

Q. Do you know whether or not this is the knife that he had?

A. That is the knife that he had.

Q. That was taken out of his clothes after he got to the hospital?

A. Yes, sir.

Q. Did he threaten this man or attempt to assault this man or do anything to indicate he was going to cut him, shoot him, or knock him in the head or do anything to him?

A. No, sir.

Q. Did he make any motion to get after him until after he shot the first time?

A. No, sir.

Q. How close was he standing to him when he shot the first time?

A. Five or six feet. I wouldn't know exactly.

Q. How close were you to him?

A. About the same distance.

Q. How close together were these shots fired?

A. One right after the other, pretty close together. Looked like might have been a minute difference in them.

Q. By using the device of saying "bang, bang" and waiting whatever time you think it was from the first page 61 } "bang" to the second "bang", could you indicate that way how long it was between the two shots?

A. He shot and it might have been probably a minute he shot again, right along together.

Q. A minute?

A. Could have been a minute.

Q. Maybe you would do better if you could attempt to show

George Lindsay.

the jury by saying "bang" and waiting what you think is the period and saying "bang" again. I don't mean to confuse you and I hope you are not confused. You don't mind saying "bang", do you?

A. Bang right down into the ground and he missed him and then he took another aim at him and shot him. The first shot was meant for him too, I reckon.

Q. Can you shoot a gun?

A. I never have shot a pistol.

Q. Don't you think you could shoot it like that and wait whatever period you think it was between? I want to give the jury some idea of the time between the two shots.

A. He shot down at the ground and at his feet and then raised it up and shot.

Q. Was that about the period of time between them?

A. Yes, sir.

Q. One followed closely after the other then?

A. Yes, sir.

Q. Was Mr. DePriest drinking or drunk or had he had any part in any quarrel other than what you described?

A. None that I know of.

page 62 } Q. Did he have anything to drink so far as you know?

A. Not that I know of.

Q. A young man by the name of "Hop" Elliott was there on the premises, was he not?

A. Yes, sir, he come there with Tom the first time.

Q. He came with Tom when he first came?

A. Yes, sir.

Q. Did he go away with Tom?

A. No, sir.

Q. Was he there when the shooting occurred?

A. Yes, sir, he was around there somewhere. He was there after the shooting occurred. He was there somewhere. Where he was I don't know.

CROSS EXAMINATION.

By Mr. Overbey:

Q. Now, you said that Tom here, the defendant, came there, shot him and left, did you?

A. No, sir.

Q. You didn't say that?

A. No, sir, I didn't say that.

Q. What did you say?

George Lindsay.

A. He come there and left and went away and stayed a half-hour or three-quarters and then came back and shot him.

Q. Came back and shot him and left without any reason or motive?

A. No more than Mr. DePriest had ordered him off the first time he came there. He told him to go away and stay away.

Q. Are you certain Mr. DePriest ordered him
page 63 } away the first time he came there?

A. Yes, sir.

Q. Are you certain Mr. DePriest wasn't drinking?

A. If he was drinking I didn't know it and couldn't tell it.

Q. Weren't you in a position to tell if he was drinking?

A. No, sir, I wasn't with him all the time.

Q. Where were you?

A. Around the place different places.

Q. Where was he?

A. Working on a bridge at the other place and at home.

Q. How could he be at both places?

A. He put it in and came home.

Q. He was there during all this time?

A. Yes, sir.

Q. The bridge didn't have anything to do with this. What
time did he get there?

A. He got there about sundown.

Q. Did you go to the milking that afternoon?

A. Yes, sir.

Q. Was he there?

A. Yes, sir.

Q. What time did that occur?

A. That was, I will say, about 7:00 o'clock.

Q. It was dark at 7:00 o'clock, wasn't it?

A. No, sir, it wasn't dark.

Q. Was Mrs. DePriest there?

A. Yes, sir.

page 64 } Q. What was her condition?

A. She was all right.

Q. Was she drinking?

A. None that I know of.

Q. Could she milk?

A. Yes, sir.

Q. And she did milk?

A. Yes, sir.

Q. Was Mr. DePriest there?

A. Yes, sir.

Q. Was he drinking?

George Lindsay.

A. Not that I know of.

Q. Were you drinking?

A. I had drank several drinks that afternoon.

Q. How many do you mean by several, 3, 4, 5, 6 or 7?

A. Three or four.

Q. What was the size of them?

A. I didn't measure them—just ordinary drinks.

Q. And they didn't have any effect on you at all?

A. No. I felt it a little bit but I wasn't drunk.

Q. Now, when Tom Mitchell first came there what did he first ask you?

A. He didn't ask me nothing when he first got there.

Q. What did he first say to you?

A. He spoke to me.

Q. Then you went together?

A. No.

Q. What was the cause of you going together?

page 65 } A. He went talking with Harvey and I went out
on the back porch and he jumped on me about the
keys.

Q. He came on the back porch and jumped on you about the car keys. What did he say?

A. He grabbed hold of me.

Q. What did he say?

A. He said he wanted the keys.

Q. What did you say?

A. I told him I wasn't going to give them to him; that I would give them to Harvey.

Q. Did they belong to you?

A. Harvey had lent me the keys to drive the car to the store. I offered him the keys when I got back and he told me to keep them and drive the car home.

Q. You say he took hold of you the first time he was there on the back porch?

A. Yes, sir.

Q. Were any licks passed?

A. Yes, sir, we passed several licks.

Q. Who passed the first lick?

A. I just couldn't say. He might have passed it.

Q. Yet you weren't drunk, but you don't know who passed the first lick.

A. He could have passed it and I could have passed it.

Q. Both of you could have passed it at the same time but I am asking you who passed it.

George Lindsay.

By Mr. Spencer: I wish to object to this brow-page 66 } beating tactics and the witness should be given a reasonable opportunity to answer a question before another is fired at him. We are in a court of justice for the administration of justice and not for the purpose of browbeating.

By the Court: All right, Mr. Overbey, what have you got to say?

By Mr. Overbey: I don't intend to browbeat the witness and I don't think it behooves that gentleman to say anything about anyone browbeating a witness. This is an adverse witness and I want to get the facts. I can't browbeat him. I wouldn't if I could and couldn't if I would.

By the Court: All right, Mr. Overbey, you ask him such questions as may be relevant and then ask them in a gentlemanly ordinary kind of way and then give the witness an opportunity to answer it, and then you ask him another.

By Mr. Overbey: I would like to ask the court have I asked him a question in an ungentlemanly way?

By the Court: You are a little bit rough on him. Just let him answer the questions. He is not up here for punishment or anything like that. You are entitled to ask questions in a proper and civil way. This is not a civil war.

By Mr. Overbey: I except to the remarks of the page 67 } court and desire to note an exception to the remarks of the court.

By the Court: Go ahead and examine the witness.

By Mr. Overbey:

Q. Now, Mr. Lindsay—

By the Court: (Interposing) And don't violate the instructions of the court any more.

By Mr. Overbey:

Q. Mr. Lindsay, how many times did you say he hit you?

A. I just don't know. We passed several licks out there before my wife got out there and she got hit.

Q. Do you think he intentionally hit her?

A. I don't suppose he did. Probably he was hitting at me and when she come in she got the lick instead of me.

Q. Where was Mr. DePriest at that time?

A. He was in the house. He came out of the house.

Q. Well, what did he say to both of you or either one of you?

George Lindsay.

A. He just said he wasn't going to have no fighting there, and no fussing there, and told Tom if that was what he came for to get away and stay away.

Q. When he told him that did he leave?

A. Yes, sir, he left.

Q. He didn't get the keys, did he?

A. No, sir.

page 68 } Q. Well, he came back, did he?

A. Yes, sir.

Q. When he came back what was the first thing he said?

A. I was standing on the back porch and he walked up to me and threw the gun on me and said he would shoot the blue hell out of me.

Q. He threw the gun on you. Was there anything to prevent him from shooting you right then and there?

A. Not that I know of.

Q. Who was present when he threw the gun on you?

A. Nobody at all.

Q. Didn't anybody see it but you?

A. No.

Q. Well, what happened then?

A. Well, he just backed on back to his car and kept telling me if I come any farther he was going to shoot me. I kept following him up. I told him he wasn't going to bluff me with an old gun or anything.

Q. Did you have a knife in your hands?

A. No, sir.

Q. Did you curse and abuse him?

A. No, sir.

Q. You didn't say an unkind word to him?

A. I might have cursed a time or two.

Q. What did you say when you cursed?

A. I just don't remember.

Q. Did you call him a son of a bitch?

A. I don't think so.

page 69 } Q. Are you certain that you didn't?

A. I don't think I did.

Q. You are certain then that you didn't?

A. I don't think I used any words like that.

Q. Didn't you tell Mr. DePriest to cut the damned son of a bitch's guts out?

A. No, sir.

Q. Did you tell him anything?

A. No, sir, I didn't know Mr. DePriest was out there until he came out there.

George Lindsay.

Q. You didn't tell Mr. DePriest anything along those lines?

A. No, sir.

Q. Did you see Mr. DePriest advancing on him?

A. No, sir, I didn't know Mr. DePriest was out there until he came around behind me and told Tom to get away, told him he had told him once to get away and stay away and said "don't you come here starting a row again."

Q. Was Mr. DePriest behind you when Tom shot him?

A. No, sir, he come around sort of between me and Tom.

Q. Did you hear him tell Mr. DePriest please not to come to him?

A. No, sir.

Q. Tom didn't say a word?

A. No, sir.

Q. Did you see Tom retreating from him while he was coming on him?

A. No, sir, I did not.

Q. Did you see Tom shoot down to the ground?
page 70 } A. Yes, sir.

Q. And then DePriest continued to come on him?

A. Yes, sir.

Q. Had Mrs. Lindsay had anything to drink?

A. Not as I know of.

Q. Had Tom said one word—Had Tom Mitchell said one word to Mr. DePriest that night before or during the shooting?

A. Not that I know of.

Q. Had he made any motion toward Mr. DePriest before the shooting or at the time of the shooting?

A. No, sir, not that I know of.

Q. Did you or did you not tell Mr. DePriest to cut the man; that powder wouldn't burn? Did you use that particular phrase, "that powder wouldn't burn"?

A. No, sir.

Q. You are certain you didn't use those words?

A. Yes, sir.

Q. Where was Mrs. DePriest, the widow of the decedent, just before the shooting and at the time of the shooting and directly after the shooting?

A. She was upstairs when the shooting occurred.

Q. She didn't see it then?

A. No, sir.

Q. Did she come downstairs after the shooting?

George Lindsay.

A. Yes, sir, after the shooting occurred she came down immediately.

Q. Came down immediately?

A. Yes, sir.

page 71 } Q. What did she do after she came down?

A. Well, I just don't know what she done. I "hoped" get Mr. DePriest away from there to the hospital.

Q. Was she present when you were getting Mr. DePriest away to carry him to the hospital?

A. Yes, sir, she was in the yard hollering and crying.

Q. You are certain Mrs. DePriest wasn't there?

A. Yes, sir, she was there when we were getting him away.

Q. And she was thoroughly sober?

A. As far as I know she was.

Q. Who put Mr. DePriest in the pickup truck?

A. Me and "Hop" Elliott and Harvey Mitchell put him in there and my wife she was out there too. Several of them had hold of him beside them to help get him in.

RE-DIRECT EXAMINATION.

By Mr. Spencer:

Q. I don't know whether I asked you the question or made it clear, did Mr. Goodman get out of the car during all of this trouble?

A. No, sir.

Q. Where was he?

A. He was sitting in the car the last time I saw him.

Q. In what sort of position?

A. Laying back with his head on the back of the cushion.

Q. And all of this took place back behind the car?

A. Yes, sir, back behind the car.

page 72 } Q. Mr. Lindsay, was there anything to keep this man from retreating away from the reach of the grasp of Mr. DePriest at any time?

A. No, sir.

Q. Was there room enough for him to have departed around the left-hand side of the car with his back toward it?

A. Yes, sir.

Q. Could he have gone back around that side of the car?

A. Yes, sir.

Q. Was there anything to keep him from getting out of Mr. DePriest's way if and when Mr. DePriest reached out for him?

Mrs. Annie Lindsay.

A. No, sir, not at all.

Q. What size man was Mr. DePriest?

A. He was about your size. He might have been a little heavier.

Q. Mr. DePriest was a man about my size. I weigh 168. Do you know what he weighed?

A. I think he weighed around 150 or 160.

Q. And was about my height?

A. Yes, sir, about your height.

The witness stands aside.

MRS. ANNIE LINDSAY,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Thompson:

Q. I believe you are the wife of George Lindsay.

A. Yes, sir.

Q. And you are a daughter of Mr. R. W. DePriest, Jr.?

A. Yes, sir.

page 73 } Q. Were you at your father's home on the evening of August 16th when your father was killed?

A. Yes, sir.

Q. Will you tell the jury and the court what you recall of the occurrences leading up to the shooting and the shooting?

A. Well, I was in the cook room taking up butter when Tom came.

Q. Was that the first time?

A. The first time, and he went on into the front room and I was in the cook room for a while and then I went in there and heard them talking about a suit that John Mitchell had brought against Harvey Mitchell and I called my father to come and cut me off a piece of ice to put in the butter. The butter was soft. He came and cut the ice off and I put it in the butter. In a little while after that Tom and George were on the porch and by the time I got out there they seemed to have hold to one another fixing to pass licks and I run in between them and caught hold to my husband and I got hit. I don't know whether Tom aimed to hit me or hit at my husband and hit me, and my father came out and told Tom, "If you can't come here and behave yourself get away and stay

Mrs. Annie Lindsay.

away." Then Tom got in the car and left and the last time when he came back I was in the house and the car came on in, turned around and headed back out, and I went upstairs to get some papers to pick the chickens on and when I come back I heard them talking out in the yard but didn't know for certain whether it was Tom or who it was, and in a little

while after I got things straight Papa came on
page 74 } through the dining room and he went on out and

I went out behind him, and before I got the chickens or got to the coop I heard Papa say to him, "Didn't I tell you not to come back if you couldn't behave yourself?" Tom said, "Don't come a step further. If you do I am going to shoot you", and about that time the fire went off. I run to my father and when I got to my father Tom was going out the road, going on down the driveway.

Q. Now, do you know what caused the fuss between your husband and Tom?

A. Well, I don't know. They were arguing about this suit, something about George had Harvey's keys.

Q. You were inside of the house and do you or do you not know what Tom and George were actually arguing about?

A. No, I didn't hear it.

Q. How long was it from the time your father went out of the door until the shooting occurred?

A. Just a minute or two. He just went straight on out and it happened.

Q. Did you follow him out?

A. I went out behind him. He had got off the porch when I went out to the chicken coop.

Q. Where was the chicken coop?

A. At an old cement well about 40 feet from where they were at.

Q. This map has been introduced in evidence. Now, this is the front porch back porch, and so forth. Is this about the position of the well?

page 75 } A. Yes, sir.

Q. Is that where the chicken coop was?

A. The chicken coop was setting on that cement well.

Q. Now, about where was Tom's car?

A. Is this the road here?

Q. Yes.

A. What is this?

Q. That is the chestnut oak tree.

A. It was right along here.

Mrs. Annie Lindsay.

Q. And where was it that your father was shot?

A. When I seen the fire from the gun it seemed right at the back of the fender on this side over here.

Q. Back of the fender of the car?

A. Yes, sir.

Q. Did you go out immediately behind your father?

A. He got off the porch walking on out as I came out of the door.

Q. Now, had you gotten to the well before the shots were fired?

A. Not quite to the well.

Q. Had you had anything to drink that day?

A. Yes, sir, I took a drink about 4:00 o'clock.

Q. Had you had anything else?

A. No, nothing else that evening.

Q. No more than that one drink?

A. That was all.

Q. About what time did you get to your mother's place?

A. Around 3:00 o'clock I would say.

page 76 } Q. Who went with you up there?

A. Millard Johnson, John Goodman, Harvey Mitchell, myself, George and my daughter.

Q. About what time did Tom come the first time?

A. It was getting dusk, I would say between 7:30 and 8:00 o'clock—dusk.

Q. Where was Harvey at that time?

A. He was in the front room on a lounge.

Q. As soon as the shots were fired what became of Tom?

A. He went out the driveway in his car.

Q. In other words, he came down the driveway into the road?

A. Yes, sir, and the lights were burning and the motor was running before the shots were fired.

CROSS EXAMINATION.

By Mr. Martin:

Q. Mrs. Lindsay, do you deny that you were intoxicated at the time that this was happening?

A. Certainly I do. I was not intoxicated.

Q. Do you think that your husband was intoxicated at the time it happened?

A. He had had something to drink.

Q. Wasn't he "tight"?

Mrs. Annie Lindsay.

A. No, sir.

Q. You deny your father was intoxicated at the time of this shooting?

A. I talked to him a few minutes before it happened and if he had a drink I couldn't tell it.

Q. Was it a dark or moonlight night?

page 77 { A. I would call it dark.

Q. And you didn't see what happened between your father and Tom Mitchell just prior to the shooting. You were going to the well.

A. I was going to the well.

Q. And you didn't see it?

A. I didn't see nothing but the fire from the gun.

Q. Did you hear Tom tell your father not to come on him, not to come any farther?

A. He said, "Don't come any farther. If you do I will shoot you." and shot.

Q. One shot was all he fired, was it?

A. Two.

Q. Fired two shots?

A. Yes, sir.

Q. Then you did hear Tom telling your father not to come any further and then you heard a shot.

A. Yes, sir.

Q. But you couldn't see the direction of that shot from where you were.

A. I could see the fire.

Q. Which way did it go?

A. Went toward the ground.

Q. Then didn't you hear him say "don't come any further"?

A. He didn't say no more. Right behind that was another.

Q. How close were the two shots?

A. Just like that. (The witness snaps her fingers.)

Q. Say "pow pow" like it sounded to you.

page 78 { A. Well, pow—pow.

Q. That fast?

A. Yes, sir.

Q. You say you got hit when Tom and your husband were in a scuffle the first time Tom was at your father's house?

A. Yes, sir.

Q. Where did that take place?

A. In the yard right off the porch.

Q. Was it light or dark then?

Mrs. Annie Lindsay.

A. It was dusk. You could tell what people were doing.

Q. Who hit you?

A. Tom.

Q. Did he hit at you?

A. I don't know whether he hit at me or my husband.

Q. Isn't it a fact, Mrs. Lindsay, that your husband on that occasion cursed and abused Tom and that you grabbed hold to your husband to keep him from going toward Tom?

A. No, they already had hold to one another.

Q. That was on the occasion of Tom's first visit there?

A. Yes, sir.

Q. Then when Tom came back the second time that is when the shooting occurred?

A. Yes, sir.

Q. Didn't your husband on that second occasion make for Tom with an open knife in his hand?

A. No, sir.

Q. And didn't you catch hold to his hand, grab him and try to slow him up?

page 79 } A. No, sir, I wasn't even in the yard when Tom came back.

Q. Didn't your husband holler at your father, using some very vile names toward Tom, and telling him to cut his guts out?

A. No, I didn't hear that.

Q. You weren't out there?

A. I was out there when the fire from the gun went off and when Papa went off the porch, and Papa hadn't been out until then.

Q. Didn't you hear those remarks?

A. No, sir.

Q. Had there been any preceding or antecedent grudge or bad feeling between your father and Tom?

A. No, sir.

Q. Tom and your father were on good terms?

A. Yes, sir.

Q. Had there been any previous grudge or bad blood between your husband, George Lindsay, and Tom?

A. No, sir.

Q. Then he simply came back and shot your father down?

A. That is the way it seemed to me.

Q. Without any argument without any words, but just came back and shot him down for nothing?

A. For nothing, for my father didn't have time to argue.

Wesley Kerr.

Q. You saw Tom when he was there, didn't you?

A. The first time.

Q. You didn't see him the second time?

A. No, sir.

page 80 } RE-DIRECT EXAMINATION.

By Mr. Thompson:

Q. Mrs. Lindsay, had your husband made any such statement to your father as Mr. Martin has asked you when your father was going through the yard toward him could you have heard it if it had been made?

A. Yes, sir, I could have heard it if it had been made.

Q. And no such statement was made?

A. No, sir.

By Mr. Martin:

Q. What was the date of your father's death?

A. 18th of August, 1940.

The witness stands aside.

WESLEY KERR,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Thompson:

Q. Mr. Kerr, I believe you are now a son-in-law of Mrs. DePriest?

A. Yes, sir.

Q. You were not married to her daughter at the time Mr. DePriest was killed, I believe.

A. No, sir.

Q. Were you present at Mr. DePriest's home on the evening when Mr. DePriest was killed?

A. I was.

Q. Where were you at the time Tom Mitchell
page 81 } came to Mr. DePriest's home the first time?

A. On the front porch.

Q. Where were you sitting on the front porch?

A. At the window.

Q. This is a sketch introduced. This is the highway. This is the road coming up to the house. This is the front porch,

Wesley Kerr.

and so forth. Now, you say you were at the window. You mean here on the front porch in front of what window?

A. Ain't but one window on the front porch.

Q. What room does that window open on?

A. Front room.

Q. And you were right in front of that window?

A. Yes, sir.

Q. Who was there with you?

A. Nancy DePriest she was then. She is my wife now.

Q. When Tom came in that front room that you mention there do you know who was in there at the time?

A. Harvey.

Q. Anybody else?

A. I don't think so.

Q. What was Harvey doing?

A. Lying on the cot.

Q. And where was that cot setting?

A. At the window.

Q. What did Tom say to Harvey when he came in?

A. I didn't pay any attention to what they were talking about.

Q. Did he have any disturbance or any little fuss there?

A. I didn't pay any attention to him.

page 82 } Q. Did you see or hear any part of the trouble
between George Lindsay and Tom at this first trip
that Tom made or between Tom and Mr. DePriest?

A. Yes, sir. After they left the front room they went out on the back porch and got to arguing and it kept getting louder and louder and I thought I would go to the front room door leading out on the back porch to see what was going on, and just as I got to the door I saw Tom hit at someone but I wouldn't say who.

Q. What happened then?

A. Mr. DePriest walked up and asked him to leave if he couldn't behave himself and if he couldn't behave himself not to come back.

Q. Did he leave?

A. He left.

Q. Did you hear Mr. DePriest or George Lindsay either one curse him or abuse him in any way?

A. No, sir.

Q. All right, how long was he gone before he came back?

A. I would say a half-hour or three-quarters of an hour.

Q. What happened when he came back?

Wesley Kerr.

A. Well, I don't know nothing about what happened until Mr. DePriest went out there.

Q. All right, what happened then?

A. I heard them talking and going on and so Nancy DePriest—Harvey called Nancy and said, "If you
page 83 } don't go out yonder somebody is liable to get hurt", and I wouldn't let her go. I went myself. I went to the front room door leading out to the back porch and when I got to the door—

Q. (interposing) Where is that door? Indicate on this plat where it is.

A. I come on in the front door off of the front porch and in the hall and went out of the hall in the front room to the door leading out on the back porch out of the front room.

Q. Is that the door there on the back porch?

A. Yes, sir.

Q. When you got there what did you see?

A. I heard Mr. DePriest say: "Tom, I have asked you to go away and stay away if you can't behave yourself and I ain't going to have no fuss here", and Tom said, "If you come 'airy' step further I will shoot you", and just that minute the shot was fired.

Q. How many shots were fired?

A. Two.

Q. How close together were those shots?

A. One right after the other.

Q. Indicate to the jury by snapping your finger or any other manner to show how close the shots were together.

A. Just before you could wink your eye.

Q. Can you snap your finger?

A. Yes, sir.

Q. Show the jury how far apart these shots were.

A. The shot went down beside his leg, the first
page 84 } one, and I could see the fire, and the next one went off before you could snap your finger.

Q. Did you hear George Lindsay tell Mr. DePriest to cut Tom's guts out; that powder wouldn't burn?

A. No, sir, I did not.

Q. Did you hear any such statement as that?

A. I did not.

Q. Were you in a position where you could have heard it if it had been said?

A. After I got to the porch I suppose I could have heard it.

Wesley Kerr.

Q. Did you hear any other statement other than the statement which was made by Tom when he told Mr. DePriest if he came any further he was going to shoot him?

A. No, sir.

CROSS EXAMINATION.

By Mr. Martin:

Q. Mr. Kerr, was everybody at the house perfectly sober?

A. As far as I could tell.

Q. As far as you could tell nobody in the house had a drink?

A. Well, if they had a drink I couldn't tell it.

Q. You couldn't tell that Mrs. Lindsay had had anything to drink?

A. If she had had a drink I couldn't tell it.

Q. And you couldn't tell that George Lindsay had had anything to drink at all?

A. No, sir.

Q. Of course you had had nothing to drink, had you?

A. No, sir.

page 85 } Q. Everybody, as far as you know, were cold sober?

A. Yes, sir.

Q. Now, Mr. Kerr, that night after the shooting didn't you and your wife go to the home of Mr. Earl Mitchell, a brother of Tom Mitchell here?

A. I did not.

Q. Did your wife go there?

A. She did.

Q. But you didn't accompany her?

A. No, sir.

Q. What did you do after the shooting occurred and where did you go?

A. I took Mr. DePriest to the hospital.

Q. Who went with you?

A. "Hop" Elliott.

Q. What did Mr. DePriest say on the way about his being drunk and drinking?

A. He didn't say anything.

Q. What time did you go to the DePriest house that day?

A. I had been there probably all day.

Q. How long had Harvey Mitchell, a brother of the defendant Tom Mitchell, been there?

Wesley Kerr.

A. Well, I went home to change clothes to go to town and Harvey come while I was gone.

Q. Couldn't you tell the jury about when that was?

A. Well, I would say along about five or six o'clock.

Q. Did you see this shooting?

page 86 } A. I did.

Q. Where were you when the shooting occurred?

A. Standing in the front room door leading on the back porch.

Q. You never heard Mr. DePriest threaten to kill this man?

A. I did not.

Q. You never heard George Lindsay say to Mr. DePriest to cut his damned guts out?

A. I did not.

Q. And calling this man a son of a bitch?

A. No, sir.

Q. Did you see Mr. George Lindsay have a knife?

A. No, sir.

Q. Did you see Mr. George Lindsay at all during the period of the shooting or immediately before it?

A. No, sir, it was dark.

Q. Did you see Mr. DePriest immediately before or at the time of the shooting?

A. After he got outdoors it was dark.

Q. You couldn't see what happened, could you?

A. I could see the fire from the gun.

Q. Up to that point you couldn't see a thing, could you?

A. No, sir.

Q. And nobody else could, could they, that were off as far as you were?

A. No.

Q. You don't know whether Mr. DePriest had an open knife in his hands when he advanced toward this boy or not, do you?

page 87 } A. No, sir.

Q. Now, when Tom first came there you said you heard them arguing somewhat on the back porch but didn't pay much attention to it. Is that right?

A. Yes, sir.

Q. You didn't go out there, did you?

A. No, sir.

Q. You were there on the front porch and heard some loud talking on the back porch?

A. It kept getting louder and I went to the front room door.

Wesley Kerr.

Q. Is that where you stopped?

A. That is where I stopped.

Q. What did you do when you got there?

A. Nothing.

Q. Did you hear anything when you got there?

A. I saw Tom hit at somebody.

Q. Did you see anybody hit at Tom?

A. No, sir.

Q. What was that talk about, do you know, that occurred out there?

A. I didn't pay any attention to it.

RE-DIRECT EXAMINATION.

By Mr. Thompson:

Q. Did you go with Mr. DePriest to the hospital?

A. I went down yonder to what they call Bob Russell's filling station just this side of it and the State
page 88 } man pulled up beside me, and then I pulled on out
and he come on behind me. "Hop" tried to get me to get the State man to take Mr. DePriest in his car and carry him and I wouldn't ask him. I tried to get "Hop" to ask him so I stopped down below Coleman's Mill and the State man pulled around in front of me and stopped and got out and come back and asked me did I want to follow him and I told him I would try, or I would, or something of the kind, and I got around just this side of Bob Russell's filling station and he found out I wasn't driving fast enough and he stopped and said "I thought you were going to follow me" and I told him I was driving as fast as I could; that I was scared to drive any faster, and asked him would he carry him and he said he would and he took him out and put him in his car and carried him on.

Q. When you got to the hospital where was Mr. DePriest?

A. In the operating room.

Q. Did you see them taking Mr. DePriest's clothes off?

A. Yes, sir.

Q. Did you see any knife taken out of his pocket?

A. I took the knife out myself.

Q. Was it closed just as it is now at that time?

A. Yes, sir.

Q. Are these the clothes taken off of Mr. DePriest at the hospital?

A. Yes, sir.

Katie L. DePriest.

By Mr. Martin: None of this is rebuttal from this witness.

We asked him nothing at all about these things.
page 89 } It seems he is taking him on rebuttal and going
back into what should have been direct evidence.
If it was just an omission I will make no objection.

By Mr. Thompson: It was an omission.

Q. This is Mr. DePriest's overalls that he was wearing that particular night?

A. Yes, sir.

Q. Is that where the bullet went in?

A. Yes, sir.

Q. This is his shirt?

A. Yes, sir.

The witness stands aside.

KATIE L. DEPRIEST,

having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Spencer:

Q. Mrs. DePriest, you are the widow of Mr. Robert DePriest who was shot and killed in August?

A. Yes, sir.

Q. Were you at home on the evening in question when your husband was shot?

A. Yes, sir.

Q. How do you all make a living or how did you all make a living until your husband died?

A. We have made a living on the farm ever since we were married.

Q. Sell produce in Lynchburg?

page 90 } A. Yes, sir.

Q. What day of the week did this happen?

A. Happened on Friday night.

Q. You all were fixing to go to Lynchburg early Saturday morning for market?

A. Yes, sir, it was a very busy day.

Q. I wish you would tell the court and jury in your own way just exactly what you know about this thing and how it happened. Tell it in your own way.

A. Well, it was just about dusk and someone said a car

Katie L. DePriest.

was coming in and in the front room it was rather dark. I lit a lamp and taken it in there and by the time I got the light and went back with the lamp it was Tom Mitchell and he came on in. He spoke to us all, and Harvey, his brother, was laying over on a day bed and Tom said, "What are you doing laying there? You better get up from there." John Mitchell has brought a suit against you and if you don't do something you will lose your car and truck both." Harvey said, "Well, I done heard all about it." He said he had been to Rustburg that day and there might have been several words passed between them and it looked like that Tom got in a better humor. My husband walked in at that time and spoke to him and he then got to talking to my husband. He seemed to be in a very good humor, no madness with either one of us. They talked on there a few minutes, pleasant conversation. Then he turned to Harvey and told him to get up and go with him. Harvey said he wasn't going. Tom said, "Give me the key." Harvey said George had the keys, so Tom
page 91 } went on out on the back porch and I stood there a few minutes and talked probably to "Hop" Elliott, just conversation—just spoke of something, and everything was pleasant, and I went on in the hall and went out on the front porch to tell Nancy to go and fix the children some cocoa, and before I got back in the kitchen I heard somebody holler and say George and Tom were fighting, and I went on through the kitchen and by the time I got on the back porch I grabbed Harvey and said "Harvey, don't you get in it", and I looked up and my husband was telling Tom to get away and not bother him and to behave himself, and Tom went on to his car. "Hop" Elliott turned around and told my husband that he wouldn't have come with Tom over there if he had any idea he was coming over to raise any kind of row.

By Mr. Martin: I object to that.

By Mr. Spencer: I think you are right and I will tell the witness to leave out that.

Q. Leave out what "Hop" told you. Tell only what you yourself saw and what things were done in Tom's presence.

A. He went on.

Q. I understand you got out there in time to see the end of the fight?

A. Just the end of it.

Katie L. DePriest.

Q. Did you take any part in it?

A. I grabbed Harvey and told him not to get in it.

Q. It has been asserted here, Mrs. DePriest, page 92 } that you were drunk, in bad condition, and being very disorderly. Were you drinking to any extent at all that day?

A. The only drop I ever taken of anything I taken with Tom Mitchell. It was wine.

Q. Who brought it there?

A. Tom Mitchell brought it there.

Q. Did you take one drink?

A. I taken one drink.

Q. Any considerable quantity?

A. I would say an inch in a glass.

Q. In an ordinary glass?

A. Yes, sir, very much like the one setting there.

Q. And that is all you took?

A. That is all I took.

Q. And I understood you to say you all were actively getting ready to go to the market in Lynchburg on Saturday.

A. Yes, sir.

Q. What time did you usually get to Market on Saturday?

A. Always try to get there by 7:00 o'clock.

Q. And how far is it from your place to Lynchburg?

A. 22 miles.

Q. And you had to be there ready to go to work the next morning at 7:00 o'clock?

A. Yes, sir.

Q. What were you getting ready to sell?

A. We sell from 25 to 30 pounds of butter and run from 6 to maybe 15 dressed chickens.

page 93 } Q. Had your chickens been dressed at that time?

A. My chickens had given out and my daughter was raising chickens and usually when my chickens gave out I would use her chickens. for my customers.

Q. You said you heard your husband say something, in effect to Tom to get off of his place.

A. Yes, sir.

Q. Will you please repeat as accurately as possible what he said?

A. He said, "Tom, get away from here and if you can't behave yourself here I don't want you here." That is what he said, as near as I could catch it.

Katie L. DePriest.

Q. Did he curse Tom or abuse Tom or use any foul language to him?

A. Not any at all.

Q. How many women folks of his family were there within hearing of his voice at that time?

A. I and Nancy, and Annie.

Q. They are his wife and daughters. Were any grandchildren around?

A. Yes, sir, but they wasn't out there.

Q. I understood you to say they were on the front porch.

A. I think they were maybe in the kitchen the first time when Tom first came there. I was fixing to make them some cocoa. We had gotten in some milk.

Q. Did your husband offer any violence to this man? Did he threaten him with a gun, knife, stick or any kind of weapon when he told him to get off his place?

page 94 } A. No, sir. It seemed that Tom just left after he just told him he wasn't going to have any fuss there.

Q. Then what was the next you heard? Just go ahead and tell the story without any help from me about it.

A. I went on back in the kitchen and went about my work. I had all of the straining of my milk and my milk to churn and things to look after like any woman in the kitchen would have to do. I reckon for 15 or 20 minutes I was in the downstairs part of the house, or longer.

Q. Then what did you do?

A. My two little grandchildren were going upstairs to go to bed and one of them didn't want to go and she was going to stay on the front porch. Maybe she had gone on the front porch, and I taken the other one and went upstairs and I laid down with her.

Q. Then what did you hear or see of the remaining trouble?

A. Well, after I had been laying up there a while my husband came up and asked me if Delina was up there and I told him that Nancy had her down on the front porch. He stood there and talked to me a few minutes and he went on down and I don't reckon it was more than 15 or 20 minutes before I heard the shot.

Q. The next you knew of any trouble was you heard some shots?

A. Yes, sir.

Q. Did you come down there then?

A. Yes, sir, I got down as quick as I could but before I

Katie L. DePriest.

got down the steps I heard them screaming and
page 95 } hollering, and I heard Annie's voice say "Papa
was shot". It sounded like she was outdoors but
before I got outdoors she met us coming out.

Q. You don't then actually know of the immediate circumstances surrounding the shooting?

A. No, sir.

Q. You say it was 15 or 20 minutes from the time you saw Mr. DePriest until the time you heard the shot first fired?

A. Yes, sir.

Q. Was he in a drunk or quarrelsome mood or disturbing anybody when you first saw him?

A. Not at all and if he even had a drop that day I didn't know anything about it.

Q. If he had had a drop you didn't know anything about it?

A. No, sir. I know that he refused to take a drink from Tom.

Q. From this accused here?

A. Yes, sir.

Q. How long was that before this trouble? Was that the first or second trip?

A. On the first trip.

Q. Was that the same time you took one?

A. That is the same time I taken one.

Q. Did he give any reason for turning it down?

A. Yes, sir, he said, "Tom, I have a boil here. It is the worst one I have had at all and I have decided not to drink anything more until I get rid of it."

Q. And that was his expressed reason for not taking the drink?

page 96 } A. Yes, sir.

Q. Had he been suffering from boils?

A. Yes, sir, he had had them for 18 months. The doctor had to give him shots for them.

Q. Why were Annie and George Lindsay over there, your daughter and son-in-law?

A. She was supposed to come on Friday and bring this coop of chickens to dress.

Q. That was part of the arrangement to get ready for the next day?

A. That was the arrangement made on Tuesday. She was there Tuesday and spent the day and it was understood she

Katie L. DePriest.

was to bring a coop of chickens on Friday and dress them for me to take over to the market to supply my customers.

Q. That was the reason for her being over there?

A. Yes, sir.

Q. I am getting at this. It has been indicated here that what was going on there was a drunken brawl. I want to ask you was any drunken brawl going on?

A. I didn't see any drunken brawl. I don't know what you would call it. Every drop of anything I saw to drink that day was what Tom brought in there.

Q. Your household was busily engaged in getting ready to go to market?

A. Yes, sir, Friday is my busiest day in the week.

page 97 } CROSS EXAMINATION.

By Mr. Overbey:

Q. Did you do any milking that afternoon?

A. I didn't do all of it. I did part of it.

Q. About what time was it?

A. Well, it was obliged to have been a little after six.

Q. Well now, Mrs. DePriest, do you mean to say that your son-in-law, George Lindsay, was not drinking in the least?

A. If he was drinking anything at all it wasn't so that I would notice it.

Q. Was his wife drinking at all?

A. Well, if she was I would have noticed it. She had churned around 11 pounds of butter.

Q. Did you see or hear Tom Mitchell say a word to Mr. DePriest that he ought not to say?

A. No.

Q. Did you see Tom making any motion toward Mr. DePriest to show he was mad with him?

A. It just happened so quick by the time I got out there it was over.

Q. Did you come out of there after you heard the shooting?

A. Sure, I rushed out.

Q. Were you there when they picked Mr. DePriest up and put him in the automobile?

A. No, by the time I got there they almost had him in Harvey's car.

Q. Then you didn't see him.

Katie L. DePriest.

A. Yes, sir, I saw him. They had got him up page 98 } almost in Harvey's car. I couldn't hardly tell you the position without showing you but it seemed he got on the edge of the seat in that position and his feet were still out of the edge of the door and he was almost drawn in that position and two or three had hold of him.

Q. As I understand you were in the house and were not in a position to see whether George Lindsay or Mr. DePriest went toward the defendant here or not prior to the shooting.

A. No, I was upstairs.

Q. You were upstairs and didn't see anything.

A. I didn't see any of the last at all.

Q. Do you know of any reason why the defendant here should shoot your husband?

A. No, sir, I don't.

Q. Isn't the defendant here your own nephew?

A. Yes, sir, my own nephew.

Q. Has the relationship between them been good in every respect theretofore?

A. Always been on friendly terms.

Q. Could you think of any possible motive the defendant had to do anything against your husband?

A. No. If I had dreamed of such a thing I would have been out on the job when the car came up.

Q. Where did you go after they left with Mr. DePriest?

A. The first place I went to was Mr. Tucker's. Harvey went to fixing his lights, some small thing about the size of a lead pencil, and was working on it in the dining page 99 } room by the lamp and it looked to me that minutes were hours so I ran to Mr. Tucker's and so I saw they had lights in the house and so I wouldn't have to go inside, and Miss Willie, I call her, came out of the door and I told her I wanted to get Mr. Tucker to take me over to town and she said "What for?" I said, "Tom Mitchell has shot Rob and I want him to take me over there." She said, "He can't see to drive in the day, *must* less at night, and he is not feeling well." She said, "Maybe he is not hurt so bad", and I said, "Oh yes he is", and I turned around and rushed back to the house. When I got back to the house they had got the lights fixed and they thought I was going to get a way, so they had left. So when I went back in the house wasn't anyone there at all and the lamp was burning. So I thought that Annie and George and Nancy and Harvey

Katie L. DePriest.

had all left and brought the children to town, so Mattie, another daughter that lives about three-quarters of a mile, I thought I would then run down to my other daughter's and tell her about her father being shot, and before I got down there I met Annie and George and Mattie and John and three children, all coming, and instead of them coming to town Harvey only brought Nancy, my baby and they went to let Mattie know. So then we all got together and came back home and when we got there I wouldn't even go in the house to dress or anything. I lit out and run and walked together, run down hills and walk up hills until I got to my sister's house. When I got there I didn't go in. I saw a light and some of them were on the front porch. I knew page 100 } my sister's voice and I asked where was Leonard, her husband, and I think she said he was on the porch, but anyway, I told her I wanted him to take us to town and she said, "We haven't got any lights on the truck." After she said that I did not lose a minute but kept on further to my brother's barn, a little this side of the house, and he was curing tobacco, had a bright light, and I could see him and called to him and asked him would he take me. I said, "Ed, won't you take me to town" and he said "For what?" I said "Tom Mitchell has shot Rob and I want to get a way to town as quick as I can." He said, "Katie, I am afraid to carry you." I said, "What are you afraid of?" He said, "I am afraid of Tom." I said, "All right, I can't lose any more time. If you can't carry me I will go on further." I went on then until I got to a place—

By Mr. Overbey: (interposing) Your Honor please, I object to all of this.

By the Court: Mrs. DePriest, don't tell what people told you. They will have to tell that themselves. That is hearsay.

By Mr. Overbey:

Q. Mrs. DePriest, you said you hadn't had anything to drink that day?

A. Nothing that day at all.

Q. And this was on Friday?

A. Friday night.

Q. This was on Friday night and you were going to town when? page 101 }

A. Saturday morning.

Q. Now, what time did Harvey come there?

Katie L. DePriest.

A. Just about dusk.

Q. About dusk Friday night?

A. Friday night.

Q. Did you see any wine or whiskey or any kind of alcoholic beverage?

A. Tom had a bottle.

Q. How much was in the bottle?

A. Well, he didn't take it out of the sack at first. He poured out a drink for me before he took it out of the sack.

Q. That was Harvey?

A. That was Tom.

Q. I am speaking about Harvey. When Harvey came what time was it?

A. Sometime the middle of the evening.

Q. Now, did Harvey bring any whiskey with him, or any beer or wine?

A. If he brought any I didn't see it.

Q. You didn't see it taken out of the car?

A. I didn't see it. I was cutting okra.

Q. Why didn't you get in the car with your husband as soon as you saw them lifting him in there and go with them on to the hospital?

A. I was barefooted.

Q. Did you ever put on your shoes after that?

A. Yes, sir.

page 102 { Q. You didn't walk up and down the road barefooted?

A. No, sir.

By Mr. Thompson:

Q. Was your being barefooted in any way related to the amount of wine or intoxicants you had taken?

A. No, sir. When we gather up vegetables in wet times like that we gather them up barefooted.

By Mr. Overbey:

Q. Did you go to Winfall with George Lindsay that afternoon?

A. No, sir. I never left the place for anything.

By Mr. Thompson:

Q. Your home is in Campbell County?

A. Yes, sir.

The witness stands aside.

By Mr. Thompson: The Commonwealth rests.

page 103 } EVIDENCE FOR THE DEFENSE.

DR. G. S. BOWERS,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Overbey:

Q. Dr. Bowers, are you a practising physician in Campbell County, Virginia?

A. I am.

Q. State whether or not you attended R. W. DePriest, Jr., on the night that he was shot.

A. I did.

Q. Where did you first see him?

A. I first saw him at my home.

Q. Then did you take him to your office?

A. I told Mr. Kerr who had him in a truck to bring him on down to my office but we didn't take him out of the car there. I saw him down there in the car and told them to bring him right straight on to the hospital.

Q. They went first to your house with him but did not get out of the car?

A. No, sir.

Q. Then he came to your office directly from your home to the hospital. Did he stop at your office?

A. Stopped the car but he didn't get out of the car there.

Q. Now, did you go with Mr. DePriest to the hospital?

A. I didn't go with him. I went in my car ahead of him.

Q. Who took him to the hospital?

A. Well, he started off in Mr. Kerr's truck but
page 104 } one of the State officers brought him to the hos-
pital.

Q. Did you hear Mr. DePriest that night say that he had been drinking?

A. In the operating room he made the remark he had been drinking some wine.

Q. Did you notice his throwing up?

A. Yes, sir.

CROSS EXAMINATION.

By Mr. Thompson:

Q. Doctor, do you attribute his throwing up to the wine he had drunk or to the fact that he had been shot through

Dr. G. S. Bowers.

the intestines and had a number of perforations in his intestines?

A. I think the most likely cause was the injury to his intestines.

Q. He simply told you he had drank some wine?

A. Yes, sir.

Q. And that is all he told you?

A. Yes, sir.

Q. He didn't appear to be a man that was drunk, did he?

A. Well, it was hard to tell. He was a mighty sick man. He looked bad.

Q. He was a man so bad off you wanted to take him to the hospital promptly and it was from that injury that he later on died, wasn't it?

A. Yes, sir.

Q. A man who has been shot in the abdomen and there are 12 perforations in his intestines wouldn't he be
page 105 } suffering terribly from shock at the time?

A. He might be but I didn't think Mr. De-Priest was. He seemed to be suffering from pain but he wasn't in shock, not in surgical shock.

Q. He suffered terrific pain though?

A. Yes, sir.

RE-DIRECT EXAMINATION.

By Mr. Overbey:

Q. What was the color of that vomit?

A. It was bluish purple.

Q. It wasn't yellow?

A. No.

Q. Do you know what the color of wine, so to speak, vomit is that has been in the stomach awhile and assimilated with food?

A. I don't imagine it would be much different from fresh wine.

RE-CROSS EXAMINATION.

By Mr. Thompson:

Q. I understand there wouldn't be much difference in fresh wine and ordinary vomit from the stomach?

A. I say there wouldn't be much difference between wine

Fulton ("Hop") Elliott.

that had been in the stomach and wine that hadn't been in the stomach in the appearance. I don't know.

Q. In other words you are telling the jury you simply don't know?

A. Yes, sir.

The witness stands aside.

page 106 } FULTON ("HOP") ELLIOTT,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Martin:

Q. Mr. Elliott, did you go over to the home of Mr. DePriest on the night he was shot there?

A. Yes, sir.

Q. Who did you go with?

A. I went with Tom Mitchell.

Q. Where did you get up with Tom Mitchell prior to going over to the DePriest home?

A. I was up at Mr. Martin's filling station and he came up by there and asked me what I was doing and I told him "nothing" and he said he was going up to Rustburg, or somewhere; that he couldn't find Harvey, his brother; that he had been off on a drunk, and said, "suppose you come and go with me and drive his car back home. I want to bring him home."

Q. He told you to go with him up toward Rustburg to see if he could find Harvey, his brother, who had been off drinking for a couple of days?

A. Yes, sir.

Q. What did you do?

A. I got in the car with him and we came over and went over to George Lindsay's home expecting to find him over there and they said he had gone over to Mr. DePriest's, so we went over to Mr. DePriest's and we found Harvey over there and we found he had been over there all the evening asleep.

By Mr. Spencer: I would like to ask that this
page 107 } witness confine himself to matters known to him.

He is telling the court and jury he found that the man had been over there all the evening asleep.

By the Court: Confine your testimony to facts that you know.

Fulton ("Hop") Elliott.

By Mr. Martin:

Q. When you got over there did you find his brother, Harvey, there?

A. Yes, sir.

Q. Where was his brother Harvey?

A. In the room asleep on a cot in the front room.

Q. All right now, in your own way pick up there and tell what happened right straight on through in your own way.

A. Well, Tom went in there and woke Harvey up and told him he wanted to see him and Harvey talked to him awhile. They went outside and talked and so Harvey came back in the house and got his hat and said he was going home and he came out to go and Tom asked me to drive Harvey's car for him. I said I didn't have any keys. I asked Harvey for the keys and Harvey said "I haven't got them either, somebody has got them." Then he said George Lindsay had the keys and he wouldn't give them to Harvey and he wouldn't give them to nobody. George Lindsay said he wasn't ready to go home.

Q. You say George Lindsay refused to give the keys to Harvey, the owner of the car?

A. Yes, sir.

Q. All right, go ahead.

A. George Lindsay said Harvey brought him
page 108 { over there and he wasn't ready to go home yet;
that Harvey would have to wait and take him
home because he brought him over there. Harvey said he didn't want to leave his car in there and Tom told him to come on and go and Tom went to take the distributor off of Harvey's car so Harvey could go with us, and then Annie or some of them came up and got in a fuss.

Q. Who is Annie?

A. Annie DePriest. George Lindsay's wife. She came up and said he couldn't take the distributor off that car; that they were going home after awhile.

Q. Was she talking about Harvey's car?

A. Yes, sir.

Q. Then what happened?

A. Tom told them if they wanted to come on and go home right now that he would take them in his car if they wanted to go home, and George said, no, he didn't come over in his car and wasn't going back in his car; that he was going back in Harvey's car. So they had a little argument about

Fulton ("Hop") Elliott.

that then. So Harvey and Tom kind of got behind Harvey's car and Tom got in his car and left then.

Q. Do you know why he left? Did he say?

A. No, I didn't know. Tom got right in the car in behind Harvey's car and I was beside the house in front of Harvey's car and Tom then got in his car and started out and left and Harvey said "Tom has gone after my other bunch of keys. You wait a minute. You can go with me back home." So that was the last. Then Harvey went page 109 } back in the house and laid down on the cot and started to go back to sleep, and I was sitting there talking to him. In a little while a car pulled in and George Lindsay said it was the "law" coming in there.

Q. George Lindsay when he heard the car coming in there said it was the "law" coming?

A. Yes, sir. So Harvey was in the front room laying on that lounge in there and I was in there talking to him. George Lindsay and Robert DePriest and Annie was out on the back porch, and Harvey and I was in the front room, and George Lindsay said the "law" was coming and I went out the front door of the house, out on the front porch. When I got out on the front porch where Wesley Kerr and the Lindsay girl were sitting on the front porch—

Q. (interposing). May I ask you if Wesley Kerr stayed on the front porch or left.

A. He was on the front porch from the time, all the time I was out there, and I never did go out to the back until after George Lindsay hollered and said come help get Rob up, that Tom had shot him.

Q. You were on the front porch when the shooting occurred?

A. Yes, sir.

Q. And Mr. Kerr was on the front porch when the shooting occurred too?

A. Yes, sir.

Q. Did you hear the shooting?

A. Yes, sir.

page 110 } Q. Now, prior to the shooting did you hear anybody say anything to Tom?

A. The first I heard was the fussing out there.

Q. What were they saying?

A. George Lindsay was the first one. I heard him tell Rob, "Cut him open Rob. Cut him open."

Fulton ("Hop") Elliott.

Q. You heard George Lindsay hollering to Robert DePriest to cut him open?

A. Yes, sir.

Q. Did he use any bad language?

A. Yes, sir.

Q. What did he say?

A. George Lindsay told Robert DePriest to cut his guts out; drop them out on the ground. I could hear that. Then the next thing I heard was Tom Mitchell hollering "Uncle Rob, don't come up on me any closer or I will shoot you." He said, "I don't want to shoot you."

Q. Did he say that one time or more than one time?

A. He said that more than one time.

Q. What did he say?

A. He said, "Uncle Rob, don't come on me no closer. I don't want to shoot you."

Q. And he said it more than once?

A. Yes, sir.

Q. Then did you hear shots fired?

A. Yes, sir.

Q. How many did you hear?

page 111 } A. Two.

Q. All right, now I want to ask you whether either on the first or second trip that Tom made to that house he said anything out of the way at all to Mr. DePriest?

A. He did not.

Q. Did he say anything out of the way to George Lindsay?

A. No more than he told George, "I am going to get them car keys if I have to get the law to come here and get them."

Q. He told Lindsay he was going to get the car keys even if he had to get the "law" to come there and do it?

A. Yes, sir.

Q. That was said when Tom first left?

A. Yes, sir.

Q. Now, was Mr. DePriest present at the time that Tom was talking to George Lindsay on that first trip about the car keys?

A. He was.

Q. Did he take any part in it?

A. I don't know.

Q. You were there.

A. I was there but I just don't know.

Fulton ("Hop") Elliott.

Q. Did he order him off the place and say anything about "if you can't behave don't come back"?

A. Not as I know of.

Q. And you were there during all of that discussion and saw Tom leaving?

A. Yes, sir.

page 112 } Q. Now, did you tell anybody in that house or around about that house that if you had known Tom was going to do like he was you wouldn't have come there with him? Did you tell anybody that?

A. Not as I know of.

Q. You know whether you told it or not.

A. I didn't tell it.

Q. Now, was Robert DePriest, Jr., sober or drunk?

A. He was drinking.

Q. Was he drinking to the degree to be noticeable that he was under the influence of something?

A. He was.

Q. Well, how about Mr. George Lindsay?

A. He was drinking too.

Q. Was he intoxicated?

A. He was intoxicated.

Q. How about Mrs. DePriest? Could you tell whether she had anything to drink or not?

A. She was drinking too.

Q. Now, how about Mrs. George Lindsay?

A. She was drinking too.

Q. Were they all pretty high?

A. They were all drunk.

Q. Are you any kin to any of those people that were in that house?

A. None at all.

Q. And all of them down there you say were drunk?

A. Yes, sir.

page 113 } Q. How about Tom Mitchell who was over there after his brother who had been on a spree for several days? What was Tom's condition?

A. Just like it always has been ever since I have been knowing him.

Q. Was he under the influence of liquor or not?

A. He was not that I noticed.

Q. You rode with him.

A. Yes, sir.

Fulton ("Hop") Elliott.

Q. Where was the first place you went looking for his brother?

A. Down to George Lindsay's home down below Mt. Zion.

Q. And then you found out there that his brother was over at the DePriest home?

A. Yes, sir.

Q. And so he then drove over to DePriest's?

A. Yes, sir.

Q. Was there any argument of any sort over a title to any car?

A. Not to my knowing.

Q. Were you there?

A. I was there and didn't hear it.

Q. It was just about the key to take Harvey's car home?

A. That was all. Tom was going to get Harvey and bring him home.

Q. Up until the time of the shooting had this boy Tom done anything out of the way either to Robert DePriest or to George Lindsay?

page 114 } A. He had not.

Q. Do you know whether DePriest before he was shot said anything to this boy? Could you hear his voice out there?

A. No, I couldn't hear his to know it but I could recognize George Lindsay's because I knew his voice and knew Tom's. If Mr. DePriest said anything I didn't recognize his voice.

Q. Which direction was the first shot fired in?

A. I do not know.

Q. You didn't see it?

A. No, sir.

CROSS EXAMINATION.

By Mr. Spencer:

Q. Mr. Elliott, you are a citizen of Campbell County, are you not?

A. Yes, sir.

Q. How old are you?

A. 32 years old.

Q. Educated in the public schools, I presume?

A. Yes, sir.

Q. Did you know who was the Commonwealth's Attorney of Campbell County on Monday of this week?

A. Know who?

Fulton ("Hop") Elliott.

Q. Do you know this man here?

A. I know Mr. Thompson.

Q. Do you know what office he holds in Campbell County?

A. Commonwealth Attorney.

Q. Did you know that last Monday afternoon about 5:00 o'clock?

page 115 } A. Yes, sir.

Q. I want to ask you then did you or did you not say to your Commonwealth Attorney in reply to a question asked you when you finally, after keeping him standing there about thirty minutes driving a tractor up and down, and he standing on first one foot and another, if you didn't say in reply to a simple question, say "I don't know nothing about it, and if I did I wouldn't tell you." Did you say that in answer to his question?

A. I didn't have to tell him nothing.

Q. I didn't ask you that. I asked you did you or did you not tell him that?

A. I just told him I didn't have nothing to tell him.

Q. My question is very simple and plain and to the point. Did you or did you not tell Mr. Thompson and me about--

A. (interposing) Mr. Thompson came and asked me if I wanted to talk to him a few minutes and I said "I know exactly what you all fellows want and I don't have anything to tell you all fellows." Those are the words I told him.

Q. I ask you again a very simple, straightforward, to the point question: Did you or did you not tell Mr. Thompson, in effect, these words, "I know what you want. I wasn't there. I don't know anything about it, and if I did I wouldn't tell you."? Did you tell him that?

A. I don't know that I told him in them words or not.

Q. Did you tell him in effect that?

A. I told him I knew exactly what you all fellows wanted and what you fellows wanted to find out from
page 116 } me, and I said "I haven't got anything to tell you."

Q. Do you deny that you said to Mr. Thompson "I don't know anything about it and if I did I wouldn't tell you"?

A. I just don't know the words I told him. I have told you the words I thought I told him in.

Q. You say you have no prejudice in this case?

A. Say what?

Q. Do you have any feeling in the matter in favor of or against this man, or in favor of or against the dead man?

Fulton ("Hop") Elliott.

A. I don't have any favor from either side. I am just telling what I know.

Q. You don't have any grudge against either one?

A. I am just telling what I know. I was—

Q. (interposing) You don't—

By Mr. Overbey: (interposing) Your Honor please, will the witness be allowed to answer the question? He didn't finish.

By the Court: I was under the impression he was given an opportunity to finish his answer. He will be given an opportunity to answer the question.

By Mr. Spencer: I beg the witness' pardon.

By the Court: This is not any back alley dog fight and you ask civil questions and the witness must give civil answers. But I wasn't impressed that you were unduly harassing the witness. Go ahead.

page 117 } By Mr. Spencer:

Q. Do you know the meaning of the terms "prejudice" and "bias", Mr. Elliott? I will ask it this way: Did you have any grudge or hard feelings toward the dead man or his family?

A. I didn't have any hard feelings toward them at all.

Q. Did you have any particular feeling or prejudice in favor of or bias in favor of this man who is standing here accused of his murder?

A. No, sir.

Q. Now then, would you please tell this court and jury why you would tell your Commonwealth Attorney that you did not know anything about it and if you did you wouldn't tell it, if you weren't prejudiced?

A. Suppose I had told everybody what I knew about it, everybody that asked me about it? When they would ask me about it I would tell them "I don't know nothing." Wasn't any use of me telling everybody what I knew about it.

Q. Is everybody charged with law enforcement and bringing to trial of those accused of offenses in Campbell County or just Mr. Thompson and his sheriff and officers?

A. I don't know.

Q. Have you any explanation to make to this court and jury of why you would tell your Commonwealth Attorney two days before this trial that you didn't know anything about the case and if you knew you wouldn't tell him?

Fulton ("Hop") Elliott.

A. I told him I didn't know nothing to tell him.

Q. Have you got anything against him?

A. No, I haven't got anything against him.

page 118 } Q. You don't have anything against him?

A. No, sir, but what was the use of me coming up and making a statement before Mr. Overbey and then making a statement before Mr. Thompson, making two statements?

Q. Were you going to make different ones? Was there any harm in your Commonwealth Attorney knowing what the real true facts in the case were?

A. I done told you all I know.

Q. In other words, that is all the explanation you care to give this jury. Now what time was it when this gentleman picked you up over at the filling station?

A. I would say around about six o'clock.

Q. And where did you go from there?

A. Went over to Mr. Lindsay's home.

Q. Who was in the car with you?

A. Tom and his two twins, his baby boys.

Q. Two little boys?

A. Yes, sir.

Q. And you made the fourth party?

A. Yes, sir.

Q. And you went from there to Lindsay's?

A. Yes, sir.

Q. Where did you go from there?

A. To Mr. DePriest's.

Q. Did you have both of the little boys with you when you arrived at Mr. DePriest's or just one?

A. The twins were in the car.

page 119 } Q. Were both of the twins in the car when you got there?

A. They were.

Q. Did they come in the house or stay in the car?

A. I just don't know whether they got out of the car or not. I think one of them did.

Q. Did the other stay in the car?

A. I just don't know. I think the other one was asleep in the car.

Q. Did you go in through the front porch or back porch?

A. Went into the side porch.

Q. Did you go up and turn your car around before you stopped or did you stop the car in the back part of the house?

Fulton ("Hop") Elliott.

A. Drove the car up behind Harvey's car.

Q. Didn't turn it around and head it out and leave the motor running?

A. No, sir.

Q. And I suppose you went straight into the front room and found Harvey there asleep as you have described.

A. We found Harvey in there asleep.

Q. Who was in the room when you and Mr. Tom Mitchell went into the front room?

A. Tom went in there and when I got in there Tom was trying to wake Harvey up and Mr. and Mrs. DePriest both were in there.

Q. Mr. DePriest, the dead man, and his wife were in there?

A. Yes, sir.

Q. Anybody else?

A. Mrs. DePriest kept on telling Tom not to
page 120 { wake Harvey up; he was sick, and let him sleep.

Q. Was anybody else there?

A. Not as I know of.

Q. Did Tom bring anything to drink with him?

A. If he did I didn't know it.

Q. Did he offer anybody a drink?

A. I don't know. He didn't offer me any.

Q. Did he offer anybody any in your presence?

A. I don't know nothing about the drinking part at all. I didn't stay in there long enough.

Q. If it happened was there anything the matter with you to keep you from seeing it right in that little room right in front of you?

A. Didn't offer me any.

Q. Were you drinking?

A. I was not.

Q. That room wouldn't be as big, all told, as from this table to the wall—in other words, including the space where the jury is sitting. Isn't that about right?

A. I don't understand what you said.

Q. I asked you if that whole room wasn't the size and shape of about the space between this desk and the wall and the window and where you are sitting.

A. I don't know how big the room is.

Q. How many times have you been in there?

A. That was the first time.

Fulton ("Hop") Elliott.

Q. Mrs. DePriest said this man did pull out a page 121 } bottle or rather pulled out a bag containing a bottle of wine and offered her a drink.

A. I wasn't in there at that time.

Q. Where were you?

A. I was out at the car, I reckon. It was a right good little while before I went in there. I came out and sat in the car waiting for Tom, thinking he was coming any minute.

Q. Why wouldn't you know whether or not one of those boys was still in the car? You said you did not know.

A. I just don't remember now about the boys.

Q. Did Tom Mitchell give any explanation of why he wanted to take charge of the car and truck or get the certificate of title of the car and truck?

A. Wasn't anything said about that. He went over to get Harvey and to get him away from that bunch over there.

Q. What bunch?

A. That bunch that was over there riding up and down the road that afternoon with Harvey's car while Harvey was asleep.

Q. Who was doing that?

A. The rest of the bunch that was over there had Harvey's car driving it up and down the road while Harvey was asleep.

Q. Did you see them?

A. Yes, sir.

Q. Who was driving it?

A. George Lindsay.

Q. Who else?

A. Mrs. DePriest was in there.

page 122 } Q. She was riding up and down the road in Harvey's car?

A. Yes, sir.

Q. And you saw them?

A. Yes, sir.

Q. Who else besides George Lindsay and Mrs. DePriest?

A. I couldn't tell who was in the back seat. I could tell George was driving it and Mrs. DePriest was sitting in the seat.

Q. Was somebody in the back seat?

A. I recognized the car as it went by.

Q. Did you tell Tom about that?

A. No, I didn't tell him that. He told me that.

Fulton ("Hop") Elliott.

Q. He told you that too?

A. I told him I saw it too. I saw them too.

Q. You did tell him that you had seen this bunch, as you call it, or gang?

A. Tom came up and said he saw them going up the road and said he wanted to go and get them, and I said, "yes, I saw them go by the store awhile ago."

Q. So he got you to go along?

A. He asked me to go along and drive Harvey's car home.

Q. He asked you to go along. That is right, isn't it, to drive the car home?

A. Yes, sir.

Q. Now, when he got there and found that there was all this bunch, and you say all of them were drunk, didn't you?

A. Yes, sir, they were all drunk.

Q. Mrs. DePriest was drunk. Mrs. George
page 123 { Lindsay was drunk. Was Nancy drunk?

A. No, sir.

Q. Was Wesley Kerr drunk?

A. No, sir.

Q. Mr. DePriest was drunk?

A. Yes sir.

Q. The only ones that weren't drunk were Nancy and the boy whom she afterwards married, young Kerr, They weren't drunk.

A. They were the only sober ones.

Q. And there was a fight out there, wasn't there?

A. I guess it was a fight. I just don't know what it was. I didn't see it.

Q. You heard some of it, didn't you?

A. I heard it.

Q. And you seem to draw quite a picture from what you heard the next time—

By Mr. Martin: (interposing) May it please the court, I don't believe that is proper—"you seem to draw quite a picture". I understand we must ask the witness—

By the Court: (interposing) Sit down! I sustain the objection. He shouldn't ask argumentative questions. Ask questions and do not argue with the witness, Mr. Spencer.

By Mr. Spencer:

Q. Where were you when the first argument took place?

A. I was out there beside Harvey's car.

Fulton ("Hop") Elliott.

Q. And that was parked right behind the house, wasn't it?

page 124 } A. It was.

Q. How far were you from it?

A. I was around on the opposite side of the car.

Q. A car length between you?

A. Yes, sir, I was on the opposite side of the car.

Q. And about a car length away?

A. No, I wasn't a car length away, just on the other side of the car. I went around on the other side and Tom said "You drive Harvey's car" and I went around to drive it, expecting the keys to be in it, and they weren't.

Q. Then you must have been as close to them as from me to you, weren't you?

A. I reckon so.

Q. Where were you when the second thing occurred, the shooting?

A. I was on the front porch of the house.

Q. All the time?

A. Yes sir.

Q. Then you were in a better position to hear and describe what occurred the first time than you were the second time, weren't you? That is to say, between the first encounter and the fatal encounter, on one occasion you were as far as from me to you and the other occasion you were out on the front porch, is that right?

A. Yes sir.

Q. Now, will you describe to the court and jury what took place on the first occasion?

page 125 } A. I done told all I know just the way it was.
I have not got nothing more to tell. I have told
all I can tell.

Q. Would you mind helping me out to understand it, just as a special favor?

A. It is down there in what that man's writing. I told it as plain as day, all I know.

Q. Now, would you mind telling me again, or telling the jury again, even if it is a little tedious? Tell them again what happened between George and this man and Mr. De-Priest the first time.

A. All I know is George wouldn't give Tom the car keys and Tom said he was going to get that car away from there if he had to go to Rustburg to get the "law" to get it away from there.

Fulton ("Hop") Elliott.

Q. Didn't they have a fight?

A. I didn't see it and if they did Mr. DePriest wasn't in it.

Q. Did Mr. DePriest tell Tom to get off of his place?

A. If he did I did not hear it.

Q. Were any threats of violence of cutting his guts out, or anything else, made out there at that time?

A. Was not.

Q. Did either Mr. DePriest or his son-in-law, George Lindsay, threaten to cut him?

A. Not as I know of.

Q. Did you hear anything said about cutting or shooting or knocking him in the head with a rock?

A. I did not.

Q. Yet you were standing on the other side of the car?

A. Tom and George were discussing about the page 126 { car keys was all the discussion I heard about.

Q. Did you hear George Lindsay's wife scream out that he had struck her in the face?

A. I did not.

Q. Didn't the women folks come running when they heard there was a squabble out there—I mean by that, Mr. DePriest's two daughters and his wife, didn't they come rushing out when they understood there was a scrap out there?

A. I didn't see them.

Q. Did you see Mrs. DePriest get hold to Harvey who had just walked out and started off the porch and say to him, "Don't you get in that"?

A. I did not.

Q. You didn't hear any of that. How far would you say you were from the back of that house at the time?

A. I just don't know.

Q. It has been testified here, Mr. Elliott, that this is about the way that layout is. This is the highway down here and down this way would be Rustburg; and you turn in and drive up a road and there is a chestnut oak tree there struck by lightning, and that drive opens into a back lot, barn yard. There are some outhouses all around and that right along here is a well, a closed over well. Now, I take it from your description that these cars must have been pulled in here back of the house, between the well and the house.

A. I suppose they were. I don't know where the well was.

Fulton ("Hop") Elliott.

page 127 } Q. You didn't see a place there about 10 or 12 feet square covered over with concrete?

A. I did not.

Q. Well, about where were the cars with reference to the back of the house and the porch?

A. They was back there. I just don't know exactly. I just know they were in the back lot back of the back porch.

Q. Over next to the wood pile or over on the other side of the house, or back up close to the porch?

A. Fairly close to the house. I just don't know how close.

Q. I don't mean exactly in feet, but as far as from here to the bench or from here to the window, or to those offices?

A. I don't know except they were there.

Q. Did you come to Lynchburg with the wounded man?

A. I came as far as Rustburg and after we got around here a little ways the State police took him and carried him the rest of the way to the hospital.

Q. Did you go on to the hospital?

A. I went on up there and I didn't go into the hospital.

Q. Did you see the girl, Nancy, who is now Mrs. Kerr, up there?

A. She came with Harvey Mitchell up there in his car around to the back. I saw them when they drove up and I carried Harvey Mitchell back home.

Q. Did you say anything to her about the shooting of her father when you saw her at the hospital?

page 128 } A. If I did I don't remember it.

Q. Would you deny that you told her that you knew nothing about it; that you were out somewhere behind a tree and that you didn't see any of it at all?

A. I did not.

Q. If she said that you would deny it. You deny that you did say it?

A. I just don't know anything about that. I just done told all I know.

Q. Done told all you know?

A. Yes sir.

Q. And you can still think of no good reason why you shouldn't have told your Commonwealth Attorney what you knew about this case when asked?

A. I told you what was the use of me telling Mr. Overbey something and then turning around and telling Mr. Thompson something.

Fulton ("Hop") Elliott.

RE-DIRECT EXAMINATION.

By Mr. Martin:

Q. Now, Mr. Elliott, is what you have told the jury here under your oath today the truth about this thing so far as you know and are able to tell it?

A. It certainly is.

Q. Mr. Spencer asked you something about coming in the car that was bringing Mr. DePriest toward the hospital, did Mr. DePriest on that occasion say anything to you about whether or not he was drinking?

A. He told me coming on that night, cussing page 129 } and all, and I said "Rob, you oughtn't to talk like that." He said, "I don't care. I have been drunk for a God damned week."

RE-CROSS EXAMINATION.

By Mr. Spencer:

Q. Why did he tell you that? You said you saw yourself he was drunk. He just volunteered that information?

A. I said, "Mr. DePriest, you ought not to be cussing like that" and he said, "I don't give a God damn. I have been drunk a damned week."

Q. You still told your Commonwealth Attorney you did not know anything about the case.

A. I didn't have to tell him anything about the case.

Q. That is quite true. Who was in the car at the time he said that?

A. That Kerr boy.

Q. Anybody else?

A. That is all.

By the Court:

Q. Did you go to the DePriest home in the car with Tom Mitchell the first time that he went there?

A. I went with Tom Mitchell to the DePriest home.

Q. Then I understand you were there a while and there was a first row and Tom went away. Is that right?

A. Yes sir.

Q. Did you go away with him?

A. I did not.

Q. Where were you while he was away?

Fulton ("Hop") Elliott.

A. I was around in front of Harvey's car. I page 130 } didn't think Tom was going to leave. He pulled off and left and I said, "Is Tom gone home?" Harvey said, "He is gone after my keys. Wait and go with me home."

Q. You were standing right near the car when he got in it and left?

A. I wasn't near Tom's car.

Q. But did you see him when he left?

A. I saw him when he pulled out of the yard and I asked Harvey was Tom coming back and he said, "Yes, you can go in my car when he comes back."

Q. When he came there the first time before he went away did he have that gun?

A. I don't know nothing about the gun. I never did see the gun.

Q. You don't know whether he had a gun when he went there the first time or not?

A. I do not. I never did see the gun the whole time.

By Mr. Spencer:

Q. You say that you didn't see Tom get in the car and you weren't anywhere near it when Tom got in it and drove away?

A. I was in front of Harvey's car. I started to Tom's car and asked Harvey was Tom going home and he said "He is going after my keys. Wait and go with me."

Q. Where was Tom's car with reference to Harvey's car?

A. Back behind it a good little ways.

Q. Haven't you already testified it was drawn up right behind Harvey's car?

A. I said back behind. I don't know the distance.

The witness stands aside.

page 131 } Note: At this point court was adjourned at 5:00 o'clock P. M., October 23rd, 1940, until 10:00 o'clock A. M., October 24th.

Note: Court met pursuant to adjournment at 10:00 o'clock A. M., October 24th, 1940.

Same parties present as heretofore noted.

EARL MITCHELL,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Overbey:

Q. Is your name Earl Mitchell?

A. Yes, sir.

Q. Are you a brother of the defendant?

A. Yes, sir.

Q. Do you recall the night that this altercation took place down at Mr. DePriest's?

A. Yes, sir.

Q. State whether or not the defendant here came to your house that night and asked for some car keys.

A. He certainly did.

Q. Did you or did you not give them to him?

A. I gave them to him.

Q. State whether or not Mrs. Nancy Kerr, who was then Miss Nancy DePriest, came to your house that night.

A. Yes, sir, Nancy and my brother came there in an automobile together.

Q. Nancy and which brother?

page 132 } A. Harvey Mitchell.

Q. Did Nancy DePriest tell you anything about the affair?

By Mr. Spencer: (interposing) Your Honor please, I think that is totally irrelevant. It violates the rule of hearsay. The witness has not been on the stand and what she said cannot in any way be material.

By the Court: The court cannot conceive of any ground under which any statement she may have made would be relevant unless it was a part of the *res gestae*. Is it your contention, Mr. Overbey, that it is part of the *res gestae*?

By Mr. Overbey: No, sir.

By the Court: Then the objection is sustained.

The witness stands aside.

JOHN GOODMAN,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Martin:

Q. Are you John Goodman?

A. Yes, sir.

Q. Mr. Goodman, are you in any way related to either the DePriests or to the defendant, Tom Mitchell?

A. No, sir.

page 133 } Q. Were you at the DePriest place the night that this shooting took place?

A. Yes, sir.

Q. When did you go there?

A. I went there that evening, Thursday evening, around about 2:00 o'clock. It might have been 1:30 or 2:00 o'clock.

Q. This shooting took place after nightfall on Thursday night?

A. Yes, sir.

Q. And you were there at the time of the shooting?

A. Yes, sir.

Q. Did you see the affair and what happened?

A. Yes, sir.

Q. Who was there at the time of the shooting?

A. "Hop" Elliott, Harvey Mitchell, George Lindsay, and Wesley Kerr.

Q. Where was Wesley Kerr and the lady who is now his wife?

A. On the front porch.

Q. Could anybody on the front porch have seen the shooting?

A. No, sir.

Q. At the time of the shooting was Mrs. DePriest anywhere around where she could have seen or heard anything?

A. No, sir.

Q. Was Robert W. DePriest, Jr., under the influence of intoxicants that night?

A. Yes, sir.

Q. How about George Lindsay, was he sober?

page 134 } A. He was drunk.

Q. George Lindsay was drunk?

A. Yes, sir.

Q. What about George Lindsay's wife?

A. She was drunk too.

John Goodman.

Q. Had the crowd down there been drinking pretty freely that evening and early night?

A. Yes, sir.

Q. Now, do you recall when Tom Mitchell came down there the first time? Did you see him come in?

A. Yes, sir.

Q. Who was with him?

A. "Hop" Elliott.

Q. That is Fulton Elliott, is it?

A. Yes, sir.

Q. Anybody else in the car with them?

A. Yes, sir, the two little twins.

Q. Well, what, if anything, did Tom Mitchell say when he got out and came up to the house?

A. He said he wanted to see Harvey a few minutes.

Q. Where was Harvey?

A. Laying down on a little lounge.

Q. Inside of the house?

A. Yes, sir, in the front room.

Q. Did he go in and speak to him?

A. Yes, sir.

Q. What did they talk about?

page 135 } A. He went in and said, "Harvey, are you ready to go home?" Harvey told him he was. He said, "But I ain't got no keys." Tom asked Harvey where were his keys.

Q. What kind of keys?

A. Car keys.

Q. Keys to Harvey's car?

A. Yes, sir, and Tom turned around and said, "You know where Harvey's keys are at?" I told him George had them.

Q. By "George" you mean George Lindsay?

A. Yes, sir.

Q. George Lindsay had the keys to Harvey's car?

A. Yes, sir.

Q. Then what did Tom say?

A. Tom said, "George, you got Harvey's keys?" George said, "I got the damn keys and I ain't giving them to no son of a bitch until I get ready to go away and that car ain't going until I get ready to go."

Q. George Lindsay said that to Tom Mitchell?

A. Yes, sir.

Q. What did Tom or Harvey say at that time?

A. Harvey told Tom, "I will go, but you take my distributor off of my car."

John Goodman.

Q. Harvey told Tom to take the distributor off of his car and he, Harvey, would go back in Tom's car?

A. Yes, sir.

Q. Did Tom undertake to take the distributor off of Harvey's car?

A. Yes, sir.

page 136 } Q. Did anything happen?

A. Annie Lindsay ran up to Tom. Tom pushed her back, and George rushed at Tom cursing and Tom got in his car and left. Harvey told Tom, "You go to Earl's and get my other set of keys."

Q. So Harvey told him to go to Earl's—that is his brother Earl's—and get his keys and he would wait there?

A. Yes, sir.

Q. Well now, is that all in the way of any scrap or row or fight that occurred when Tom first came? Was there any blows or grappling or fist fight or anything of the sort?

A. No, sir.

Q. Now, when Mrs. Lindsay ran up to stop him from getting the distributor you say he pushed her back and then went and got in his own car and went after the keys?

A. Yes, sir.

Q. Did you go with him?

A. Yes, sir.

Q. You got in Tom's car and went with him to Earl's?

A. Yes, sir.

Q. Before you got to Earl's did you ask for a cigarette?

A. Yes, sir.

Q. What did Tom tell you?

A. He said he had some cigarettes up under the dashboard. I reached in and got a cigarette and he said "You can keep them", and there was a gun laying in the pocket of the dashboard.

Q. And you saw it when you reached in to get the cigarettes out?

A. Yes, sir.

page 137 } Q. And that was when you were coming away from the DePriest home and on the way to Earl's to get the keys?

A. Yes, sir.

Q. Did Tom stop by his own home on that occasion?

A. Coming back he put his children out.

Q. He let his two children out at his home?

A. Yes, sir.

John Goodman.

Q. Did he go to Earl's to get the keys?

A. Yes, sir.

Q. Did he see Earl?

A. Yes, sir.

Q. Did he get the keys to Harvey's car from his brother, Earl?

A. Yes, sir.

Q. What did he do then?

A. Well, he come over there and put his children out and came back over to Mr. DePriest's.

Q. Well, when he got back to the DePriest home with the keys to Harvey's car what happened?

A. Well, Tom when he got back he told me to go in there and tell Harvey to come out; that he wanted to see him. Well, when I started George Lindsay and Mr. DePriest were standing in the kitchen door and George Lindsay had a knife in his hand and Mr. DePriest had a knife in his hand. I called Harvey to come on out to the car. So George Lindsay said "You damned son of a bitch, I am going to cut your guts out."

Q. Had Tom said anything to George Lindsay on that occasion at all?

A. No, sir.

page 138 { Q. Did George Lindsay start toward Tom?

A. Yes, sir.

Q. What did Mr. DePriest do or what happened next?

A. Well, Annie Lindsay reached and caught George and turned George around toward the back porch and Mr. DePriest started at Tom and George told him to cut the God damned son of a bitch's guts out.

Q. Hollering at who?

A. Hollering at Mr. DePriest to cut the damned son of a bitch's guts out.

Q. Did Mr. DePriest go forward with the knife when George hollered that at him?

A. Yes, sir.

Q. What did Tom do?

A. Tom said, "Uncle Rob, don't come at me with that knife." He reached in the dashboard of the car and got the gun out and shot down at Mr. DePriest's feet and said, "Uncle Rob, I don't want to shoot you." George said, "Keen on Rob. Powder won't burn". and the second shot went off and Mr. DePriest fell and hit the car fender when he fell.

Q. It was George Lindsay who was yelling at Mr. De-

John Goodman.

Priest to cut his guts out and telling him that powder won't burn?

A. Yes, sir, "Cut the damned son of a bitch's guts out, powder won't burn."

Q. And Mr. DePriest kept on toward Tom with the open knife?

A. Yes, sir.

page 139 } Q. Did he have the knife drawn back as he got close to him?

A. He had his knife drawn back like this. (indicating)

Q. You could see the fire from the gun?

A. Yes, sir.

Q. And the first shot you say was down at the ground?

A. Yes, sir.

Q. And the next one was straight out?

A. Yes, sir.

Q. Well, after the first shot did Mr. DePriest stop or did he keep on coming?

A. He kept on coming. George told him to keep on going. He kind of stopped and George said, "Cut the damned son of a bitch's guts out, powder won't burn", and Rob started out again and never did stop no more.

Q. Did you that afternoon, or early part of the night, go with anybody who was down at the DePriest home to get any wine or liquor or anything to drink?

A. Come to Mr. Holland's and got a gallon.

Q. He runs a mercantile store and sells A. B. C. wine?

A. Yes, sir.

Q. Who bought the gallon?

A. Annie Lindsay and George.

Q. Did they take it back to the house?

A. Yes, sir.

Q. Did they drink from that gallon of wine?

A. Yes, sir.

page 140 } Q. Were you there around milking time?

A. Yes, sir.

Q. Did they take a round of drinks before starting to milking?

A. We met Mr. DePriest and when we started across the hill across the other side of the creek met Mr. DePriest and Mrs. DePriest coming to milking and got down to the bridge and the bridge was torn up. He had tore it up sometime that day to keep the water from washing it away, and Mrs. DePriest came up and said, "You all got any medicine for any-

John Goodman.

body sick?" She asked George and Annie. They said, "yes", and they came and took a drink of wine and so did Mr. DePriest, and Mrs. DePriest was barefooted and was so drunk she couldn't walk across the log and she had to wade across through the water in the branch barefooted because she was so drunk.

Q. Could she milk?

A. No, sir. She was too drunk to milk.

Q. Well, somebody did the milking, didn't they?

A. I milked two cows and Mr. DePriest milked the other two.

Q. When you got through milking did they take another round of drinks?

A. We went back to the house and Mr. DePriest saw that wine in the car and he said, "look" and I looked and saw it and he said, "Slip me a drink out here. I have a boil on me and don't want my daughter, Annie, to see me take a drink", and I handed it to him and he took a drink and set it back in the car.

page 141 } Q. What became of the balance of that wine?

A. Annie Lindsay took it out of the car and carried it in the house.

By the Court:

Q. Whose car was it?

A. Harvey Mitchell's.

By Mr. Martin:

Q. That was the gallon of wine that Annie and George Lindsay had bought?

A. Yes, sir.

Q. And you all had driven Harvey's car to get the wine?

A. Yes, sir.

CROSS EXAMINATION.

By Mr. Thompson:

Q. Your name is John Goodman?

A. Yes, sir.

Q. Are you the same John Goodman who was convicted in the Trial Justice's Court of Campbell County on the 19th of July, 1940, of cursing and abusing and assaulting and threatening the life of a man, and of being drunk and disorderly?

John Goodman.

By Mr. Martin: (interposing) One moment. We object to that, if your Honor please, on the ground that he can't impeach a witness by showing a conviction of a misdemeanor unless the offense involved moral turpitude, and any answer to this question would be incompetent, irrelevant and immaterial.

page 142 } By the Court: Objection sustained.

By Mr. Martin: Your Honor, I omitted, through inadvertence, of asking this witness about one phase of the matter. I would like the privilege of doing that now.

By the Court: Go ahead.

By Mr. Martin:

Q. Mr. Goodman, I want you to tell the jury whether or not Mr. DePriest at any time told Tom Mitchell to either get off of his place or go home or not to stay there if he couldn't behave himself? Did he in any way do any of that at any time?

A. No, sir, he did not.

CROSS EXAMINATION (continued).

By Mr. Thompson:

Q. Who do you work for, John?

A. I work for Tom some and I don't have no regular one to work for. I work for anyone I can get a job from.

Q. When you work at all you work for Tom?

A. No, sir, not regular.

Q. Who else have you worked for in the last twelve months except Tom Mitchell?

A. I worked for George Lindsay and I don't think it has been over twelve months ago, and I have worked for several people. I have worked for Earl some.

Q. The principal part of the time you have been working for Tom Mitchell, haven't you?

page 143 } A. I have worked for him right much.

Q. You are working for him now, aren't you?

A. I have been.

Q. Now, on this particular day in question who did you go with over to Mr. DePriest's home?

A. Harvey Mitchell and George Lindsay and Annie Lindsay.

Q. Where did you get with them?

A. I went to the house with Harvey.

John Goodman.

Q. Went to the house with Harvey?

A. Yes, sir, and George Lindsay.

Q. How long have you known George Lindsay?

A. I have been knowing George, I reckon, around about ten years.

Q. Ever had any trouble with him?

A. Never had any trouble with him at all except one time he cut me across the leg with a knife.

Q. How long ago was that?

A. That has been around about 12 months ago when I was working with him.

Q. In other words, you were perfectly friendly with George Lindsay?

A. Yes, sir.

Q. And you were perfectly friendly with Mr. DePriest, Mrs. DePriest, Annie Lindsay and all of them?

A. Yes, sir.

Q. What did you go over to Mr. DePriest's for?

A. All of us had been drinking together for about two days.

page 144 } Q. You had been along with the rest of them drinking for about two days?

A. Yes, sir.

Q. When you got over there where did you find Mr. DePriest?

A. At the house.

Q. Now, what time was that, about 2:00 o'clock?

A. Around about 1:30 or 2:00 o'clock.

Q. Who else did you find there?

A. Wesley Kerr.

Q. Who else?

A. Nancy DePriest.

Q. Who else?

A. That was all except Mrs. DePriest.

Q. What were they doing when you got there?

A. They had done got done eating dinner.

Q. 2:00 o'clock in the afternoon?

A. Yes, sir, around about 1:30 or 2:00 o'clock.

Q. They had a hot dinner?

A. They had done eat dinner and were cleaning up the dishes.

Q. Everybody at the house had eaten dinner. All right now, what did you do then?

A. Well, Harvey went in and laid down on the lounge.

John Goodman.

Q. What did you do?

A. I laid down on the floor and went off to sleep. The lounge wasn't big enough for two.

Q. As a matter of fact you were drunk at that time.

A. No, sir, I was sick.

page 145 } Q. Sick from drinking too much?

A. I had been drinking and stayed up all night too.

Q. Now, what did you do after that?

A. Well, we slept then until around about 4:00 o'clock.

Q. What did you do at 4:00 o'clock?

A. Well Katherine Johnson and Millard Johnson came over and they took Harvey's car off.

Q. You slept until 4:00 o'clock?

A. Yes, sir.

Q. Who is Katherine Johnson?

A. Millard Johnson's wife.

Q. All right, she came over there and then what happened?

A. George Lindsay took the car and got the keys out of Harvey's pocket while we was asleep.

Q. How do you know that if you were asleep?

A. He was the one that had them.

Q. I am only asking you to tell what you know. Do you know where the keys came from and who got them and how he got them?

A. He told me when he come back that he got them.

Q. When he came back he told you?

A. Yes, sir.

Q. When did George tell you that he got the keys out of Harvey's pocket?

A. When he come back about 4:00 o'clock. I asked him where he had been and he said "I went to Winfall", and I said, "How did you go?" He said, "I got Harvey's keys out of his pocket."

page 146 } Q. Harvey didn't have his coat on, did he?

A. I think he did. I know he did.

Q. He got them out of his coat pocket while he was there asleep?

A. Yes, sir.

Q. Where was Millard Johnson?

A. He come with them back. He left with them and come with them back.

Q. I didn't hear anything about him going over there.

A. He went with George Lindsay and Annie Lindsay over there.

John Goodman.

Q. Did he go with you over there?

A. No, sir, I didn't go, until he went to carry them home. I didn't go with them to get Katherine Johnson.

Q. Did Millard Johnson go with you and Harvey and George and Annie over there?

A. Yes, sir, the first time.

Q. Why didn't you tell me that the first time?

A. You didn't ask me.

Q. You mentioned everybody else. They went to carry Millard Johnson home, is that right?

A. Yes, sir.

Q. And they came back with his wife, Katherine Johnson?

A. Yes, sir.

Q. Was she drunk?

A. I couldn't say because I couldn't smell none on her breath. I didn't get close enough to her.

page 147 } Q. She didn't appear to be drunk, did she?

A. No, sir.

Q. Then what did you do?

A. Well then they took Katherine Johnson and Millard Johnson back home.

Q. Who did?

A. George Lindsay and I went back with them and Annie and Harvey.

Q. You and George and Annie and Harvey in Harvey's car?

A. Yes, sir.

Q. Did Harvey raise any objection to using his car?

A. No, sir, only when he got back over there he told George he didn't want him to drive the car off any more and wanted the key and George said, "No, I am going to keep the key."

Q. At the time he went to carry Katherine Johnson and her husband home no objection was raised and Harvey went along in his own car?

A. Yes, sir.

Q. Who was driving?

A. Harvey.

Q. Did Harvey come with you up to Holland's to get the wine?

A. Yes, sir.

Q. Who bought and paid for the wine?

A. George Lindsay and Annie Lindsay got it on credit.

Q. Now, that was on the 16th day of August, the day Mr. DePriest was killed?

John Goodman.

A. I couldn't tell you. I can't keep up with page 148 } the days of the month.

Q. Do you know it was the day Mr. DePriest was killed?

A. Yes, sir, it was that night.

Q. What did you do then?

A. Went back over to Mr. DePriest's.

Q. All of you?

A. No, sir, Katherine Johnson and Millard Johnson stayed at their home where we carried them to.

Q. Who went back?

A. I and Harvey and Annie and George Lindsay.

Q. What did you do when you got there?

A. Met Mr. DePriest coming down the hill to milk.

Q. What hill?

A. After you cross the bridge coming down the hill to the creek.

Q. And did you all stop?

A. Yes, sir.

Q. Who was driving then?

A. George Lindsay was driving.

Q. And Harvey was in there?

A. Yes, sir.

Q. Harvey didn't object to him driving?

A. Didn't object then, no, sir.

Q. He stopped the car and what happened then?

A. Mr. DePriest and Mrs. DePriest said "You all come and go with us to milking", and we drove down to the branch where the bridge was taken up and Mrs. DePriest page 149 } asked Annie and George if they had any medicine for anybody sick and Mrs. DePriest came and took a drink of wine and Mr. DePriest did too.

Q. Did you drink any?

A. No, sir.

Q. You hadn't drank any since when?

A. Since 2:00 o'clock.

Q. Where did you drink that?

A. I drank that coming over to Mrs. DePriest's.

Q. Who had that?

A. Millard Johnson.

Q. And did you all go on to milking with them?

A. Yes, sir.

Q. I believe you said awhile ago the bridge was out and it had no planks in it.

John Goodman.

A. You had to walk across a plank. Mrs. DePriest waded because she was so drunk she couldn't walk the plank.

Q. Just a plank, no bridge?

A. Yes, sir. We laid a plank and walked across that.

Q. The bridge had been completely washed out?

A. No, sir, it was took up.

Q. The bridge was completely gone. There was no bridge there.

A. That is right.

Q. Mrs. DePriest waded the branch because she was so drunk she couldn't walk the plank. Did Mr. DePriest walk the plank?

A. Yes, sir.

page 150 } Q. Did Mr. DePriest walk the plank?

A. Yes, sir.

Q. Did you walk the plank?

A. Yes, sir.

Q. Did George walk the plank?

A. No, sir.

Q. Did Annie walk the plank?

A. No, sir, she waded.

Q. Did Harvey walk the plank?

A. He didn't even go. He stayed in the car.

Q. I believe you testified awhile ago when you got to the milk gap that you milked one cow and Mr. DePriest the other.

A. No, sir, I did not. I said I milked two cows and Mr. DePriest milked two too.

Q. Mr. DePriest wasn't so drunk then?

A. No, sir. He was drinking but not too drunk to milk.

Q. But Mrs. DePriest was drunk?

A. Yes, sir.

Q. After milking the cows what did you do?

A. Went back to the house and Mrs. DePriest took another drink of wine and so did Mr. DePriest.

Q. Did you take another drink?

A. No, sir, I did not.

Q. Did George take any?

A. Yes, sir, George and Annie took one.

Q. Harvey take any?

A. No, sir.

Q. Had Harvey taken any since 2:00 o'clock?

page 151 } A. No, sir.

Q. Now, did you all get in the car and go home?

John Goodman.

A. Went on up to Mr. DePriest's.

Q. Got in the car?

A. Mr. DePriest and Mrs. DePriest got in the pickup.

Q. What pickup?

A. In his pickup.

Q. Where was that?

A. Behind Harvey's car.

Q. Do I understand they were driving down to milk rather than walking?

A. Yes, sir.

Q. And Mr. DePriest drove the pickup to the house?

A. Yes, sir. He didn't drive it across the branch because there wasn't any bridge there.

Q. He drove the truck up there?

A. Yes, sir.

Q. Now, when you got back up there what did you do?

A. Mrs. DePriest went in the house, and Mr. DePriest took another drink of wine after she got to the house and Mr. DePriest came out and asked was any more wine in the car and I said I didn't know.

Q. Where were you?

A. I was in the yard.

Q. Were you asleep?

A. No, sir, I wasn't asleep then.

Q. As a matter of fact didn't Mr. DePriest
page 152 } have to drag you out of the yard that afternoon
when it was raining to keep you from getting
drowning wet?

A. No, sir, he did not.

Q. That is not true?

A. No, sir, it is not.

Q. Now, you were out in the yard?

A. I was out in the yard. I was there when Mr. DePriest asked me about the wine in the car.

Q. Did he find any wine?

A. Yes, sir.

Q. Did he drink some?

A. Yes, sir.

Q. Did you drink any?

A. No, sir.

Q. What did you do then?

A. He put the wine back in the car and I went on in the house.

Q. Where did you go?

John Goodman.

A. In the front room.

Q. Who was in there?

A. Harvey.

Q. Anybody else?

A. George Lindsay and Annie.

Q. How long did you stay in there?

A. Stayed in there until Tom come.

Q. How long was that?

A. I would say around about an hour. It might have been less, but about an hour.

page 153 } Q. Who came with Tom?

A. "Hop" Elliott and the two twins.

Q. Was Tom drinking?

A. No, sir, he was not.

Q. Was "Hop" drinking?

A. No, sir.

Q. I believe you testified that when Tom came in he wanted to wake Harvey up. Harvey had gone back to sleep, had he?

A. Yes, sir.

Q. You hadn't gone back to sleep, had you?

A. No, sir.

Q. And where did the first altercation between Tom and George take place?

A. It was in the back yard.

Q. Where were you at that time?

A. I was out there too.

Q. What were you doing out there?

A. I went out with Harvey when Tom said he wanted to see him.

Q. Harvey and Tom were out there and you were out there with them?

A. Yes, sir.

Q. Who else was there?

A. George Lindsay and Annie Lindsay. That is all.

Q. Where was Mr. DePriest?

A. In the kitchen.

Q. Where was Mrs. DePriest?

A. She was not there. The last time I seen
page 154 } Mrs. DePriest she was drunk.

Q. Where was she?

A. In the kitchen the last time I seen her. Between 5:30 and 6:00 o'clock, or it might have been a little after, she was drunk and trying to do the buck dance.

John Goodman.

Q. What do you mean by buck dancing?

A. That is what she called it, and I walked back and she was drunk then and carrying on all kind of crazy talk, and I walked on back in the front room.

Q. You got ashamed of it and walked on off. You don't believe in things like that. Now, where was Wesley Kerr and Nancy DePriest at the time that this altercation took place?

A. On the front porch.

Q. How do you know they were out there?

A. Because I seen them out there.

Q. How long before this had you seen them out there?

A. How long before the shooting took place?

Q. I am talking about the first altercation that took place.

A. I saw them out there.

Q. You were out in the back yard with Tom and George and Annie when the altercation took place?

A. They were out there on the front porch when we went out of the house.

Q. That is all you know about it; that they were out there on the front porch when you left the house.

A. Yes, sir.

page 155 } Q. Where was "Hop" Elliott?

A. He was out there too.

Q. Were all of you right around together, "Hop", you and Tom and Harvey and George and Annie?

A. Yes, sir.

Q. You were all around in a bunch?

A. Yes, sir.

Q. Now, "Hop" is wrong if he said that he was on the other side of the car out of sight, isn't he?

A. He might have been out of sight when the shooting was going on.

Q. I am talking about the first occurrence. You have just testified that when the first little occurrence took place that "Hop" Elliott was right there with you and George and Annie.

A. Yes, sir, he was there.

Q. If he said he was behind a car on the other side of a car then he is mistaken?

A. I did not say "Hop" was right with the bunch. I said "Hop" was out there in the yard with us.

Q. Now, are you going to change your statement you made a minute ago?

John Goodman.

A. No, sir.

Q. Where was "Hop"? Did you see him?

A. He come out when we come out.

Q. Where did he go?

A. He was about the car when the thing took place. "Hop" come out with Tom. I reckon he thought Tom was going to leave and he was going with him when he went back.

page 156 } Q. Do you know where "Hop" was?

A. I know he was out in the yard where we was.

Q. Did you see him?

A. Yes, sir, he come out with us.

Q. Right there with you. Now, that trouble started when Tom demanded of George Lindsay that he give him the keys to Harvey's car, didn't it?

A. He asked George to give Harvey's keys to Harvey.

Q. Tom asked George to give the keys to Harvey's car to him, isn't that right?

A. No, sir, to give them to Harvey.

Q. That was when this trouble started, wasn't it?

A. Yes, sir, the first time.

Q. Now, did Tom and George pass any licks?

A. No, sir, they did not.

Q. None at all. Then how did Annie Lindsay get hit?

A. Annie Lindsay didn't get hit.

Q. That is a mistake too, but she was out there?

A. She was out there. Tom pushed Annie back just like that (indicating) on account of she ran up and grabbed Tom when Tom aimed to take the distributor off.

Q. When did Mr. DePriest come out there?

A. He didn't come out until the last time we went back.

Q. He wasn't out there the first time at all?

A. No, sir, he was in the kitchen.

Q. And Mr. DePriest had no word with Tom Mitchell the first time he was there?

page 157 } A. No, sir.

Q. He didn't catch Tom in the collar and ask him or tell him to leave or anything of the kind?

A. No, sir, he did not.

Q. You are sure about that?

A. Yes, sir, I am sure about that.

Q. And you are just as sure about that as anything you have testified to here today?

John Goodman.

A. I am sure.

Q. I say you are just as sure of that as anything you have testified today?

A. I am sure of what I testified to.

Q. Will you answer my question?

A. Yes, sir.

Q. Are you as sure of this, that Mr. DePriest did not come out there when this first little trouble occurred as you are of anything that you testified to?

A. Yes, sir.

Q. Now, where was Tom's car at that time at the first altercation? I am talking about the first one.

A. Right behind Harvey's car.

Q. How far apart were they?

A. Now, I don't have no idea. I didn't measure and I can't tell you.

Q. Was it as far as from you to the gentleman sitting right over there?

A. I couldn't say.

Q. Was it as far as from you to the wall over there?

A. It might not have been that far.

page 158 } Q. Do you know where that old well with the concrete cap is there in the yard?

A. Yes, sir.

Q. How high is that concrete cap above the ground, about two feet?

A. I don't figure it is more than six or seven inches.

Q. How close was Harvey's car to that well?

A. I wouldn't hardly say because it was certainly setting above the end of the porch.

Q. Harvey's car was between the end of the well and the end of the porch?

A. Yes, sir.

Q. Which way was Tom's car headed that time? Was it headed in or out?

A. It was turned right in to Harvey's car.

Q. In other words, it was just behind Harvey's car as it drove in. It didn't turn around, or anything of the kind?

A. No, sir.

Q. I believe you say that Tom then left without any fuss or any quarrel at all and you went with him.

A. Yes, sir.

Q. Why didn't "Hop" Elliott go with him?

A. Harvey told "Hop" to stay there; that Tom would

John Goodman.

be back in a few minutes because Tom was coming back in a few minutes.

page 159 } Q. And that was why "Hop" stayed?

A. Yes, sir.

Q. Why didn't Harvey go?

A. He didn't want George Lindsay driving his car all up and down the road drunk. He had gotten too drunk to drive it.

Q. He had been driving it all the afternoon and the day before, hadn't he?

A. Yes, sir.

Q. Now, how did you all come to Winfall? Did you come up to Oak Grove and turn across?

A. No, sir.

Q. How did you go?

A. Come on up here to the Cardwell place.

Q. Up to Ed Cardwell's place and turned?

A. Yes, sir.

Q. Why didn't you go through Oak Grove?

A. It was too muddy through there.

Q. Where did you first go when you came back to Winfall?

A. Went down to Mr. Lewis's.

Q. What did you go there for?

A. To get some ice.

Q. Who for?

A. Mrs. DePriest.

Q. Mrs. DePriest sent for some ice?

A. Yes, sir, she said she wanted some ice to make up some butter.

Q. Mrs. DePriest, I understand, at 5:30 was
page 160 } so drunk she didn't know what she was doing
and had left and you hadn't seen her since, yet
when Tom left over there she sent word to bring back some
ice.

A. I am talking about when we brought Katherine Johnson home. That is what you asked me about.

Q. I am talking about the time you left with Tom Mitchell.

A. We come through by the old grove.

Q. You come by the Oak Grove that time. It was too muddy the first time but not too muddy the last time.

A. I thought you was talking about Harvey.

Q. In other words it was too muddy about four or five o'clock but at seven or seven-thirty it wasn't too muddy for you to come that way.

John Goodman.

A. Tom wasn't over there at five o'clock.

Q. All right, now where did you and Tom and the two children go when you got to Winfall?

A. Went to Earl Mitchell's.

Q. You went to Earl Mitchell's and where did you go from there?

A. Come on back up to Tom's and put the children out.

Q. You went to Earl's first?

A. Yes, sir.

Q. Then you stopped at Tom's place and did you all get out of the car there?

A. We put the children out and went on over to DePriest's.

Q. Did you all get out of the car?

page 161 } A. Yes, sir, and carried the children around to the back porch.

Q. Both of you?

A. Yes, sir, I carried one and Tom carried one.

Q. Didn't Tom go in the house?

A. No, sir, he did not.

Q. Did you go in the house?

A. No, sir.

Q. As a matter of fact, John, didn't Tom go in the house and get his pistol at that time?

A. No, sir. How could he get the pistol when it was in the car when we came from over there the first time?

Q. Then it isn't true that he went in the house and got his pistol at that time?

A. No, sir.

Q. How far were you from your home when you got back over there?

A. About a mile.

Q. Why didn't you go home?

A. Well, I told Harvey I was coming back with Tom.

Q. In other words, you wanted to go back too. How did you go back?

A. Went back with Tom.

Q. In what way did you go, by Oak Grove?

A. We come up to the crossing and turned.

Q. And when you got back over there who did you first see?

A. George Lindsay and Annie Lindsay and Mr. DePriest.

page 162 } Q. I believe you stated on direct examination awhile ago that when you drove up that Mr. DePriest and George Lindsay began cursing immediately. Is that right?

John Goodman.

A. No, sir, I did not say that.

Q. All right, when you came in where did you park your car?

A. Well, Tom drove up and turned around.

Q. Drove up and turned the car around. Did he leave the motor running?

A. No, sir.

Q. Did he leave the lights on?

A. Yes, sir.

Q. Do you know any reason why he should have drove up and turned his car around and headed it out?

A. I reckon he done it for Harvey to turn around. He carried the keys up for Harvey.

Q. Now, he had the keys to Harvey's car, is that right?

A. Yes, sir.

Q. Did he give them to Harvey?

A. Yes, sir.

Q. What did Harvey do?

A. He gave Harvey the keys after the shooting.

Q. I understood you to say when Tom got back over there he gave Harvey the keys.

A. He gave him the keys when the shot was made.

Q. What?

A. He gave Harvey the keys after he had done page 163 } shot Mr. DePriest.

Q. I am talking about when he got there the first time, did he give Harvey the keys?

A. You are talking about the first time he come there?

Q. This last time when he went back and Tom supposedly had the keys to Harvey's car.

A. He gave the keys to Harvey that time because he couldn't give them to him the first time because Mr. DePriest and George started toward him with a knife and then he came around and shot Mr. DePriest and Harvey was standing there and he handed Harvey the keys.

Q. Now, Harvey was standing out there in the yard, was he?

A. Yes, sir.

Q. What was to keep Tom from giving Harvey the keys immediately he got out of the car when you and he started over there to the porch? You all went to the porch, didn't you?

A. Iindsay and Mr. DePriest ran between them and started after him with a knife. George started and Annie caught

John Goodman.

George and Mr. DePriest started and George said, "Keep on, cut the damned son of a bitch's guts out."

Q. One or two things I don't get straight in my mind. When you got there and got out of the car where was George Lindsay and Robert DePriest, on the back porch?

A. In the kitchen standing in the door is what I told you.

Q. Now, you all parked your car in the driveway right close to that chestnut oak tree, didn't you, that page 164 } old chestnut oak, isn't that right?

A. I couldn't tell you what kind of a tree.

Q. It is a tree there?

A. Yes, sir, there is a tree there.

Q. It was close to that tree, whatever kind of tree it was. You all crossed the yard and did you get to the porch?

A. Tom never did go to the porch.

Q. Did you go to the porch?

A. Yes, sir.

Q. You went to the porch?

A. Yes, sir.

Q. What did you say when you got to the porch?

A. I called Harvey and told him Tom wanted to see him.

Q. Where was Harvey?

A. Laying on the lounge and he came out and DePriest was between Harvey and Tom.

By Mr. Martin: Your Honor, I don't want to be captious but it seems to me that this is about the third time on cross examination that he has been over that same field, eliciting the same answers. He has asked about the first trip, where they were, I know distinctly, more than once, and he has gotten his answer, and this is about the third time that this thing has been asked this witness on cross examination.

By Mr. Thompson: I believe Mr. Martin evidently doesn't understand what has been asked this man because I have not on cross examination asked him about this second trip until this time and have just gotten to the point where he came in, and I absolutely have not asked him anything about that prior to this time. Now, he went over it twice but I haven't been over it at all.

By the Court: Gentlemen of counsel, if you have asked a question once don't ask it again. Of course I can't recall at this time whether that has been over or not but anyhow make an effort to cover the ground only once.

John Goodman.

By Mr. Thompson:

Q. When Harvey came out did he come out where you were?

A. He did.

Q. Did you all meet about the porch?

A. Well, when Harvey come out George Lindsay started at Tom before Harvey could get to Tom.

Q. Did Mr. DePriest start toward him?

A. George Lindsay started toward him and Annie caught George and turned George around to the porch, and Mr. DePriest started and George said, "Cut the damned son of a bitch's guts out."

Q. What did Mr. DePriest do?

A. He was cursing Tom and he had a knife drawed back in his hand.

Q. A knife drawed back in his hand and was
page 166 } going to cut Tom's guts out?

A. Yes, sir.

Q. What did Tom do?

A. Tom backed all the way around the car and said, "Uncle Rob, don't come after me no closer with that knife. I didn't come after any trouble. I came to see Harvey."

Q. I understand you were pretty close to the porch when Mr. DePriest came up and he followed Tom around to the car and around the car.

A. He followed Tom around to the car and around the car and Tom opened the door of the car, opened the side pocket of the car, and took his gun out and then shot him.

Q. Tom took the gun out of the side pocket of the car and shot him with it?

A. Tom took the gun out of the pocket of the car and said, "Uncle Rob, don't come any closer." George said, "Keep on, Uncle Rob, powder won't burn. Cut the son of a bitch's guts out", and Tom said, "Don't come any closer", and he kept on and he shot the second time.

Q. What kind of car is Tom Mitchell's?

A. '37 Ford.

Q. And which way does that door open?

A. He didn't open no door when he got the gun. He reached through the glass and got the gun.

Q. The glass was down?

A. The glass was broken out.

Q. Was Tom on the right or left side of his
page 167 } car when he got the gun?

John Goodman.

A. On the right.

Q. Now, how is that side pocket in the dashboard of that model Ford fastened?

A. It has a spring at the bottom and when you shut it it holds it up there.

Q. Do you have to press that spring to release it?

A. No, sir, just catch hold and pull the door open and when you shove it back the spring holds it.

Q. Did Tom reach in with his right or left hand to get his gun?

A. Left hand.

Q. And is Tom left-handed?

A. Yes, sir.

Q. He is left-handed?

A. Yes, sir.

Q. Shoots with his left hand?

A. Yes, sir.

Q. And he shot Mr. DePriest with his left hand?

A. Yes, sir.

Q. Where were you at the time Mr. DePriest was backing Harvey from the porch back around the car?

A. He wasn't backing Harvey.

Q. Excuse me, I mean backing Tom. Where were you?

A. I was right there looking at him.

Q. Were you following along? Were you beside Tom or beside Mr. DePriest?

page 168 } A. I was behind Mr. DePriest, standing right behind him when he was backing Tom.

Q. Where was Harvey?

A. Standing up against the car.

Q. Was Harvey doing anything at all?

A. No, sir.

Q. Did Harvey say anything?

A. No, sir.

Q. Did you say anything?

A. No, sir.

Q. Did you or did you not say to Mr. DePriest when he first started up, "Watch out Mr. DePriest", or "Watch out Rob, Tom will shoot you"?

A. No, sir.

Q. You didn't say anything like that to him?

A. No, sir.

Q. I will ask you if you didn't tell E. L. Mayberry on Sunday following this shooting at Mr. Marcomb's filling sta-

John Goodman.

tion at Winfall, that you told Mr. DePriest, "Get back, Rob, Tom will shoot you"?

A. No, sir.

Q. You didn't tell him that?

A. No, sir. I have had no talk with Mr. Mayberry.

Q. Didn't you also tell Mr. Mayberry at the same time and same place that you were standing between Tom and Mr. DePriest?

A. No, sir.

page 169 } Q. You didn't tell him that. Where was George Lindsay at the time that Mr. DePriest was in front of Tom and backing him back to his car?

A. Annie Lindsay had taken George Lindsay back to the porch. He had turned around about ten steps to the porch and he was hollering "Keep on, cut the damned son of a bitch's guts out."

Q. Now, at the time that Mr. DePriest came out there was he still drunk?

A. He wasn't too drunk to walk but he was feeling pretty good.

Q. How large a man was Mr. DePriest?

A. He was a little heavier than I am. I reckon he would weigh about 165.

Q. You think he would weigh from 150 to 165?

A. I would think so. I never seen him weigh.

Q. About your height?

A. He might have been a little taller.

Q. Nothing like as tall as Tom, was he?

A. No, sir.

Q. Wouldn't weigh nothing like as much as Tom would weigh, would he?

A. I have no idea. A little low chunky man will fool you sometimes.

Q. There had been no trouble prior to this time between Mr. DePriest and Tom at all?

A. No, sir.

page 170 } Q. Now, as a matter of fact, John, isn't the truth of this matter that you didn't see any of this trouble; that the last time Tom came back that you were in the car and you were so drunk that you couldn't get out and you don't know what went on?

A. I seen it all. I seen every bit of the trouble. I was not drunk.

John Goodman.

RE-DIRECT EXAMINATION.

By Mr. Martin:

Q. John, you ain't too good to get drunk, are you?

A. No, sir, I ain't too good. The only reason I didn't drink was I had been sick.

Q. If you stick to it it will make you too sick to want any more?

A. Yes, sir. My head was about to "bust" open. I wan't too good to drink it.

Q. Now, did Tom Mitchell say anything to Mr. DePriest when he returned there the second time with the car keys other than to tell Mr. DePriest not to come on him when he was advancing on him with a knife?

A. No, sir.

Q. Had Tom used any vile or abusive language toward him in any way?

A. No, sir.

Q. Had he done anything of that sort even on the first trip?

A. No, sir.

page 171 } RE-CROSS EXAMINATION.

By Mr. Thompson:

Q. I understand your statement to be this, Mr. Goodman, that on the first occasion Mr. DePriest said nothing to Tom and Tom said nothing to him. There was no controversy between them, between Mr. DePriest and Tom?

A. There was not.

Q. On the second occasion, without Tom having said anything to Mr. DePriest, without any previous disagreement, Mr. DePriest came out of the house with a knife in his hand. I understand Tom said nothing to him, and that he started toward Tom with that knife and Tom told him to stay back. and continued to tell him to stay back, and he backed Tom back to that car and still without any argument between them prior to this time he was advancing on Tom, and at that time was about to cut Tom at the time he was shot. Is that right?

A. Yes, sir.

By the Court:

Q. I understood you to say that at the time Tom Mitchell shot Mr. DePriest he was on the right-hand side of the car. Is that right, and he shot him with his left hand?

A. Yes, sir.

Q. Now, which side of the car was Mr. DePriest on at that time?

John Goodman.

A. Right-hand side too.

Q. How close to the car was he?

A. Right against the car. When he fell he fell right against the right-hand fender.

Q. How close was he to Tom Mitchell?

page 172 } A. I would say around about two or three steps, even with the hind wheel.

Q. In other words, Tom Mitchell was even with the front wheel. Where was Tom standing with reference to the front wheel of the car?

A. Tom was a little bit down below the door.

Q. Then how far was Mr. DePriest from him when Tom shot him?

A. Right at him. When he fell he fell and caught on the fender.

Q. He fell on the corner of the right-hand side?

A. Yes, sir, caught on his hand on the fender.

Q. Was that the side of the car opposite from the house or nearest to the house?

A. Opposite from the house.

Q. In other words, at the time the shooting took place the car was between Tom Mitchell and Mr. DePriest and the house.

A. No, sir, Mr. DePriest was on the same side Tom was when he shot him.

Q. I say the house was on the opposite side.

A. On the left-hand side and it was on the right-hand side where he shot Mr. DePriest.

Q. In other words, the car was between Mr. Mitchell and the house at the time the shooting took place. Were they on the same side of the car when the shooting took place?

A. They were on the right-hand side and the
page 173 } house was on the left-hand side.

Q. Do you understand what I am trying to ask you? They started out from the house, didn't they?

A. Tom wasn't at the house. Tom was about ten steps from the car.

Q. Mr. DePriest started out from the house, came out of the kitchen door?

A. Yes, sir.

Q. And Tom backed off?

A. Yes, sir.

Q. Now, did he back off behind the car on the right-hand side of the car?

John Goodman.

A. All around behind the car and around to the right-hand side.

Q. At the time he shot was the car between Tom and the house?

A. No, sir, not between Tom and the house.

Q. How was it then?

A. Tom was on the side of the car and so was Mr. DePriest.

Q. Which was closer to the house at the time the shooting took place, the car or Tom Mitchell and Mr. DePriest?

A. The car was the closest, on the left-hand side.

Q. In other words, the car was between them and the house.

A. The car couldn't have been in between them. They weren't between the car and the house.

Q. The car was between them and the house, page 174 } wasn't it,—was it or was it not?

By Mr. Martin: I think the witness is confused about the word "between".

By the Court:

Q. Do you know what the word "between" means?

A. That means he was shot between the car and the house, don't it?

Q. Which way was the car headed?

A. Headed straight out.

Q. Toward the road?

A. Yes, sir.

Q. Toward the road in front of the house?

A. Kind of on the side of the house.

Q. But headed toward the road which is in front of the house. The car was headed toward the road.

A. Yes, sir.

Q. The main road?

A. Yes, sir.

Q. And at the time of the shooting Tom was standing on the right-hand side of the car and the car was headed toward the road.

A. Yes, sir, and Mr. DePriest was too.

Q. Then the house was on the left-hand side of the car.

A. Yes, sir.

Q. Wouldn't that place the car between Tom page 175 } and Mr. DePriest and the house?

A. Yes, sir, the car was between Mr. DePriest and the house and between Tom and the house.

John Goodman.

Q. You understand now?

A. Yes, sir.

By Mr. Thompson:

Q. Where was "Hop" Elliott at the time that you all came back, you and Tom?

A. "Hop" were in the front room when I called Harvey,—when I stepped up on the porch and called Harvey.

Q. Did you see him after that?

A. No, sir, I did not.

Q. Did he come out in the back yard?

A. No, sir. If he did I didn't see him.

Q. You don't know where he was. How close together were the shots that were fired at Mr. DePriest?

A. Mr. DePriest was kind of at the back wheel, you know from the back wheel a little bit, I would say around about three steps. He had done made about three steps before the other shot was fired and George hollered "Cut his damned guts out, powder won't burn."

Q. Can you indicate how close those shots were by snapping your fingers, one, two?

A. No, sir.

Q. Can you do it?

A. I can do it but it wan't that quick.

Q. I am asking you to tell the jury how quick it was.

A. Around about a half-minute, I reckon it page 176 { was.

Q. Can't you snap your fingers?

A. Yes, sir.

Q. Indicate how it was done.

A. (the witness snaps his fingers). Now, it wan't quite as quick as that now.

Q. Go ahead and tell the jury how it was.

A. I say about half a minute.

Q. Will you snap your fingers.

A. I can snap my fingers but I tell you it was about a half-minute.

Q. Can't you snap your fingers and wait awhile and snap them again.

A. (the witness snaps his fingers twice.)

By the Court:

Q. Let me ask you another question. Now, were you standing there where you could see the shots?

A. Yes, sir.

Harvey Mitchell.

Q. When he shot the first time I understand you to say he shot down between his legs at the ground.

A. Yes, sir.

Q. Then did he keep on backing or was he standing in the same place?

A. No, Tom kept backing and George Lindsay hollered "Cut his damned guts out, powder won't burn."

Q. How far did he back back after he shot the first shot before he fired the second shot?

A. He backed back about even with middle way page 177 } the front door and the front wheel.

Q. And he pulled the gun out of the pocket of the car when he shot the first time?

A. Yes, sir.

Q. When he pulled it out of the pocket did he turn around and shoot immediately or walk any distance?

A. He took the gun out and said, "Uncle Rob, don't come no closer to me with that knife."

Q. Then he shot?

A. He then pulled down and shot.

Q. That was the first time?

A. Yes, sir, and then George Lindsay hollered "Cut his damned guts out."

Q. He backed back how many steps or feet?

A. I reckon about two steps.

Q. And that would be about six feet?

A. I couldn't say. I wouldn't know.

The witness stands aside.

HARVEY MITCHELL,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Overbey:

Q. Your name is Harvey Mitchell?

A. That is right.

Q. Are you a brother to the defendant here?

A. That is correct.

Q. What was the relation between you and Mr.
page 178 } DePriest, the deceased?

A. My uncle.

Q. Were you at Mr. DePriest's house at the time of the shooting?

Harvey Mitchell.

A. That is right.

Q. What time did you get there?

A. About one or one-thirty.

Q. Were you intoxicated when you came there?

A. Yes, sir, very much.

Q. Well, where did you go when you first got there?

A. Well, I went in there and laid down on a cot and dropped off to sleep.

Q. About how long do you think you slept?

A. I slept until about 4:30 or 5:00 o'clock. Mrs. Johnson came in and woke me up to take her and her husband home. We brought them home and went down to Mr. Lewis's to get some ice, and left Mr. Lewis's and come back by Holland's and she bought a gallon of wine.

Q. Who is "she"?

A. George Lindsay's wife.

Q. She bought a gallon of wine?

A. That is right, and we went back to Rob DePriest's then.

Q. Where did you first see Robert DePriest and his wife, what part of the premises were they on when you got back?

A. We met them coming to milking.

Q. What was the condition of Mrs. DePriest page 179 } and Mr. DePriest when you met them there just prior to the milking?

A. Mrs. DePriest was right smart intoxicated and Mr. DePriest had been drinking but not as much as Mrs. DePriest.

Q. Did Mrs. DePriest do any milking whatever there that afternoon?

A. Now, I couldn't say because I didn't go to the stable. You see there was a branch between us and the stable and couldn't cross it with the car and I stayed in the car.

Q. Did you see Mrs. DePriest and Mr. DePriest take a drink there?

A. Yes, sir, I seen them take a drink.

Q. Did you see them take anything after the milking?

A. Yes, sir, they took a drink after the milking, and asked me if I wanted any. I told them I did not because I had been drinking for two or three days. We had been off on a little party. It was not as I was too good to drink with them but I was so sick I didn't want any. That is the reason I didn't go with them to the stable.

Q. After the milking did all of you go on to Mr. DePriest's house?

A. That is right.

Q. Then what took place when you got there in the yard of

Harvey Mitchell.

Mr. DePriest's house? Did you go in the house?

A. That is right. I went back and laid down on the same cot I was laying on at first and went back to sleep. The next thing I knew Tom, my brother, woke me up.

Q. Your brother Tom, the defendant here, woke page 180 } you up?

A. That is right.

Q. Go ahead and tell exactly what happened in your own way.

A. The first thing he wanted to know was why I hadn't been home.

Q. That was Tom Mitchell?

A. That is right. I told him I had been off on a little party and was having a good time was the reason I hadn't been home. Then he got after me to come with him home. He said he had seen George and them driving my car up and down the road and had got uneasy about me and was hunting for me. So I got my hat and come out to go with him home and he told "Hop" Elliott to drive my car and for me to go with him, which I agreed to do.

Q. When you speak of "Hop" Elliott you mean Fulton Elliott?

A. That is right. I agreed to go with Tom home and let "Hop" take my car. I come to find out I didn't have no keys for the car. George had the bunch of keys, so my brother asked for him to give them to me and he wouldn't do it.

Q. That was George Lindsay?

A. That is right. He wouldn't give me the keys, so I told Tom to take the distributor off my car so they couldn't drive it and I would go with him on home. So Tom started toward the car to take the distributor off and got beside the car and Annie reached and got him by the hand.

Q. Annie Lindsay?

page 181 } A. That is right, and said, "When this car leaves here we are going in it and the car ain't going until we get ready to go."

Q. Who said that?

A. Annie Lindsay. Tom sort of pushed Annie back. So George he had a word or two. I can't remember what George said to them, but he had a word or two and I told Tom to go home and get my other bunch of keys so I could take my car home. So him and John Goodman left there going home after the other keys.

Harvey Mitchell.

Q. Did you see any scuffle between George Lindsay and Tom Mitchell, your brother, at that time?

A. No, sir, none whatsoever.

Q. Did your brother, Tom Mitchell, say anything at all to George Lindsay to warrant him in making an assault upon him or cursing him or abusing him?

A. No, sir, he did not.

Q. All right then, your brother and John Goodman went after the keys.

A. That is right.

Q. Where were you when they first came back?

A. Me and Fulton Elliott was in the front room laying down on that same cot.

Q. Then what was the next thing that happened after they came back?

A. Well, when the car drove up in the lot I page 182 { heard George Lindsay say, "Here comes the damn law."

Q. When he drove in?

A. That is right. He drove on up and "Hop" goes out the front door. I don't know where he went but he goes out the front room out the front door. The car come on up and John come to the door and called me. So I goes out to see what he wanted.

Q. That was John Goodman?

A. Yes, sir. I sent them home after my keys. I went out to get them and Tom handed me the keys.

Q. Tom handed you the keys?

A. Yes, sir, so when Tom handed me the keys George he started then, started toward Tom and Annie reached and got him and held him back. Well, when Annie reached and held him back George told Rob to go to him and to cut his guts out.

Q. Where was Rob at that particular time when George told him that?

A. Rob, I think, was in the kitchen. That is the door he come out of anyhow. He come out of the kitchen door and George told Rob to cut his guts out, so Rob started after him. Tom went back, backed up behind the car and said, "Uncle Rob, don't come any closer." Well, Rob stopped. George said, "Go ahead and cut his guts out." Rob started again and Tom backed on around beside the car and when he got to the corner of the car he shot in the ground and said "Don't come no closer", and when he come on down beside the car he shot him. He kept crowding him. He went as far as he

Harvey Mitchell.

could go. He backed up against a saw-frame and I think a tree there and he had gone as far as he could go.
page 183 } Q. Now, just a moment—when Tom first came in to see you state whether or not he said that a suit had been brought up here against you and wanted to get your title and transfer your car. Was anything like that said?

A. No, sir, not a word.

Q. You are certain of that?

A. Yes, sir, I am certain of that.

Q. Now, you were sober, as I understand it, when all this took place.

A. That is right. I hadn't drank a drop since two o'clock.

Q. And this took place a little after dark?

A. That is right.

Q. Now, where was Nancy DePriest who was afterwards married to Mr. Kerr?

A. She was on the front porch.

Q. Who was on the front porch with her?

A. Wesley Kerr, the boy that she married.

Q. Well now, could either one of them have seen what took place just prior to and during the shooting?

A. No, sir.

Q. Was it a physical impossibility?

A. That is right.

Q. Now, was George Lindsay under the influence of intoxicants at the time he was doing this cursing and abusing and abetting?

A. He was drunk.

page 184 } Q. Was Mr. DePriest under the influence of some intoxicant at the time he was advancing upon Tom?

A. That is right.

Q. Had Tom Mitchell, the defendant here, said one word to Lindsay or to Mr. DePriest before or during the altercation?

A. No, sir.

Q. Had he ever, at any time, addressed Mr. DePriest, the deceased?

A. I hadn't heard him say a word.

Q. Now, was that motor to that car of Tom's running or not?

A. No, sir, it was not.

Q. Are you certain of that?

A. I am certain of that. The lights on it were burning.

Harvey Mitchell.

Q. The lights were burning but the motor was not running?

A. That is right.

Q. Now, Annie Lindsay, the wife of George Lindsay, said she only took one drink there that day, and that there was no wine there except a little that Tom had. State whether or not you were in your car and went up to Holland's filling station.

A. I did go up to Holland's filling station and got a gallon of wine.

Q. Who was in the car with you at the time?

A. Me and George Lindsay and George Lindsay's wife and John Goodman.

Q. Well, who bought the gallon of wine?

A. George Lindsay's wife.

page 185 } Q. Annie Lindsay bought the gallon of wine?

A. That is right.

Q. Did you see her take a drink out of that gallon?

A. I seen her take a drink at the milking on this side of the bridge, and when she came back she took another drink.

Q. When you got back in the home did you hear Annie say anything about the wine?

A. No, I didn't.

Q. Do you know what became of the wine?

A. No, I don't. I didn't see the wine no more.

Q. But she bought a gallon of wine that day, the day that Mr. DePriest was shot?

A. That is right.

Q. Now, did it appear to you at the time Mr. DePriest was advancing upon your brother, Tom Mitchell, the defendant here, that Tom Mitchell's life was in danger?

A. Yes, sir, it was.

Q. That his body was in danger?

A. Yes, sir, that is right.

Q. Suppose this is the automobile, and this is the left-hand side, and the house would be right here, wouldn't it?

A. That is right.

Q. Now where would the public road be?

A. That runs down yonder.

Q. Did I understand you to say that when Robert DePriest was advancing on him Tom retreated around this side of the car around to here on the right-hand side of the
page 186 } car and Mr. DePriest followed him and Tom shot him along about the door of the car?

A. That is right.

Harvey Mitchell.

Q. In other words, he had retreated all around the car and Mr. DePriest followed him.

A. That is right.

Q. And he told him please not to come to him.

A. He said, "Uncle Rob, don't come no closer."

Q. And he kept on coming?

A. He kept on coming.

Q. And George Lindsay was aiding and abetting and telling him to keep on and cut his guts out.

A. Yes, sir.

Q. He shot in the ground the first time?

A. Yes, sir, and he kept on coming after he shot in the ground.

Q. And then he shot him?

A. That is right.

Q. Now, did you hear at any time Mr. DePriest tell Tom to leave the premises?

A. No, I didn't.

Q. Were you in a position to hear him if he had told him?

A. Yes, sir, because I was with him from the time he woke me up until he left there.

Q. Do you know whether George Lindsay had a knife at the time he was aiding and abetting Mr. DePriest?

A. No, sir, I didn't see any.

page 187 } Q. Did you see the knife in the hands of Mr. DePriest when he was advancing on Tom Mitchell?

A. Yes, sir, I did.

Q. Did you see the knife after the shooting?

A. That is right.

Q. Where was it?

A. Laying on the ground.

Q. Was it still open?

A. That is right.

Q. Who picked it up?

A. I did and shut it up and put it in his pocket.

Q. And put it in Mr. DePriest's pocket?

A. Yes, sir.

Q. Now, who put Mr. DePriest in the pickup, as they call it, or the automobile that they carried him to the hospital in?

A. I did.

Q. And he went on to the hospital?

A. That is right.

Q. Was Mrs. DePriest, the widow of the deceased, there when it happened?

Harvey Mitchell.

A. No, sir, she wasn't. I hadn't seen her for a couple of hours.

Q. Just subsequent to this what became of Tom Mitchell?

A. Tom got in his car and drove off, I would say 100 feet or 150 feet; and stopped, got out of his car and got back in his car and went on. What he got out for I don't know.

Q. Was Tom sober?

page 188 { A. Yes, sir, I couldn't tell he was drinking a drop.

Q. When did you next see Mrs. DePriest, if you saw her at all, subsequent to the shooting?

A. Seen her at the hospital on the following Sunday.

Q. How long did you remain on the premises after you had put Mr. DePriest in the automobile?

A. I would say fifteen minutes.

Q. And you still didn't see Mrs. DePriest?

A. That is right.

CROSS EXAMINATION.

By Mr. Spencer:

Q. Mr. Mitchell, it seems that these people fall roughly into two groups, witnesses for the Commonwealth, and witnesses for the defendant, the witnesses for the Commonwealth being the family, the wife and daughters and son-in-law of Mr. DePriest—on the other hand, your brother, Tom, yourself, "Hop" Elliott and Goodman. I gather from all of your testimony that strangely enough you and your brother and "Hop" Elliott and Goodman were all sober. Is that right?

A. Yes, sir.

Q. And in a general way all of the family of Mr. DePriest was sloppy drunk.

A. No, sir, they weren't sloppy drunk. Mrs. DePriest was sloppy drunk but Mr. DePriest was not.

Q. He must have been crazy drunk.

page 189 { A. No, he wasn't. He was drinking but he wasn't drunk. He was very much intoxicated but he wasn't drunk. He knew what he was doing all right, I think.

Q. I understood you to say on your examination in chief that your brother had done nothing at any time to offend Mr. DePriest.

A. That is right.

Q. He hadn't assaulted him or any member of his family?

Harvey Mitchell.

A. Well, they had my car keys and wouldn't give them to me.

Q. Was Mr. DePriest interested in your car keys?

A. I don't know whether he was or not, but George had them and George wouldn't give him the keys.

Q. I am talking about Mr. DePriest now. Did Mr. DePriest want your car or want to keep your car?

A. I don't reckon he did. He was taking up for his daughter.

Q. Had he had any part in the preceding quarrel or row?

A. No, sir.

Q. There had been no harsh words, no fight, no blows of any kind?

A. I heard George curse my brother once or twice.

Q. You didn't hear your brother curse him back?

A. No, sir.

Q. Certainly so far as Mr. DePriest, this dead man, is concerned, he had had no trouble whatever with your brother.

A. That is right.

Q. Your brother had not offended him.

A. That is right.

page 190 } Q. He had behaved himself perfectly?

A. That is right.

Q. He was sober?

A. That is right.

Q. He had not assaulted any member of his family?

A. That is right.

Q. Mr. DePriest had not told him to get off the premises?

A. That is right.

Q. And yet you say that Mr. DePriest pursued him around the car and into the face of death and into the face of a gun and yet you say he wasn't crazy drunk?

A. No, he wasn't crazy drunk.

Q. Just drunk?

A. No, he wasn't drunk, but he was drinking.

Q. Would you mind telling the court and jury what conceivable reason Mr. DePriest had for assaulting your brother in the manner you have described?

A. Well, when my brother got there John Goodman came in the house and called me and I went out there and he gave me my keys, my brother did. George Lindsay started at him and Annie grabbed George back and George said, "Go ahead and cut his guts out" and he started. He was in the kitchen. I reckon. That is the door he come out of. He come out the kitchen door.

Harvey Mitchell.

Q. Now, with reference to you, and with full liberty to you to answer these questions any way you want to, I would ask you please not to repeat unless you feel it is necessary, will you please answer my question and tell the court and the jury what reason Mr. DePriest had for assaulting your brother as you say he did?

A. Just George Lindsay told him to cut his guts out.

Q. You sit there and tell this court and jury—

By Mr. Martin: (interposing) I wish to object to the tone of argument of counsel.

By the Court: Mr. Spencer, you ask a civil question and in a gentlemanly and orderly way so it can be understood and he will answer you, and you must keep your temper under your shirt.

By Mr. Spencer: I apologize.

By the Court: I hate to have to call these matters so sharply to counsel's attention but I think it is absolutely necessary in order that we might have an orderly disposition of this trial here.

By Mr. Spencer: Might I say in my own vindication that perhaps I might have become vehement in my manner. If I said anything discourteous or unreasonable to the witness I would like to have it pointed out so I might correct it.

By the Court: It wasn't so much what you said, Mr. Spencer. What you stated was proper, I think, but it was the manner in which you said it. There is a right way to do everything and I think we get better results, and certainly it is necessary in order to have a fair and impartial trial, that you keep your temper. Use a moderate, usual tone of voice. Make your questions clear and then give the witness an opportunity to answer them in his own way, and, of course, he, at the same time, shall keep his temper under his shirt.

By Mr. Spencer: I have been unaware of any temper about the matter at all.

Q. Mr. Mitchell, if I have said anything out of the way I hope you will disregard it. Now, do you mean to tell this court that Mr. R. W. DePriest, without any provocation, without any reason that you can think of, except that his son-in-law told him to cut this man's guts out, did thereupon follow him out there and attempt to cut his guts out?

A. That is right.

Q. Where were you standing when all of that occurred?

Harvey Mitchell.

A. I was standing down about two-thirds of the way to the car from the house.

Q. Could you on that plat there, rough as it is, indicate to the court and jury about where you were standing? Hold it up so the jury can see it. This is the highway and, in a general way, I understand, this direction is Rustburg, and that direction is on past the DePriest home. This is page 193 } the roadway running into Mr. DePriest's home, and this is the front porch. This is the front room in which I understood you had been lying on a day bed, and this is the back porch. This is a closed, or capped, well just back of the house about some 40 feet, and a chestnut oak out beside this driveway, and the car had been headed back out and was setting about this position indicated there. Now, do you understand that?

A. What is this in here?

Q. That is supposed to be a chestnut oak.

A. And this other spot?

Q. That is the car, supposedly.

A. If this is the car there is an old well standing along over here.

Q. This is the well over here.

A. I know, but there is another one. That is the well that has been covered up. This is the one down here they use. I was standing about halfway between that car and that well.

Q. Then that would put you over in this neighborhood here.

A. I would say five feet from the car, about five feet from the car.

Q. About five feet from the car on the side next to the house?

A. That is right.

Q. Had you been in that position all of the time that Mr. DePriest was pursuing your brother?

A. That is right.

Q. You were there then before Mr. DePriest page 194 } came out of the kitchen?

A. I had been there ever since my brother gave me the keys.

Q. And Mr. DePriest came out of the kitchen and came out into the yard and started after your brother? .

A. That is right.

Q. Did he have to pass you?

A. Well, he went to the front of me.

Q. How far from you?

A. He come about seven or eight feet from me.

Q. Did he have the knife in his hand then?

Harvey Mitchell.

A. He sure did.

Q. Where was your brother then?

A. He was behind the car, backing up.

Q. He had already gotten over to the car?

A. Yes, sir, he was at the car but you see I was about five feet from the car.

Q. I understand you were on the side next to the house and Mr. DePriest passed you some six or seven feet up above.

A. That is right.

Q. And toward the back end of the car?

A. That is right.

Q. Did you attempt to help your brother or try to grab Mr. DePriest?

A. No, I didn't.

Q. You are a pretty good size man, aren't you?

A. Yes, sir, I am.

Q. What do you weigh?

page 195 { A. Do that come in this?

Q. We might leave it to the jury if you won't tell us.

A. If you want to know, about 250.

Q. And how tall are you?

A. Six foot two.

Q. Six foot, two inches, tall and weigh 250 pounds, and your brother is six feet, three, isn't he?

A. Something like that.

Q. And what does he weigh?

A. I couldn't tell you.

Q. He weighs around 200, doesn't he?

A. Close to it.

Q. And how big was Mr. DePriest?

A. He weighed something about 175 or 180 pounds.

Q. It has been said by some of the witnesses that he was about my size.

A. I couldn't tell you exactly what he weighed. I am just guessing.

Q. Was he about my size?

A. Something about your size.

Q. And although he was pursuing your brother with an open knife in his hand you didn't attempt to go around and grab him or do anything to help your brother?

A. No, I didn't, because wasn't but one coming toward him.

Q. I understand George Lindsay's wife was holding him.

A. That is right.

Harvey Mitchell.

- Q. Where were they?
- page 196 } A. Close to the porch.
- Q. That is something like 40 feet from where that car was setting to that porch, isn't it?
- A. Something like that.
- Q. In other words, it would be further than across this court room.
- A. Something like that, about 40 feet, or close to that.
- Q. And did George Lindsay ever get over close to the shooting?
- A. No, sir, he stayed over there next to the porch.
- Q. His wife held on to him?
- A. Yes, sir.
- Q. And you didn't attempt, by the use of anything, to go to your brother's rescue?
- A. No, sir, I didn't.
- Q. What sort of weather was it that night? Was it clear, dark, or what?
- A. I don't remember much but I think it was clear.
- Q. As a matter of fact wasn't that a long rainy spell about that time? Hadn't it been raining for days on end?
- A. Yes, sir, I think that flood had been in.
- Q. Wasn't that a dark, murky night?
- A. I just can't remember whether it was dark.
- Q. Didn't you all go down on the preceding evening to see the high water at Altavista?
- A. No, we went to Brookneal, but I think it had
- page 197 } stopped raining then.
- Q. But it was dark out there?
- A. It was sort of dark.
- Q. Was there any kind of artificial light?
- A. I didn't see none. What do you mean?
- Q. I mean by that did they have any lamps or electric lights. Do they have electric lights?
- A. No, they have lamps. There was a lamp in the dining room.
- Q. That would have been 50 or 60 feet from the scene and inside of the house.
- A. 45 or 50 feet.
- Q. It didn't help to see anything at the car.
- A. It was right after dark. You could see.
- Q. Right after dark and you could see?
- A. Yes, sir.
- Q. I understood this thing happened between eight and nine o'clock at night.

Harvey Mitchell.

A. It hadn't gotten good and dark. It had got dusk dark.

Q. You were able to see by the daylight and not by any artificial light?

A. That is right.

Q. The lights were burning on the car?

A. Yes, sir.

Q. I assume, like most automobiles, those lights were thrown toward the front, isn't that right?

A. That is right.

page 198 } Q. And they didn't shed any light back toward where this thing was taking place.

A. It shed out to the side. You could see.

Q. It didn't help you to see what was going on up behind that car.

A. That is right.

Q. Where did your brother get that gun from?

A. I don't know. He had it in the car.

Q. Did he have it when he got out of the car?

A. No, he didn't.

Q. Did he have it when he gave you the keys?

A. No, he didn't.

Q. At what stage of the encounter did he get the gun?

A. He got that gun out that door as he backed down beside that door and backed up against that saw frame.

Q. Did you see that?

A. Yes, sir, I did.

Q. The car, I take it, was in between you and your brother at that time.

A. Yes, sir, that is right, but it had glasses in it. I seen him when he reached in after the gun.

Q. But you could see it by daylight?

A. I seen him when he reached for it.

Q. Where did he get it from?

A. Out of the box on the dashboard.

Q. Did he open the door on his car?

A. No, sir, he just reached in the window.

page 199 } Q. Reached through the window into the box on the dashboard and got it out?

A. Yes, sir.

Q. You were able to see that?

A. That is right.

Q. Where was Mr. DePriest when he got the gun out?

A. He was coming right at the back wheel. I can show you better than I can tell you.

Harvey Mitchell.

By Mr. Martin: For convenience, can I get him to indicate on the plat which way the car was headed? That is not on there.

Q. This is put here for the car and the car was headed toward the main highway?

A. That is right.

Q. Let's put it that way then to show the front of the car.

Mr. Spencer: (continues)

Q. I understood from what you said you were standing over, as you have described it, about two-thirds of the way from the porch to the car or putting it differently, you were standing on this side of the car next to the house some five feet, more or less.

A. That is right.

Q. Mr. DePriest came by you from the kitchen door and passed to the rear of the car passing about seven
page 200 } feet from you.

A. That is right.

Q. That you then saw a knife in his hands.

A. That is right.

Q. That your brother had backed around the car and backed down toward the front end of the car and reached through the front window of the car and got the gun out of the compartment.

A. That is right.

Q. Where was Mr. DePriest when he done that?

A. Coming around and when Uncle Rob got at that wheel he shot in the ground and told him not to come no closer, and when he told him not to come any closer he made a step or two more and he shot him, and that is when he fell. He fell on the fender of the car.

Q. You could see all of that although you were standing on the other side of the car.

A. I surely could.

Q. Did your brother get in the car and go away then?

A. He got in and went about 100 feet or 150 feet and got out of the car and then got back in the car and went on.

Q. Did he stop to see how badly he had hurt his uncle?

A. No, he didn't.

Q. Did he express any feeling about having wounded him or killed him?

A. I be dog if I know.

Harvey Mitchell.

Q. Did he wait to see if he had killed him or
page 201 } not?

A. No, he didn't.

Q. Did he offer to take him to a hospital or do anything for him?

A. I guess that is what he stopped down there for and thought he would have more trouble and left.

Q. The fact is he expressed no concern about his uncle. He expressed no wonder as to whether he had killed him or not, but got in the car and drove away, stopping outside of the yard.

A. Yes, sir, and I was on the way of fixing him to go to the hospital.

Q. You were within a few feet of this.

A. Yes, sir.

Q. Who picked him up?

A. I think Lindsay got there first, if I am not mistaken.

Q. Lindsay got there first?

A. In my opinion he did.

Q. And you picked him up?

A. That is right. When I picked him up Lindsay went to open my car door and when I picked him up "Hop" was standing, I would say, halfway from me to the car, and George went on in front of me to open the car door.

Q. "Hop" was standing where?

A. When I picked him up "Hop" was standing between me and my car.

Q. Where was "Hop" when the shooting occurred?

A. I don't know. I didn't see "Hop".

Q. You got to Mr. DePriest after George got
page 202 } to him and you picked him up. You said you found
a knife lying on the ground.

A. I did.

Q. Was it this knife here or some other knife?

A. Something about that same knife. I couldn't swear to it.

Q. Was it open?

A. Yes, sir.

Q. Which blade was open, do you know? Does that appear to be the blade that was open?

A. That seems to be the blade.

Q. And what did you say you did with it?

A. Shut it up and put it in his pocket.

Q. Didn't you know at that time that your brother had shot this man and wounded him?

Harvey Mitchell.

A. I knew he had shot him.

Q. And that you had witnessed an assault on your brother with that knife?

A. I didn't know he had shot him bad enough for him to die.

Q. And you closed the knife up and put it back in his pocket?

A. That is right.

Q. Did you report that matter to any of your sheriffs or deputy sheriffs or the Commonwealth Attorney?

A. No, I didn't. Ain't nobody asked me.

Q. Where did you go after that?

page 203 } A. I carried Nancy DePriest, one of Rob DePriest's daughters, to the hospital. I went by Winfall first and got some gas and went by my brother's house to tell him that my brother Tom had shot Rob.

Q. You then had the keys to your car?

A. I had the keys that Tom gave me.

Q. Now, are you positive, Mr. Mitchell, that you gave your brother the keys to the car when he got there?

A. The second trip he gave me the keys.

Q. Then if John Goodman says he gave you the keys immediately after the shooting he is mistaken?

A. Yes, sir. He gave me the keys before that.

Q. Now, do you know Mr. John Board Bailey?

A. I know him.

Q. Did you on that night see Mr. Bailey at Mr. DePriest's home?

A. I seen him after I had come back from the hospital.

Q. Tell the court and jury whether or not you told Mr. Bailey at that time that at the time of this shooting you were inside on the cot and you didn't see any of it.

A. I did not tell Mr. Bailey that.

Q. You deny that you told him that?

A. I sure do.

Q. Did you see Mrs. Katherine Johnson the next morning at the store?

A. I can't remember whether I did or not.

Q. Mrs. Johnson's husband runs a store.
page 204 } doesn't he?

A. That is right.

Q. Were you at the store the next morning?

A. I don't remember.

Q. Do you remember whether or not you then told Mrs. Johnson at her husband's store the following morning that

T. R. Mitchell.

you were in there on the cot and that you didn't see any of it?

A. No, I didn't tell her either.

Q. You deny that?

A. I ain't told nobody I was on the cot.

Q. Would you deny if Mrs. Nancy Kerr and Mr. Kerr, then her sweetheart and now her husband, would say that they were out on the front porch and that when Tom came they heard this talk and talk about shooting somebody, or noise. and that you from the inside on the cot called to Nancy and said, "Nancy, you better go out there. If you don't somebody is going to get hurt."?

A. No, sir, I didn't say that.

Q. You deny that?

A. I do.

The witness stands aside.

page 205 } The defendant,

T. R. MITCHELL,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Martin:

Q. You are Mr. Thomas R. Mitchell, the accused in this case?

A. That is right.

Q. And before going any further I want you to look at this diagram, which I understand is not drawn to scale but is just intended to roughly show the general situation, and ask you if it about correctly shows the situation there.

A. I kind of think there is a tree on this side of the road, right here close to this place.

Q. In other words, this round dot here I understand was supposed to represent a tree. Is that on the proper side of the road or is the tree on the other side?

A. It is over on the other side.

Q. Mr. Mitchell, you did shoot your Uncle Robert W. DePriest, did you not?

A. Yes, sir.

Q. And that occurred, I believe, on the 16th of August of this year, did it?

A. I think so.

T. R. Mitchell.

Q. Were you and your uncle, Mr. DePriest, on friendly terms and relationship?

A. Yes, sir.

Q. Was there any bad blood or grudge between you at all?

A. No, sir.

page 206 } Q. What was the occasion of your going to the house on the 16th of August?

A. To get my brother and his car.

Q. Why did you want to get your brother and his car?

A. Well, he had been off about two days, I think, and they were running his car up and down the road there.

Q. Who was running it up and down the road?

A. George Lindsay had it one time.

Q. Do you know whether or not your brother was off on a spreeing party?

A. I thought so anyway.

Q. So you went there looking for your brother and to get his car?

A. Yes, sir.

Q. When you left home to go did you know your brother was at DePriest's and did you go direct to the DePriest home?

A. No, sir.

Q. Did you go somewhere else looking for him first?

A. Yes, sir, I went to George Lindsay's back down here the other side of Mount Zion.

Q. You didn't find him at Lindsay's?

A. No, he wasn't there. I was told there that he had gone to the DePriests'.

Q. On that information did you go to your Uncle Robert DePriest's home?

page 207 } A. Yes, sir.

Q. Was anybody in your car with you when you were going around looking for your brother?

A. "Hop" and my two twin boys.

Q. "Hop" is Fulton Elliott?

A. Yes, sir.

Q. How old are your two boys?

A. They will be seven in February.

Q. They are just six now?

A. Yes, sir.

Q. And they are twins, are they?

A. Yes, sir.

Q. When you got to the DePriest home about what time of day was it?

T. R. Mitchell.

A. I would say it was around between seven and eight o'clock, something like that. I don't know exactly.

Q. What did you do when you got to the DePriest home?

A. I just done like I always done, got out of the car and went on in the house.

Q. Speak to them?

A. Spoke to them and all of them spoke to me.

Q. Where was your brother that you were seeking?

A. He was laying in the front room on a cot.

Q. That brother's name is what?

A. Harvey Mitchell.

Q. Did you arouse him up?

A. I waked him up and told him to come on page 208 } and let's go home, and so he got his hat and come on out on the porch, and George Lindsay was there and then "Hop" went around to Harvey's car to bring it home and wasn't any keys in it. John said George had Harvey's keys, so I asked George about them and he didn't say much about it, and then Harvey asked him for them himself.

Q. Harvey asked George to give him the keys to his own car?

A. He sure did.

Q. What did Lindsay say when he was asked to give over the keys?

A. He said he come in that car and was going to leave in it and wasn't going to leave until he got ready, and I offered to carry them home myself.

Q. You offered then to take them home in your car if they wanted to go?

A. Yes, sir.

Q. Then what happened?

A. He wouldn't give me the keys and Harvey said he didn't want to leave the car for them to drive it and told me to take the distributor cover off.

Q. When Harvey told you to take the distributor cover off to prevent it from being run did you go to his car to do that?

A. Yes, sir.

Q. Did you take the distributor cover off?

A. No, sir, I didn't.

page 209 } Q. Why?

A. George's wife run up beside me and caught hold to my arm and I seen it would be a little fuss or some-

T. R. Mitchell.

thing of the sort and I pushed her out of the way and walked on up to my car.

Q. Was George Lindsay's wife under the influence of intoxicants at that time?

A. She sure was.

Q. Was George Lindsay drunk or drinking too?

A. He was.

Q. So then, when she ran up to prevent you from taking it you shoved her aside?

A. Yes, sir.

Q. And went on and got in your car?

A. Yes, sir.

Q. Now, did your brother, Harvey, say anything to you as to what to do?

A. He told me to come on and get his other keys, which I did.

Q. Where did you go after the other keys?

A. I went to my brother, Earl's house.

Q. Did anybody go with you to Earl's house to get the extra keys?

A. John Goodman.

Q. Did you go to Earl's house and get the keys?

A. Yes, sir.

Q. What did you do with your two little kids?
page 210 } A. I stopped at the house and left them. They had both gone to sleep and I put them in bed, or at least carried them to the back porch and my wife put them to bed.

Q. Did you go into your home at all on that occasion or did you just let the kids out on the back porch?

A. I didn't carry them in the house. I carried them to the back porch and she opened the door and they went in.

Q. Did you get any gun from your home on that occasion?

A. No, sir.

Q. Did you go into your brother Earl's house?

A. No, sir.

Q. Did you get any gun there?

A. No, sir.

Q. Did you have any gun when you first went to the De-Priest house?

A. It was in my car.

Q. What was the occasion of it being in your car?

A. Well, I kept it in there right smart and I had been to town Thursday and got some money and brought it back to Rustburg.

T. R. Mitchell.

Q. Whereabouts in your car was the gun?

A. In the pocket.

Q. Do you mean the side door pocket?

A. No, sir, up in the dashboard.

Q. Up in that little compartment in the dashboard?

A. Yes, sir.

page 211 } Q. Had Mr. DePriest taken any part in any way in the discussion between you and Harvey and Lindsay and his wife about the keys when you had that discussion on the first trip to the DePriest home?

A. No, sir, he had not.

Q. Had you said anything out of the way to him or had he said anything out of the way to you on that trip?

A. No, sir.

Q. What was Mr. DePriest's condition so far as drinking was concerned?

A. I could just tell he had been drinking some.

Q. You could tell he was somewhat under the influence of intoxicants?

A. Yes, sir.

Q. Well, when you had gotten the keys from your brother, Earl, at the direction of Harvey you returned to the DePriest house?

A. Yes, sir.

Q. Now, just what were you after, Mr. Mitchell, in going back there? What was your object?

A. I just went back after the car and my brother.

Q. How long had your brother been out on a party, do you know?

A. Probably two or three days, I couldn't say for I don't know exactly.

Q. Now, when you got back to the DePriest house you drove in the usual and customary road to enter the house, did you?

A. Yes, sir.

Q. Did you turn your car around?

A. Drove up around Harvey's car, backed around and got out of the way so they could back up Harvey's car.

Q. You put your car in a position so that Harvey's car could be turned around?

A. So he could back his car up and turn it around too.

Q. Do you know whether or not your motor was running when you got out of the car?

A. It was not.

T. R. Mitchell.

Q. Do you know whether or not you left your lights burning?

A. I did leave the lights burning.

Q. Why did you leave the lights burning?

A. So I could see how to walk to the porch.

Q. Did you go up to the porch when you got there?

A. No, I didn't go clear to the porch.

Q. Now, pick up there in your own way and tell the jury what happened.

A. I went on out just by that well a little and John had called Harvey and he had come out and I handed him the keys, and when I handed him the keys George seen me.

Q. When you say "George" you mean George Lindsay?

A. Yes, sir, George Lindsay, and he started toward me and when he started toward me Annie caught him and wouldn't let him come.

page 213 } Q. That is his wife?

A. Yes, sir, and he turned to Rob DePriest and said, "Kill the damned son of a bitch", and then Uncle Rob started.

Q. Up until the time that George Lindsay hollered to Rob to "kill the damned son of a bitch" DePriest had not done anything to you?

A. No, sir.

Q. But when DePriest started toward you did he have any weapon?

A. He had a knife in his hand.

Q. Was it open or closed?

A. Open.

Q. How far off was he from you at the time he started toward you with this open knife?

A. I would say he was probably some ten or twelve feet—maybe a little more than that. I couldn't say how far but somewhere in the neighborhood of maybe 15 feet.

Q. What did you say or do to Mr. DePriest?

A. I told him, "Uncle Rob, I didn't come over here after any fuss."

Q. Did he stop?

A. Then he stopped and George said to him, said, "Kill him". and he started to me.

Q. Did you stand your ground or not?

A. I backed all the way around the car.

Q. What were you backing for, Tom?

T. R. Mitchell.

A. Out of his way. He was still coming to me
page 214 } all the time and I was begging him not to come.

Q. You asked him more than once not to come on you. Did you feel that in his condition, your uncle's condition, being somewhat under the influence of liquor, that he might really do you serious damage?

A. Yes, sir, I sure did, and I backed all the way around the car and got to the door and reached in the car and got the gun.

Q. Now, in the meantime had George Lindsay "aggged" him on or said anything more to him?

A. Yes, sir, he was talking all the time and cursing.

Q. When you got the gun did you say anything further to your uncle about standing where he was?

A. I shot down to the ground and I told him, I said, "Rob, please don't come no further."

Q. Did he stop?

A. He kept on.

Q. Did you feel that you really needed to shoot him in order to protect yourself from serious damage?

A. I had it to do.

Q. Then after shooting in the ground you say he didn't stop but still kept on?

A. Yes, sir.

Q. Did he have his knife just in his hand or had he raised it?

A. He had his hand raised like this. (indicating)

Q. Was the knife open?

page 215 } A. Yes, sir.

Q. Was he along the right-hand side of the car when the shooting occurred?

A. Yes, sir, he backed me around the car and was on the right-hand side.

Q. Tom, after the shooting what was your reaction? What occurred to you? Were you excited?

A. Yes, sir.

Q. What was your thought? Now, just tell the court what you did and what you had in mind.

A. I got in the car and started off and then I decided to get him to the hospital and George and them run in the house. I got out of the car.

Q. You started off and then thought about getting him to the hospital. Did you stop?

A. Yes, sir.

T. R. Mitchell.

Q. Did you get out?

A. Yes, sir.

Q. Then what?

A. Then George and them started toward the house and I said, "If I go back up there there will be more trouble" and I got in the car and come on up here and give up.

Q. You said when you said that, you mean you thought that to yourself?

A. Yes, sir.

Q. Did you come on by your home on the way
page 216 } up here to the court house?

A. I sure did.

Q. What did you do? Did you tell your wife what happened?

A. Yes, sir.

Q. Did you leave your gun there?

A. Yes, sir.

Q. Did you come straight on up to the court house and surrender yourself to the law?

A. I sure did.

Q. Who received you, do you know?

A. The new deputy here.

Q. You surrendered yourself to him. Did they bail you right away?

A. Then I got bail right away.

Q. Then did you later receive any further message from the law to come and surrender again, or anything?

A. Yes, sir. Then I had to come back the next morning.

Q. You received a message?

A. Yes, sir.

Q. Nobody came for you?

A. No.

Q. When you received the message that the "law" wanted you the next morning did you voluntarily come up here again?

A. Come right on up, yes, sir. Rob DePriest was as good a friend as I ever had in my life.

Q. Did you see Mrs. DePriest when you went
page 217 } back the second time with the keys to your
brother's car?

A. No, sir, I did not.

Q. Was she round about at all?

A. No, sir, I did not see her.

Q. Did you see her in the yard or anywhere?

T. R. Mitchell.

A. I did not see her.

Q. Had you been drinking yourself any that day?

A. I took one little drink of wine and took that with Mrs. DePriest and Mr. DePriest both.

Q. That was when you first arrived?

A. That was the first time I went there.

By the Court:

Q. Who did you say you took that drink with?

A. Mr. and Mrs. DePriest.

CROSS EXAMINATION.

By Mr. Thompson:

Q. Tom, that wasn't the first drink you had had that day, was it, the one you took with Mrs. DePriest?

A. Yes, sir.

Q. Where did you get your wine?

A. We bought the fifth of wine down here at Puckett's store and hadn't opened it until we got there.

Q. Puckett's store is down here near Mt. Zion?

A. Yes, sir.

Q. Who was with you?

A. "Hop" Elliott.

Q. Did he take some?

page 218 } A. He didn't take any until he got there.
Whether he took any then I don't know because I didn't see him.

Q. You hadn't drank any except that that day at all?

A. No, sir.

Q. When did you become so interested in Harvey? Harvey don't live with you.

A. When I saw George and them driving his car up and down the road I didn't know what was the matter with him.

Q. Wasn't Harvey in the car with them?

A. Not one time.

Q. You heard Harvey testify.

A. He was with them when they brought Mrs. Johnson home.

Q. Did you see them then?

A. Yes, sir, I seen them then.

Q. You knew Harvey was in the car?

A. He was in there then but he hadn't been in there.

Q. It was his car?

T. B. Mitchell.

A. Yes, sir.

Q. Harvey doesn't live with you, does he?

A. No, sir.

Q. This isn't the first time that Harvey has gone away and gone on a several day spree, is it?

A. No, sir.

Q. Why did you at this particular time suddenly develop an interest in Harvey and want to go and get him and bring him home?

A. I just know he had been drunk for two or
page 219 } three days and I was going to get him home. They
had been running the car up and down the road
for the last two days and every one of them driving was half
drunk.

Q. Hadn't you heard that John Mitchell had filed suit against Harvey that day?

A. No, sir.

Q. You hadn't heard that?

A. No, sir.

Q. You didn't know anything about it?

A. No, sir.

Q. When you went over there, Tom, you went in and you had this wine and you say you gave Mrs. DePriest a drink and gave Mr. DePriest a drink. Did Mr. DePriest take a drink then?

A. He sure did.

Q. Did they appear to be drunk at that time?

A. They weren't sober.

Q. Then you took the wine along and saw that they were under the influence and yet you gave them some more.

A. They asked me for it.

Q. Asked you for it?

A. Yes, sir.

Q. Who took it out of the car?

A. I went to the car and got it and carried it in there to them.

Q. At that time was "Hop" Elliott in there?
page 220 } A. I don't think so.

Q. Where was "Hop"?

A. I think he was still outside.

Q. Where did you leave him?

A. I just don't recall but I don't think he was in there.

Q. Did you leave him in the car?

A. He was sitting in the car when I got out of it.

T. R. Mitchell.

Q. Now, you and George Lindsay had the first little squabble about the keys on the back porch, didn't you?

A. It wasn't no squabble. I merely asked him for the keys.

Q. What ever was said was said there on the back porch?

A. Right off the back porch a little bit. It wasn't on the porch.

Q. And you and Harvey both were there?

A. Yes, sir.

Q. "Hop" there?

A. "Hop" was there somewhere. I don't know exactly where he was but I think he was behind Harvey's car. He wasn't standing right where we were. He was standing right in front of my car at one time.

Q. But he went in the house with you, didn't he?

A. I am talking about when I left. When we went there the first time.

Q. Did he come in afterwards?

A. He come in afterwards.

Q. How long did you stay in there?

• page 221 } A. I would say we probably stayed in there twenty or thirty minutes talking.

Q. Mr. DePriest wasn't mad and wasn't trying to fight you or cause any trouble there?

A. No, sir.

Q. And did George attempt to hit you or fight you in any way when he went outside?

A. No, sir.

Q. Now, did Hop go around to get Harvey's car before you went in the house? You said "Hop" went to get his car.

A. He sure did when we started away from there the first time and wasn't any keys in it.

Q. When was it "Hop" went to get in Harvey's car and discovered that it had no keys in it?

A. That is when we come out and Harvey said he was ready to come home.

Q. That is when you told "Hop" to go and get in the car?

A. Yes, sir.

Q. Was there any reason Harvey shouldn't have known about it?

A. I reckon Harvey thought the keys were in the car as well as "Hop" did.

T. R. Mitchell.

Q. Do you suppose Harvey knew where the keys were?

A. After he turned around he asked George what did he do with them.

Q. I want to know why he thought in the first page 222 } place they were in the car.

A. He didn't know. He asked George where the keys were and George said he had them.

Q. Didn't you say he told "Hop" to go and get in the car?

A. I was the man that told "Hop" to drive Harvey's car and he started around the car but hadn't gotten in it and "Hop" said "Ain't no keys in it."

Q. Then it was that Harvey asked George for them?

A. Asked George for them.

Q. Why were you going to take the distributor off the car?

A. To keep them from driving it.

Q. Hadn't they been driving it with Harvey in there and with his permission for two or three days?

A. He was going to leave and he didn't want them driving it up the road if he wasn't in it.

Q. As a matter of fact, hadn't George Lindsay used that car that very afternoon to go down to Mr. Moore's store to get some little purchase down there?

A. Harvey was asleep and didn't know that he drove it then.

Q. But he was with them when they came to Winfall and took Mrs. Johnson home.

A. Yes, sir, he was with them then.

Q. He wasn't objecting to it then, was he?

page 223 } A. I don't know. You will have to ask him that.

Q. So far as you know he didn't object?

A. So far as I know he didn't.

Q. Now, as a matter of fact, Tom, when you left there the first time didn't you go home and go in your house and get this gun out of your house?

A. I did not.

Q. Is that your gun?

A. Yes, sir.

Q. Now, when you took that gun back home why did you put the empty shells in the heater?

A. I dumped the shells out on the table and handed the

T. R. Mitchell.

gun to my wife and told her that I was going to Rustburg and give myself up.

Q. What time?

A. I don't remember exactly what time it was but I would say it was around—I don't know—it was straight from the time of the shooting and I come straight on up here. I got to the jail before they passed with Rob DePriest.

Q. Wasn't it about 11:00 o'clock?

A. I don't know. It was somewhere between 9:30 and 11:00 o'clock, but what time I don't know.

Q. And you consulted counsel that night, didn't you?

A. Yes, sir, I come right on up here.

Q. And you consulted your lawyer that night?

A. No, sir, I did not. It was the next morning.

Q. It was the next morning you consulted him the first time?

page 224 } A. Yes, sir, the next morning.

Q. You say you were bailed that night?

A. Yes, sir.

Q. Who bailed you?

A. I went my own bail.

Q. You went your own bond?

A. Yes, sir.

Q. According to your theory of the case you hadn't committed any crime. Why did you come to give yourself up?

A. Because I had shot a man. I would like to know why come I hadn't.

Q. You considered you had committed a crime?

A. I shot him to keep him from killing me.

Q. You considered you had committed a crime and that is why you came to give yourself up?

A. Sure, I shot him.

Q. Now, you are sure that when you got over there you gave Harvey his keys just as soon as you got there?

A. I gave Harvey his keys standing right beside the well, not the old well you are talking about. You haven't got the other one on there.

Q. The well they are using?

A. Yes, sir.

Q. Why didn't Harvey get in his car and drive away? Why didn't you get in your car and drive away?

A. I started toward my car and George Lindsay started after me and his wife caught him.

T. R. Mitchell.

page 225 } Q. Right at the porch?

A. Out from the porch, I would say maybe 10 feet.

Q. You weren't over five or six steps from your car at the time.

A. I was above the car, probably 20 feet.

Q. What were you doing up there?

A. That is where I was standing at.

Q. How far were you from the car when George Lindsay first came out and started cursing you?

A. I just didn't measure it.

Q. I know you didn't measure it but how many steps do you imagine you were from it?

A. I would say ten.

Q. Now, didn't you have time to make ten steps and get in your car and get away from there before Rob DePriest could have possibly have gotten to you, or George Lindsay either one?

A. I did not.

Q. Did you wait until they came to you before you started to move at all?

A. No, I didn't wait until they got to me. I started walking, backing back and talking to them.

Q. Your car had a door on both sides, didn't it?

A. Yes, sir.

Q. Why didn't you get in on the left-hand side?

A. The door on the driver's side you can't undo if the glass is up on that side. You can go out there and try it now.

page 226 } Q. When you went around the other side couldn't you have gotten in the car as easy as you could have reached through the door and reach in the pocket and get the gun and shoot the man?

A. I didn't have time to get in.

Q. Couldn't you have gotten in in less time than it took you to get the gun and shoot the man?

A. No, sir.

Q. You can open the door on that side, can't you?

A. Yes, sir.

Q. Do you know any reason why Rob DePriest should have tried to cut you?

A. The only reason was George Lindsay putting him on me. He was sicking him on me like a dog.

Q. You have known Rob DePriest all your life?

T. R. Mitchell.

A. All my life.

Q. And did you ever know him to do anything of that kind before?

A. I don't know whether I have or not.

Q. You don't recall it, do you? You say you begged him not to come to you?

A. I sure did.

Q. Did he see your gun?

A. No, sir, not until I reckon he seen the fire from it when I shot the first time.

Q. Now, at the time you fired that gun was there anything to keep you from backing around in front of the car?

A. A wood saw and a tree both on that side.

page 227 } Q. Are you sure about that?

A. I am pretty sure of it.

Q. Now, as a matter of fact isn't the tree on the other side of the driveway?

A. I took it for granted it was on that side.

Q. You don't recall?

A. No, sir, of course I couldn't swear to it. I don't exactly remember.

Q. Granting there was no tree there, couldn't you have backed on around in front of that car and even gotten away from there?

A. I did not know where George Lindsay was. He had a knife as well as Uncle Rob did.

Q. Didn't you say that George was back at the porch?

A. He was at the porch.

Q. The fuss started at the porch.

A. He was at the porch the last time I saw him but I didn't know where he was at the whole time while I was backing all the way around the car.

Q. Was it light enough for you to see? Could you have seen George Lindsay?

A. Not if he was back out in the dark. You could see up next to the house on account of the light from the house.

Q. But you couldn't see out there?

A. No, sir.

Q. How could you see the knife in Mr. DePriest's hand?

A. I could see it from the light from the
page 228 } kitchen.

Q. In other words it was too dark to have seen it by daylight, wasn't it?

A. Well, you could see a little that night. I wouldn't say how dark it was.

T. R. Mitchell.

Q. The way you saw it was from the light from the kitchen?

A. I saw it, whether it was from the light from the kitchen or daylight.

Q. Did Mr. DePriest say anything to you?

A. He never opened his mouth the first time except the time he said, "I am going to cut your damned guts out." He sure said that. That was after George Lindsay got him started toward me the last time.

Q. Now, as a matter of fact, Tom, isn't the truth of the whole matter that you were drinking and had been drinking all day?

A. No, sir.

Q. Wait until I get through—and that you had heard about Harvey's trouble?

A. No, sir.

Q. And you took it into your head—

A. (interposing) You have asked me that once.

Q. If you will wait until I get through you can answer it. You had heard of Harvey's trouble and you went over there to try to get him to give you the title to his truck and car in order that you might transfer them before John
page 229 } Mitchell might possibly get a judgment against
Harvey? Isn't that the truth of the matter?

A. I had not.

Q. I understand you had had this gun all the time, the first time and the last time?

A. Yes, sir.

Q. You had had it all the time.

A. Yes, sir. You remember the day I come from town, the day I brought you some money by there and you put it in the bank for me?

Q. That is right. That was the day before the shooting?

A. The day before the shooting, late that evening.

Q. That is correct.

A. I had that gun with me while I had that money and never had taken it out of the car.

Q. One thing I haven't got clear in my mind, Tom, and that is this: Was it light enough for you to see Mr. DePriest's knife by daylight or not?

A. Well now, I don't know whether it was daylight or the light shining from the kitchen or back light from the car. You see all of them lights was there. It was light enough to see him and see what he had in his hands.

Q. Which was it, do you know?

R. K. Tucker.

A. I do not.

By the Court:

Q. Where does Harvey Mitchell live?

A. He lives with my brother, Earl Mitchell.

The witness stands aside.

page 230 } By Mr. Overbey: We rest.

REBUTTAL EVIDENCE FOR THE COMMONWEALTH.

R. K. TUCKER,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Thompson:

Q. Mr. Tucker, how old are you?

A. 68 years old.

Q. How far do you live from the home of the late R. W. DePriest, Jr.?

A. Well, I reckon four or five hundred yards.

Q. How long have you known Mr. DePriest?

A. 23 years.

Q. Do you know his general reputation as a peaceable, law abiding citizen in the community in which he lived?

By Mr. Martin: (interposing) We object. The ground of our objection is that it is incompetent, irrelevant and wholly immaterial. No issue has been made in this case by us about the reputation of Mr. DePriest.

By Mr. Spencer: Your Honor, if it hasn't been I never have seen a reputation for a man being peaceful and law abiding attacked. They have got him attacking a
page 231 } man with a knife.

By the Court: The objection is sustained.

Note: At this point court took a recess of one hour for lunch.

E. L. MAYBERRY,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Thompson:

Q. Mr. Mayberry, you live at Winfall, I believe.

A. Yes, sir.

Q. I want to ask you if on the Sunday following the occurrence over at Mr. DePriest's when he was shot if you heard John Goodman at Mr. Markham's filling station say that he was standing—

By Mr. Martin: (interposing) I think the proper thing would be not to lead the witness but to let the witness state what the man said.

By Mr. Thompson: I asked the witness if he made this statement and I think it proper for me to repeat the statement that I asked John Goodman if he made and ask this man if he made that statement.

By Mr. Martin: Ask this witness what that man on that occasion said.

page 232 } By the Court: I think possibly Mr. Martin is right on that, Mr. Thompson. I think you should call his attention to the time and place and ask him what conversation he had with the witness that you are seeking to impeach. That is certainly a leading question and suggests the answer. I know you have laid the foundation for impeaching the witness. Now then, you ask him what conversation, if any, he had with him, and ask him what he did say and let him tell you what was said.

By Mr. Thompson: All right, sir.

Q. Tell me what John Goodman did tell you on that occasion.

A. Well, on the Sunday evening I went in the store and John was in there and, of course, I heard talk of this accident and I asked John Goodman—I said, "John, where was you? Was you over there when it happened?" He said, "Yes, I was standing right there." I said, "How did the thing happen?" He said, "They were arguing" and said, "Rob DePriest started at Mitchell and he stepped between them and said 'look out, Rob, he will shoot you. You better get back'", and he said he shot once at the ground and the second shot was the shot that hit him.

Ottie Moore.

Q. Is that all that was said at that time?

A. Yes, sir.

No cross examination.

The witness stands aside.

page 233 { OTTIE MOORE,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Thompson:

Q. Your name is Ottie Moore?

A. Yes, sir.

By Mr. Martin:

Q. How old are you, son?

A. Eleven.

By Mr. Thompson:

Q. Did George Lindsay come to your mother's or Father's store down near Mr. DePriest's home on the afternoon or evening that Mr. DePriest was shot?

A. Yes, sir.

Q. About what time did he come there?

A. About 7:30.

Q. How did he come?

A. In a car.

Q. Was he driving the car?

A. Yes, sir.

Q. What did he come for?

A. A box of salt.

Q. How close did you get to him?

A. Well, I got close to within three feet of him, I think.

Q. Did he pay for the salt?

A. Yes, sir.

Q. Did you deliver it to him?

page 234 { A. Yes, sir.

Q. Did he at that time appear to be drunk?

A. I couldn't tell it.

By Mr. Martin: If your Honor please, we object to that. In evidence in chief the Commonwealth injected into this case

Ottie Moore.

by direct questions to witnesses as to the condition of George Lindsay and made that an issue in the case by their own testimony in chief. Now in rebuttal they can't put on other witnesses to fortify things they went into in chief.

By Mr. Thompson: Your Honor, the defendant has put witnesses on the stand time after time to say that George Lindsay was drunk. Now we are proving by this young man that he was not drunk. If that is not rebuttal evidence I don't know what rebuttal evidence is.

By the Court: I overrule the objection. I think it competent.

By Mr. Martin: Your Honor, we would like to be heard on that.

By the Court: I will be glad to hear you but it is quite apparent to the court the question whether he was drunk or not was introduced by the defendant and this is the first time that the prosecution has had to meet it.

By Mr. Martin: That is where we think the page 235 } court is in error. The question of the condition of George Lindsay, whether he was drunk or sober, was raised by the Commonwealth itself by their evidence in chief and if you would care to have the record on that we would be glad to have it read, and when the Commonwealth asks a witness whether he was drunk or sober, or his condition as to drunkenness they bring that into the case in chief right there and must put all their evidence on to sustain it before they reach rebuttal. I think that the record will show that the Commonwealth itself injected into the case the condition of George Lindsay as to intoxication and I think if you permit the stenographer to read his notes you will see that they themselves asked their witness, George Lindsay, on direct examination as to his condition and we overcame that, or sought to do so. I think if you will let the stenographer read the record you will find that is true.

By the Court: Mr. Martin, if that be true, if the issue was brought into the case by the prosecution, then I think that your position is well taken.

By the Court: Refer to the record there and see—

By Mr. Spencer: (interposing) Here is what I think happened. Counsel in their opening statement made the assertion that this all came about because of drunkenness of this family and those witnesses were, of course, brought forward to testify as to not the drunkenness but as to the facts in the case, and for the pur-

Ottie Moore.

pose of not bringing them back to the stand a second time to deny it they were asked about it themselves and this matter is entirely within the discretion of the court. Here is a conflict of testimony, even if Mr. Martin's contention is correct, which I submit it is not, why would the Commonwealth be undertaking to prove what it don't believe, that George Lindsay was drunk, or inject that in issue into the case? That is the most ridiculous proposition I ever heard. It was to make it not necessary to bring that same witness to the stand a second time to deny it.

By Mr. Martin: If my position is absurd, with all deference to my able and distinguished friend, then I think the law is absurd, and I see no absurdity in it. It is a rule of law enforced in every court of law and why the Commonwealth enters a field of interrogations is immaterial. If they enter it and ask the witness a question that is sufficient.

By Mr. Spencer: I will say if he can show me authority for that proposition I would go back to the farm where I belong. We concede that the Commonwealth did
page 237 } ask those questions on direct examination simply because it had been stated in the opening statement that that was a fact and there was no sense in bringing the witness back a second time.

By the Court: My recollection, gentlemen, is that not only Lindsay himself but several other witnesses were asked whether Lindsay was drunk, and asked whether Mr. DePriest was drunk, and asked whether Mrs. DePriest was drunk, and asked about the condition of everybody present at the DePriest home with reference to their condition, all of those. Well then the defense comes along and offers positive evidence that he was drunk.

By Mr. Martin: Contradicting their evidence.

By the Court: Why isn't this rebuttal?

By Mr. Martin: You can't rebut a condition of affirmation. "A" affirms. You put him on to affirm. The defense comes in and denies the affirmation. That ends it. You can't come in to rebut my denial of your affirmation. There would be no end of rebuttal. You would rebut and rebut and surrebut and surrebut forever and a day. When any litigant, Commonwealth, or whoever he be, opens the question and
page 238 } asks a *questions* about a certain matter, bringing that matter for the first time into the case, he must put his evidence on in chief as relating to that matter. He can't hold a part of it back, put one witness

Ottie Moore.

on to say something and wait and see whether the defense is going to contradict or controvert it, and after he finds he is controverted puts another group of witnesses on to bolster up his original witness. He must put all his original case in and not a piece of it and leave a balance back. That is not rebuttal. When we deny his affirmation that don't open the field for rebuttal. Rebuttal is to answer something that we have brought in new.

By the Court: Let me hear from you, Mr. Thompson.

By Mr. Thompson: All of the Commonwealth's evidence was that George Lindsay was not drunk. Now the defense comes along and puts witnesses on the stand to prove that he was drunk. Now, at the very time that his witnesses are testifying that the man was so drunk that he could scarcely stand up here is a man who saw him at that time. We did not know what their witnesses were going to testify to. We couldn't read their minds. We had no opportunity to know when they were going to say he was drunk or where. Now, since they have put their evidence on we do know and we are bringing this witness to prove that at the very
page 239 } time they say this man was drunk to say *the* he
wasn't. Now, I think that is clearly admissible. It is not to bolster up our case but to rebut what their witnesses have said.

By Mr. Martin: He introduced the question whether he was drunk or not and he is out of court.

By the Court: You have presented a case where one fellow says "'tis" and the other fellow says "'tisn't". Now, it seems to the court that that is about as far as you can go to get any light on the subject. These witnesses were asked if they were drunk or sober and you asked for all the information you could get about it and they all denied it and said they were not drunk. Mrs. DePriest said she had one drink of wine and another said "We had a drink", and I can't say that you didn't introduce it.

By Mr. Thompson: Certainly we introduced it but I think we have a right to contradict their witnesses.

By Mr. Spencer: There are two propositions. In the first place originally, adherence or non-adherence to that rule is entirely in the discretion of the court. Now second: Those witnesses called by the Commonwealth were witnesses who were there. They were not called to prove
page 240 } whether somebody was drunk or not. They were
called to prove how this man was killed. Now,

Ottie Moore.

they could have been taken down from the stand at that time, put back in the witness room, wait until they said they were drunk, and then put them back on the stand to prove the same thing, or in the orderly trial of a case, and an expeditious trial, I submit they might, while on the stand, be asked that same question in as much as counsel in their opening statement disclosed all we knew of any such contention. Now then, an outsider, somebody not related to either side, had an opportunity, if he is stating the facts right, to come here and testify that wasn't true. Another thing, he says in his opening statement they were drinking or drunk. The witnesses in this case have the people all practically undressed, barefooted, and we didn't know that, and particularly, this man, George Lindsay, the cause of it all, they say. We didn't know that. Now, here is a young man that saw him and to enforce any such rule as that would be, I think, sacrificing the administration of justice.

By the Court: Do you think it is a matter that lies within the discretion of the court?

By Mr. Spencer: Absolutely no question about it.

By the Court: Mr. Spencer, I am inclined to page 241 } think that if it is a matter within the discretion of the court, and, of course, the general rule is the court has rather broad discretion in the admission and exclusion of evidence, when it is nothing prejudicial, and in this case I can't see that anybody would be prejudiced. If you had known of the witness or had him at the time or known in advance you could have put the witness on in the first instance and not be prejudiced. Now, as far as the court is concerned rebut him if you want to do so. I am going to let the evidence go in for the time being.

By Mr. Martin: If Your Honor please, we except to the court's ruling and save the point, and in so doing state that it was as much a part of the Commonwealth's case to show the condition of the participants in this alleged offense and the witnesses as a part of the original case as any other item in it. We think it is decidedly prejudicial to the defendant to permit the introduction of this evidence as offered.

By the Court: Go ahead and ask the questions.

By Mr. Thompson:

Q. Did he appear to be drunk?

A. If he was I couldn't tell it.

Leonard Moorman.

page 242 } CROSS EXAMINATION.

By Mr. Martin:

Q. Son, when was that?

A. August 16th.

Q. What time?

A. About 7:30.

Q. Suppose Mr. George Lindsay had admitted he had had about four drinks, couldn't you tell that?

A. No, sir.

The witness stands aside.

By Mr. Martin: Will the court please record us, for convenience, every time as making the same objection to the testimony of each and all of the witnesses as to the condition of all of the witnesses as heretofore made as to the testimony of one witness and give us an exception to all of them, to each and every one of them that they ask any question about the condition of the parties, in the same motion?

By the Court: The court can't pass upon an objection until you get to it. I don't know what they are going to ask them.

By Mr. Martin: I am trying to save time.

By the Court: The court can't rule on a question until it is presented.

By Mr. Martin: My question is very clear. I thought that it was simply that in event those questions were asked would you treat us as having made that objection. I don't, of course, expect your honor to anticipate the evidence but it was founded upon that line of questioning and that is all.

By the Court: Go ahead and examine the witness.

LEONARD MOORMAN,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Thompson:

Q. Are you Mr. Leonard Moorman?

A. Yes, sir.

Q. Did you see Mr. Robert DePriest on August 16th, the date that he was killed?

Leonard Moorman.

A. Yes, sir.

Q. About what time did you see him?

A. Around 1:00 o'clock.

Q. You saw him at 1:00 o'clock?

A. Yes, sir.

Q. Where did you see him?

A. He went over to the home place fixing to put in a bridge. He was there when we drove up.

Q. When you drove up at 1:00 o'clock he was page 244 } there?

A. Yes, sir. A bridge had washed up and we all got together and put in a bridge. I was there until about 4:00 o'clock, I reckon, somewhere around 4:00 o'clock.

Q. At the time you were with him did he appear to be drunk or under the influence of intoxicants?

By Mr. Martin: We object to that question on the grounds heretofore assigned to this line of testimony and if the court desires I will restate those grounds.

By the Court: I understand you make the same objection and I give you the same exception.

By Mr. Thompson:

Q. Answer the question.

A. He did not appear to be under the influence of anything.

CROSS EXAMINATION.

By Mr. Martin:

Q. Mr. Moorman, were you over at Mr. DePriest's house at any time after sundown that day?

A. No, sir.

Q. And you didn't see him or know anything about his condition from 7:00 o'clock on, did you?

A. Not from 4:00 o'clock on.

Q. Your last contact was around 4:00 o'clock?

A. Around 4:00 o'clock.

The witness stands aside.

John Board Bailey. Jack Moorman.

page 245 } JOHN BOARD BAILEY,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Thompson:

Q. Mr. Bailey, on the night Mr. DePriest was killed did you see Harvey Mitchell at the home of Mr. DePriest?

A. Yes, sir.

Q. Will you please tell the court and the jury if he made a statement to you relative to where he was at the time that Mr. DePriest was shot and if so what?

A. Yes, sir.

Q. Tell the court and the jury what he said.

A. He told me he was in the front room laying on the lounge; that he didn't know nothing about it. I asked him the question.

Q. When did he tell you that?

A. Between 12:00 and 1:00 o'clock.

Q. You are a son-in-law of Mr. DePriest, I believe.

A. Yes, sir.

No cross examination.

The witness stands aside.

JACK MOORMAN,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Thompson:

Q. Did you see Robert DePriest on August 16th, the day that he was killed?

A. Yes, sir.

page 246 } Q. About what time did you see him?

A. Well, I reckon about 1:00 o'clock when I first seen him and when I left it was about 4:00 o'clock.

Q. Were you all together from 1:00 until 4:00 o'clock?

A. Yes, sir.

Q. During that time did he appear to be drunk or under the influence of intoxicants of any kind?

A. Not any ways that I could tell.

By Mr. Martin: I move that the question and answer be

Jack Moorman.

stricken out and I renew my same objection to this witness' answer as was made to the preceding witnesses' testimony on the same ground.

By the Court: Mr. Martin, I think your objection with reference to his condition at 1:00 o'clock is well taken. I think that is too far ahead.

By Mr. Martin: Then we ask that the evidence of this witness and the preceding one be stricken out.

By the Court: No, the other witness said he saw him at 4:00 o'clock.

By Mr. Martin: This man said the same thing. He was with him from 1:00 until 4:00.

By the Court: I think evidence of his condition at 4:00 o'clock would be relevant and material, but I can't see where it would be at 1:00 o'clock. A man can get sober in that length of time.

By Mr. Thompson: They claim that at 1:30 when they came to the home he was drunk.

By Mr. Spencer: And one witness, Goodman, said he had been drunk for two weeks.

By the Court: I think you are right, so I think that it is relevant.

By Mr. Martin: Your Honor please, you are ruling on a point of law from a statement of counsel on one side. We think we should be at least afforded an opportunity to express a contra view to the court.

By the Court: I thought we had argued that out and you were merely asking to make the same objection. Now, if you want to re-argue it I will be glad to hear you.

By Mr. Martin: I don't wish to re-argue the same thing. Counsel said something to you about the deceased having been drunk for two weeks. The witness, Goodman, testified that the deceased made the statement to him while
page 248 { on the way to the hospital that he had been drunk for two weeks. If you want to show that the deceased didn't say that that would be admissible testimony, but whether he was drunk two weeks or not is not. We didn't introduce any evidence on that except the statement made by the man. They can rebut the statement and show the man didn't make it.

By the Court: The witness for the defense stated that Mr. DePriest said on his way to the hospital that he had been on a drunk for a week or something.

By Mr. Martin: If they want to deny he said that that is perfectly proper and we have no objection, but as to this

Mrs. Katherine Johnson.

witness' testimony I am now asking that it be not admitted on the same ground that I have stated to the preceding witness and an exception is taken to your Honor's ruling in admitting it.

The witness stands aside.

MRS. KATHERINE JOHNSON,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Thompson:

Q. Mrs. Johnson, did you see Harvey Mitchell on the morning after Mr. DePriest was killed, at Winfall?

A. I certainly did.

Q. Where was he?

A. Right in front of the store and his car drove page 249 } right up to the porch.

Q. At that time did he make any statement relative to the killing of Mr. DePriest and how it happened and what he knew about it?

A. I asked him how it happened and he said he didn't know because he was in the house laying on the lounge and didn't see any of it.

Q. Now, on the day that Mr. DePriest was killed did you go to the home of Mr. and Mrs. DePriest?

A. I certainly did.

Q. About what time were you there?

A. About four o'clock. It was supper time, fixing to eat supper.

Q. Did you eat supper with them?

A. I certainly did.

Q. What time did you leave?

A. I don't know exactly what time we left, but about five-thirty when we got back home and we came straight home.

Q. During the time you were there was Mr. DePriest, Mrs. DePriest, George Lindsay or Annie Lindsay, or any of them drunk?

A. Wasn't anybody drunk and if any of them was drinking I didn't see any of them drinking.

Q. Did you see any evidence of drinking?

A. I saw John laying out. He was the only one I saw. He was laying on the floor.

Mrs. R. W. DePriest, Jr.

page 250 } By the Court: Do you note the same objection to that, Mr. Martin?

By Mr. Martin: The same objection and same exception, and subject to that objection and exception I want to ask her a question without waiving it.

CROSS EXAMINATION.

By Mr. Martin:

Q. I understand you did not observe either George Lindsay or any of the other parties there to be drinking and they didn't even appear to have had a drink.

A. Not to my knowing.

Q. Their conduct and such as it was was if any of them had a drink you couldn't tell it.

A. I didn't know it.

By Mr. Thompson:

Q. Mrs. Johnson, are you any kin to any of the parties involved?

A. No.

The witness stands aside.

MRS. R. W. DePRIEST, JR.,
Recalled.

DIRECT EXAMINATION.

By Mr. Thompson:

Q. It has been testified to by John Goodman, Mrs. DePriest, that he milked two of the cows on the night that Mr. DePriest was killed and that you were so drunk that you couldn't milk. Is that true or not?

page 251 } By Mr. Martin: (interposing) One moment!

This woman's condition was testified in direct evidence by herself as to her condition on the witness stand. Now, this is an original witness of the Commonwealth who, if my recollection is right, said she wasn't drunk; that she had one drink of wine, and was asked her condition by the Commonwealth. She also testified about her milking.

By Mr. Thompson: I withdraw the part about her drinking but I do want to ask her how many cows she milked herself.

Mrs. R. W. DePriest, Jr.

By the Court: I sustain Mr. Martin's objection and will let you ask another question.

By Mr. Thompson:

Q. Mrs. DePriest, did John milk any cows?

A. He started to milk one and probably he milked a teacup of milk and my husband finished the one he was milking and he finished that cow, and I was milking six cows instead of four.

Q. Now, there has been some question raised as to where that tree in the yard is with reference to the driveway. I believe it was stated by Tom Mitchell that the tree, in his opinion, was on the side of the driveway opposite the house. Will you please tell us where it is?

A. No. There is a wood saw setting on the page 252 } right-hand side going out. Like going out the wood saw was setting over here. The wood saw was setting over there and the tree over on this side.

Q. Now, I will ask you this, is there any tree over here at all?

A. No tree at all.

Q. There was no tree on the right-hand side of that car the way the car was setting that night?

A. That is right.

Q. It has been testified to by several witnesses for the defendant that you and Mr. DePriest met Harvey Mitchell and John Goodman and Annie Lindsay and George Lindsay on your way to milking and that they had a gallon of wine and gave you a drink and Mr. DePriest a drink. Please tell us whether or not that is correct.

A. I didn't see any at all.

Q. Did you or your husband either one take a drink?

A. Neither one took a drink. Harvey was curled up in the back seat of the car and John Goodman rode with my husband and I in the hind end of the truck.

Q. You mean to say John Goodman did not get in the car with George and Annie and Harvey going from there to the house but got in the back end of your truck?

A. In the back end of our truck.

Q. If he said he rode with the others he is mistaken?

A. Yes, sir.

page 253 } The Witness stands aside.

Jack L. Miles. R. K. Tucker.

JACK L. MILES,
recalled.

DIRECT EXAMINATION.

By Mr. Thompson:

Q. Mr. Miles, did you see Mrs. DePriest on the night that her husband was killed?

A. Yes, sir.

Q. What time did you see her?

A. Quarter to eleven.

Q. At that time—

By Mr. Martin: (interposing) We, of course, make the same objection if he is asking about the condition of Mrs. DePriest at 11:00 o'clock at night. We make the same objection that we made as to the other about the inadmissibility of any such evidence, and the further objection is it is irrelevant, incompetent and immaterial, and should not come in at this time as it was a part of the Commonwealth's case and we are reserving an exception if your Honor still rules as you did.

By the Court: Gentlemen, this shooting took place around 7:30 or 8:00 o'clock.

By Mr. Spencer: Between 8:00 and 9:00.

By the Court: There is evidence here that she was drunk and I reckon he could tell about her condition. I will permit him to answer the question.

By Mr. Martin: My exception is noted.

page 254 { By the Court: I overrule your objection and permit you to except.

By the Witness: She came to my house at quarter to eleven and told me her husband was shot and I talked to her between two and five minutes and if she was drinking anything I couldn't tell it, and I know that she was not drunk.

The witness stands aside.

R. K. TUCKER,
Recalled.

DIRECT EXAMINATION.

By Mr. Thompson:

Q. Mr. Tucker, how far do you live from the home of Mr. R. W. DePriest, Jr.?

R. K. Tucker.

A. Approximately four or five hundred yards.

Q. How long have you known Mr. DePriest?

A. Twenty-three years.

Q. Do you know his general reputation for truth and veracity?

By Mr. Martin: We object to that.

By the Court: All right. Do you want to address yourself further to the court?

By Mr. Martin: Yes, sir.

By the Court: Mr. Thompson, do you want to page 255 } reply? I think I am prepared to pass on that question. That very question was argued at some length in chambers before lunch.

By Mr. Thompson: I understood your Honor's ruling was that it was admissible since the dying declaration has been attacked. The dying declaration set up one set of facts and they have sat up a different set of facts.

By the Court: That was not my ruling. That was not my understanding. I don't think so. I don't think that is admissible. I don't think this evidence is admissible. You must have misunderstood me. You can attack the dying declaration in a method provided by law but not this way.

By Mr. Thompson: We are not attacking it.

By the Court: His evidence isn't here. The dying declaration is here and it is on a different basis. The basis is absolutely different from that of testimony of witnesses. I don't think there is any use of taking time out. I sustain the objection to that question.

The witness stands aside.

By the Court: Gentlemen, I have some very page 256 } definite views about that, but if you want to empty your spleen, well, I will listen to it.

By Mr. Martin: We are satisfied.

By Mr. Spencer: Judge, I can't produce authority but I think I can give you a pretty definite clear-cut version of that theory.

By the Court: You are so beguiling I am afraid I might believe you if I was to turn you a loose, but I don't believe that is the law.

By Mr. Spencer: If the Commonwealth had any objection I would object to that.

By the Court: You are very persuasive, Mr. Spencer.

R. K. Tucker.

By Mr. Spencer: I am persuasive only when I know what I am talking about.

By the Court: The element of the condition that gives weight and gives rise to a dying declaration is the question of impending death.

By Mr. Spencer: That is true as a substitute for the oath and cross examination.

By the Court: In other words, if it does have page 257 } sanctity the sanctity of the dying declaration is based upon the fact that it is made at a time when the declarant is laboring under a sense of impending death and he has no hope whatever of recovery and that people in that condition are not very likely to lie about a matter. In other words, just getting ready to go into the great beyond and they are supposed not to be inclined to misrepresent the facts in the case.

By Mr. Spencer: Your Honor, may I call your attention to this proposition? That is the substitute. That is what takes it out of the rule of hearsay and admits it. Otherwise the rule of hearsay would bar it. But now I would like to state the proposition—

By the Court: (interposing) Let the Court give you a further one. Now, of course, you may show—you may show whether the declarant at the time he made the declaration was in such mental or physical condition as to make it; whether he was rational; whether his faculties were clear, or whether he made it in response to pressure, and all such matters. Those are questions that go to the weight.

By Mr. Spencer: Would the court let me state my proposition?

By the Court: Go ahead and state it.

page 258 } By Mr. Spencer: It is just as simple, with deference, I think as it can be, and it is not along that line at all. It permits that statement to go in in violation of the rule of hearsay on exactly the basis your Honor has stated, but the credibility of a witness, any witness, when attacked by a denial or a statement of contrary facts it is attacked and certainly if Ananias had made a dying statement his dying statement if denied by a witness would be impeached. Now then, it is impeached by this statement or contrary statement of facts. Now, if that is true is not, under the general rule that you may prove the reputation of any witness whose testimony is contradicted or impeached by proving their reputation for truth and veracity, just as applicable to him as it is to the witness on the stand? Would

R. K. Tucker.

your Honor take, we will say, the late John W. Daniel's dying statement on the same basis as you would that of Ananias? That, I think, sir, is just as plain as it can be.

By the Court: Have you any authority for it, Mr. Spencer?

By Mr. Spencer: I didn't bring the whole library down here.

By the Court: You have been Commonwealth page 259 } Attorney for how many years?

By Mr. Spencer: Eleven and three-fourth years, and some before that.

By the Court: You ought to have it on your fingertips.

By Mr. Spencer: I have stated what I think the law is. If you can tell me anybody that carries their books around with them and are able to bob up with a book to substantiate everything they say I don't know who it is.

By the Court: Mr. Spencer, is that all you want to say?

By Mr. Spencer: Yes, sir.

By the Court: With all deference, the court feels impelled to follow the rules of evidence that are laid down by the authorities and are accepted, but you are presenting a proposition here for which you don't offer any authority and I am not, in a matter as serious as this, willing to undertake to coin some new law that I don't know anything about. Now, you may be right but I wouldn't feel like adopting that view without some authority in some degree. You show me some authority and I will be glad to listen to it.

By Mr. Spencer: Do these gentlemen of de- page 260 } fence admit the rule to be that where a witness has testified and there is evidence to the contrary that that witness' testimony is put in issue and that you then may prove that witness' reputation, good reputation for truth and veracity, or shall we start with that proposition? I think I can undoubtedly get you authority in ten minutes on that proposition.

By the Court: It is my understanding of the general rule, Mr. Spencer, that when the evidence of a witness has been attacked by any manner known to the law that you may show his general reputation in the community in which he lives for telling the truth, but I don't understand that that same rule applies to a dying declaration.

By Mr. Spencer: Well, sir, I must confess that I have not a library with me and can't produce it.

By the Court: If he had testified I would be prepared to admit it.

R. K. Tucker.

By Mr. Spencer: Yet because his lips have been sealed in death you can't do the same thing?

By the Court: The other side can't attack him. If his lips are sealed in death we are all sorry. The other page 261 } side can't attack him. They haven't undertaken to attack him.

By Mr. Spencer: Four or five of them have given a version entirely different from what he gave on his death bed.

By the Court: One group testified to one set of facts and another group testified to another set.

By Mr. Spencer: I will not press my point any further.

By the Court: I am going to sustain the objection. I may be wrong.

By Mr. Thompson: (continuing examining the witness)

Q. Do you know Mrs. Katie L. DePriest?

A. Yes, sir.

Q. Do you know her daughter, Annie?

A. I do.

Q. Do you know her daughter, Nancy?

A. I do.

Q. Do you know George Lindsay?

A. Yes, sir.

Q. Do you know their reputation for truth and veracity?

A. As far as I know it is all right.

Q. You know it, do you?

A. I say as far as I know it is all right. I never knew any other thing.

By the Court: There was no objection but I don't think the question was in the right form.
page 262 } By Mr. Martin: We will object.

By the Court: Call him back and ask him if he knows the reputation in that particular community.

By Mr. Thompson:

Q. Do you know the reputation of the several people mentioned in the community in which they live?

A. It is all right as far as I know.

By the Court: You answer his question. Answer his question.

By Mr. Thompson:

Q. Do you know what reputation they bear in that community?

Holcomb Morris.

A. It is good.

Q. Do you know it?

A. Yes, sir, I could say I know it.

Q. And what is it?

A. It is good.

By the Court: Now you have done what you ought to have done in the first place.

The witness stands aside.

page 263 } HOLCOMB MORRIS,
 having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Thompson:

Q. Mr. Morris, where do you live?

A. About a mile and a half from Mr. DePriest toward Michell's Mill.

Q. Do you know Katie DePriest?

A. Yes, sir.

Q. Do you know her daughter, Mrs. Annie Lindsay?

A. Yes, sir.

Q. Do you know George Lindsay?

A. Yes, sir, raised up right at me.

Q. Do you know the reputation of each and all of them?

By Mr. Martin: We object to that.

By Mr. Thompson:

Q. Do you know the reputation of Katie L. DePriest, Annie Lindsay, Nancy Kerr and George Lindsay for truth and veracity in the community in which they live?

By Mr. Martin: We object to that question, if it please the court. It is irrelevant, incompetent and entirely immaterial in every respect.

By the Court: In what respect is it improper?

By Mr. Martin: He is asking about the reputation of people who have never testified.

page 264 } By Mr. Thompson: Every one of them have testified.

By the Court: Every one of them have testified. It is the

Luther Moses.

court's understanding if he wants to show their good reputation he can do it.

By Mr. Thompson: I beg your pardon, I believe Nancy Kerr hasn't testified. I withdraw her name.

By the Court: Take them one by one and see if they testified.

By Mr. Thompson:

Q. Do you know the reputation of Mrs. Katie L. DePriest in the community in which she lives for truth and veracity?

A. Yes, sir.

Q. What is it? Is it good?

A. It is good.

Q. Do you know the reputation of George Lindsay in the community in which he lives for truth and veracity?

A. Yes, sir.

Q. What is it?

A. Good.

Q. Do you know the reputation of Annie Lindsay in the community in which she lives for truth and veracity?

A. Yes, sir.

Q. What is it?

A. Good.

The witness stands aside.

page 265 } LUTHER MOSES,
 having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Thompson:

Q. Where do you live, Mr. Moses?

A. I live in Kingston.

Q. Do you know the reputation of Mrs. Katie L. DePriest in the community in which she lives for truth and veracity?

A. It is good.

Q. I say do you know her reputation?

A. Yes, sir.

Q. What is it?

A. It is good.

Q. Do you know the reputation of her daughter, Annie Lindsay, for truth and veracity in the community in which she lives?

A. It is good.

Ottie Tucker.

Q. Do you know the reputation of George Lindsay?

A. It is good.

CROSS EXAMINATION.

By Mr. Overbey:

Q. You say you live at Kingston?

A. Yes, sir.

Q. Where is that?

A. On 29.

Q. How far do you live from Mrs. DePriest?

A. Six miles.

Q. How far do you live from Mr. Lindsay?
page 266 } A. About the same distance. He is there with
them.

Q. Mr. Lindsay lives there with them?

A. Yes, sir.

Q. You know that?

A. Yes, sir.

The witness stands aside.

OTTIE TUCKER,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Thompson:

Q. Mr. Tucker, how far do you live from the home of the late R. W. DePriest?

A. About a half-mile I would say.

Q. Do you know the general reputation of Mrs. Katie L. DePriest in the community in which she lives for truth and veracity?

A. Yes, sir.

Q. What is it?

A. You can depend on what she tells you.

Q. Do you know the reputation of her daughter, Annie Lindsay, for truth and veracity in the community in which she lives?

A. Yes, sir. You can depend on what she says.

Q. Do you know the reputation of George Lindsay in the community in which he lives?

A. Yes, sir. You can depend on what he tells you.

Q. Are you related to any of the parties?
page 267 } A. No, sir.

Herbert Moore.

CROSS EXAMINATION.

By Mr. Martin:

Q. Did you ever hear anybody discuss the reputation of Mr. Lindsay?

A. No, sir.

Q. Did you ever hear anybody discuss the reputation of Annie Lindsay?

A. No, sir.

Q. Did you ever hear anybody discuss the reputation of Mrs. DePriest?

A. No, sir.

Q. Does George Lindsay live at the DePriest home?

A. He lives there now, I think. I don't know how long he has been living there.

Q. In the same house with Mrs. DePriest?

A. I think so.

Q. Don't you know that, sir?

A. I don't know where he lives at now.

The witness stands aside.

HERBERT MOORE,

having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Thompson:

Q. Mr. Moore, how far do you live from the page 268 } home of the late R. W. DePriest, Jr.?

A. About three-quarters of a mile.

Q. Do you know the reputation of Mrs. Katie L. DePriest in the community in which she lives for truth and veracity?

A. It is all right, good.

Q. First, do you know the reputation?

A. Yes, sir.

Q. What is it?

A. It is good.

Q. Do you know the reputation of Annie Lindsay in the community in which she lives for truth and veracity?

A. Yes, sir.

Q. What is it?

A. It is good. It is all right.

Q. Do you know the reputation of George Lindsay in the community in which he lives for truth and veracity?

Jake Gibson.

A. Yes, sir.

Q. What is it?

A. It is good.

CROSS EXAMINATION.

By Mr. Martin:

Q. Did you ever hear anybody discuss and talk about Mrs. DePriest's reputation for truth and veracity?

A. No, sir.

Q. Did you ever hear anybody discuss the reputation of Annie Lindsay?

A. No, sir.

Q. Did you ever hear anybody discuss the reputation of George Lindsay?

A. No, sir.

Q. Where does George Lindsay live?

A. He lives three-quarters of a mile from me with Mrs. DePriest.

Q. How long has he been living with Mrs. DePriest?

A. He has been living there about two months or longer.

Q. Been living there in the house for about two months?

A. Yes, sir.

Q. Previous to that he lived separate and apart in a house of his own?

A. Ever since he has been there he has lived with them. He hasn't been there much over two months.

Q. Where did he live before he went to live at the DePriest house?

A. He lived over near Mt. Zion awhile and lived at different places around.

Q. Where did he live last before he went to the DePriest house to live?

A. Over near Mt. Zion.

The witness stands aside.

page 270 }

JAKE GIBSON,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Thompson:

Q. Mr. Gibson, how far do you live from the home of the late Mr. R. W. DePriest?

Lucas Morris.

A. Between three-quarters and a half-mile.

Q. Do you know the general reputation of Mrs. Katie L. DePriest for truth and veracity in the community in which she lives?

A. It is all right, I suppose.

Q. Do you know her reputation?

A. Well, how do I know?

Q. I say do you know it?

A. No, I don't know it. I think I do.

Q. Have you ever heard it discussed?

A. No, I never heard it discussed. I never heard anything said about it.

Q. Never heard anything either way?

A. No, sir, never heard nothing being bad and nothing being good. I haven't heard nothing specially about her.

The witness stands aside.

page 271 }

LUCAS MORRIS,

having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Thompson:

Q. Mr. Morris, do you know the reputation—first, where do you live?

A. I live down near Mr. DePriest.

Q. How far?

A. About a mile and a half.

Q. Do you know Mrs. Katie DePriest's reputation for truth and veracity in the community in which she lives?

A. Yes, sir, it is good as far as I know.

Q. Do you know the reputation of Annie Lindsay?

A. Yes, sir, that is good.

Q. Do you know the reputation of George Lindsay?

A. Yes, sir.

Q. What is it?

A. It is good.

CROSS EXAMINATION.

By Mr. Martin:

Q. You ever heard anybody discuss the reputation of Mrs. Lindsay?

A. I don't know as I have.

Walter Morris.

Q. Ever heard any discussion of what sort of reputation Annie Lindsay bore?

A. No, sir.

Q. Ever heard any discussion of what sort of reputation George Lindsay bore?

A. No, sir.

Q. Then you really don't know what reputation page 272 } they bear in that neighborhood.

A. No more than I know them.

Q. You know them and that is your personal view, is that right?

A. I have been knowing them all my life.

By Mr. Martin: I move that his evidence be stricken out.

By the Court: What have you to say, Mr. Thompson?

By Mr. Thompson: I think that is right.

By the Court: (addressing the jury) You gentlemen will disregard the entire testimony of the man.

The witness stands aside.

WALTER MORRIS,

having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Thompson:

Q. Mr. Morris, how far do you live from Mr. DePriest's home?

A. Somewhere about a mile and a half, I reckon.

Q. Do you know the reputation of Mrs. Katie L. DePriest in the community in which she lives for truth and veracity?

A. Yes, sir.

Q. What is it?

page 273 } A. Good.

Q. Do you know the reputation of Annie Lindsay in the community in which she lives for truth and veracity?

A. Well, no, she don't live right in the neighborhood.

Q. You don't know her as well?

A. No, sir.

Q. You know George Lindsay?

A. Yes, sir.

Q. What is his reputation for truth and veracity?

A. Good.

Walter Morris.

CROSS EXAMINATION.

By Mr. Martin:

Q. You say Annie Lindsay doesn't live in that neighborhood?

A. No, sir.

Q. You don't know anything about her reputation?

A. Oh yes, I have seen her.

Q. I say you don't know anything about her reputation.

A. No.

Q. And George Lindsay lives in that neighborhood?

A. No, sir, but he used to. He lived there adjoining places with us.

Q. You know his reputation?

A. Yes, sir.

Q. Did you ever hear anybody discuss his reputation?

A. Just how do you mean?

Q. I mean talk it over, discuss what sort of
page 274 { reputation the man had.

A. No, sir.

Q. Did you ever hear anybody discuss Mrs. DePriest's reputation?

A. Well, I don't know as I have.

Q. Do you know who George Lindsay is?

A. Yes, sir, I know George Lindsay.

Q. Does he and his wife live together?

A. I reckon they do.

Q. You don't know his wife, do you?

A. Yes, sir, I know his wife.

Q. His wife is named Annie Lindsay?

A. Yes, sir.

Q. And that is the woman whose reputation you don't know.

A. That is right.

Q. And they don't live there at the DePriest home, do they?

A. Well, I couldn't say right at this time. They didn't up until a little while back.

Q. And you never heard any reputation discussed by anyone?

A. No, sir.

By Mr. Thompson:

Q. Have you ever heard anything against Mrs. DePriest or George Lindsay, either one?

John Mattox.

A. No, sir.

The witness stands aside.

page 275 } JOHN MATTOX,
 having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Thompson:

Q. Mr. Mattox, how far do you live from the home of the late Robert W. DePriest, Jr.?

A. I think around two miles.

Q. Do you know Mrs. Katie L. DePriest?

A. Yes, sir.

Q. Do you know her reputation for truth and veracity in the community in which she lives?

A. Well, as far as I know she is all right.

Q. Do you know her general reputation for truth and veracity?

A. Well, she is supposed to be all right.

Q. I don't think you understand my question. First I want to know if you know what the people in the community say about her reputation for truth and veracity.

A. They say, all I ever heard speak of her, say she was all right, the DePriest family and Mr. DePriest. I know that. I am personally acquainted with him.

By Mr. Martin: We object to that.

By Mr. Thompson:

Q. You can't tell about Mr. DePriest's reputation. I am only asking you about Mrs. DePriest's reputation. From what you have heard in the community do you know what the people in the community say generally about Mrs. DePriest's general reputation for truth and veracity.

page 276 } A. All I know is the family of DePriests is all right.

By Mr. Martin: We object to that answer.

By Mr. Thompson:

Q. Did you ever hear anything against Mrs. DePriest's reputation for truth and veracity?

Wesley Kerr.

By Mr. Martin: The issue is first do you know the general reputation and you can't budge from that unless that be established first.

By the Court: He says he doesn't know.

By Mr. Martin: He is asking if he knows anything against it instead of asking an affirmative question. "Do you know her reputation?" He has got to ask *her* that first before he can go into the other.

By the Court: I sustain the objection.

By Mr. Thompson: The fact that people in the community have never heard anything against the person's reputation has been held repeatedly as the best evidence of a good reputation.

By the Court: Of course that is evidence, but page 277 } before you can give the evidence as to it you must state that you know it. You have got to first establish that he knows it and if he don't know it he can't say anything as to what it is.

The witness stands aside.

WESLEY KERR,
recalled.

DIRECT EXAMINATION.

By Mr. Thompson:

Q. Mr. Kerr, it has been testified by "Hop" Elliott that he was on the front porch of Mr. DePriest's home at the time Mr. DePriest was shot.

A. He was not.

Q. I believe you testified on yesterday that you saw the fire from the gun at the time Mr. DePriest was shot and you were standing then in the back door to the front room leading out to the back porch, is that right?

A. Yes, sir.

Q. Could you have seen the fire from that gun if Tom Mitchell had been on the opposite side of the car from the house?

A. I could not.

Q. On which side of that roadway is that tree that stands beside the driveway?

A. Next to the house.

Q. Is there any tree on the other side of that driveway?

A. No, sir.

Nancy Kerr.

page 278 }

CROSS EXAMINATION.

By Mr. Martin:

Q. You say Elliott was not on the front porch?

A. He was not at the time of the shooting.

Q. If you weren't on the front porch how do you know where Elliott was?

A. I had just left from the front porch.

Q. You mean he wasn't there at the moment you left.

A. He was not there when I left.

Q. Where was he?

A. I don't know where he was when I left.

Q. You don't know where he was?

A. I know he wasn't on the front porch when I left.

Q. And you don't know what he saw?

A. No, I don't know what he saw.

The witness stands aside.

NANCY KERR,

having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Thompson:

Q. Mrs. Kerr, it was testified to yesterday by "Hop" Elliott that at the time your father was shot that he was on the front porch. Were you on the front porch at the time that your father was shot?

A. Yes, sir.

Q. Was "Hop" Elliott there?

A. No, sir.

page 279 } Q. Were you able to hear the conversation between George Lindsay, your father, Tom Mitchell and any others from the front porch?

A. No, sir.

Q. You didn't hear anything that was said?

A. No, sir.

Q. Did "Hop" Elliott make a statement to you at the Lynchburg Hospital relative to what he knew about it on the night your father was in the hospital?

A. Yes, sir.

Q. Please tell the jury and the court what he told you.

Nancy Kerr.

By Mr. Martin: We don't recall any foundation having been laid in that respect.

By Mr. Thompson: I asked "Hop" Elliott yesterday when he was on the witness stand that question, if he told her that he was out behind a tree and didn't see any part of it, and that is what I am referring to.

Q. Mrs. Kerr,

By the Court: (interposing) If you laid the foundation it is a proper question and if you didn't lay the foundation it isn't proper. If you did lay the foundation the court will allow you to develop it and if it develops that you didn't I will strike it out.

By Mr. Martin: We save the point to that.
page 280 } By the Court: If there is a serious doubt about it we might have the reporter go back and read the examination and find it.

By Mr. Martin: I have no recollection of it at all, but go ahead.

By Mr. Thompson:

Q. Will you tell the jury and the court what "Hop" Elliott told you at that time?

A. He said he was in the yard behind a tree and didn't see any of it and to keep his name out of it.

Q. About the time that this fight or trouble occurred did Harvey Mitchell make any statement or ask you anything about going out to try to stop the disturbance in the back yard, and if so, did he tell you—

By Mr. Martin: (interposing) Your Honor, that is new matter.

By Mr. Thompson: May I explain why I am asking this question?

By Mr. Martin: I don't know what you are trying to get across to the jury and I am objecting to that question as new matter.

By Mr. Thompson: I may say this: This morning on cross examination we asked Harvey Mitchell if he didn't say to Nancy Kerr, "If you don't go out there and stop that disturbance in the back yard there is going to be
page 281 } trouble", and Harvey denied that statement, and I think Mr. Martin will recall me asking him that.

Nancy Kerr.

By Mr. Martin: That is wholly collateral. You can't impeach a witness on a collateral thing of that sort. That doesn't shed any light as to how this offense occurred.

By Mr. Thompson: It goes to test his veracity.

By Mr. Martin: You can't impeach a man on a collateral issue. Why we would be here until doomsday if on collateral matters we tried to impeach every witness. Although it may be admissible evidence if it is collateral to the issue you can't impeach a man on that. You can't impeach on collateral matters no matter what he said. It don't aid us in finding the facts of the case.

By Mr. Spencer: May it please the court, Harvey Mitchell was the witness as to whom you called me down for riding him perhaps a little too hard and I disavowed any intention to do it. He was giving the court a version of being within six or seven feet of this shooting and before I let him go I asked him if in fact he wasn't lying on the cot just under the window which opens upon the porch where this
page 282 } young lady was sitting and if he didn't say to her, "Nancy, you better go out there in the back yard. There is going to be trouble and somebody is going to get hurt." I asked him those questions and Mr. Martin says they are collateral.

By the Court: What was his answer?

By Mr. Spencer: That he didn't do it; that he was out in the yard.

By the Court: This isn't new matter. The foundation was laid. The man said he was outside and was within seven feet of it when it happened, and this witness' testimony, if she is believed, will show that he was at the time of the shooting lying on the cot.

By Mr. Martin: Mr. Thompson hadn't asked anything about that. The question was, "What was said?" Now, what was said between these parties is wholly collateral and you can't get away from it and further than that it was said out of the presence of the accused. Now, it is collateral as to what conversation these two parties may have had. Where the witness was is pertinent evidence, but the conversation between them is collateral to any issue in this case and would further be inadmissible on account of being out of the presence of the accused.

page 283 } By the Court: In other words, you think it would have been admissible in the first instance?

By Mr. Martin: That phase of it, if they had asked if any-

Nancy Kerr.

thing was said between them, but, Judge, you see the adroitness that comes up. They ask a witness whether somebody said something—catch that? And the witness says “No”. Then they come around later and want to prove that it was said.

By the Court: Gentlemen, declarations made out of the presence of the prisoner or without his authority are not admissible except as a part of the *res gestae*. Now, was this conversation a part of the *res gestae*? Declarations with reference to the crime constituting a part of the *res gestae* are admissible.

By Mr. Spencer: Actually I think they might do that.

By the Court: The question presented to the court is were the declarations a part of the *res gestae*. What do you have to say to that?

By Mr. Spencer: I can repeat it and it is for the court to say whether it is a part of the *res gestae*. The testimony, as I understand, was seeking to be elicited, is that page 284 } this girl was on the porch with a young man who was then her sweetheart, now her husband, and he said upon this warning he got up and barely got across the room to the other door when the shooting occurred; hadn't even gotten to the door.

By the Court: Gentlemen, it was the beginning of the time the controversy started and I am inclined to think that the declarations were properly admissible on the ground that they accompanied part of the *res gestae*. Now, the foundation was laid by which he is entitled to be impeached. He was asked if he made the statement or not, and he denied it and the court is of the opinion that the Commonwealth is entitled to offer the evidence for the purpose of impeaching his statement, and that only.

By Mr. Martin: We respectfully except to the ruling of the court and save that point.

By the Court: Very well, go ahead.

By Mr. Thompson:

Q. Tell the jury and the court what Harvey said to you at that time.

A. He said if I didn't go out there there was going to be trouble and somebody was going to get hurt.

page 285 } Q. Where was he when he made that statement?

A. He was in the front room.

Q. Where?

A. On the lounge.

Nancy Kerr.

Q. Where were you?

A. I was out on the porch right under the window.

Q. How close were you to him?

A. Well, I could have touched him if the screen wire hadn't been there.

Q. Now was not Wesley Kerr, who is now your husband, there on the porch with you at the time you are talking about now?

A. At the time Harvey called me?

Q. At the time he made that statement was he not there?

A. Yes, sir.

Q. And did he stay there with you on the porch?

A. Not after Harvey called me. He got up and went in the house and hadn't been gone but a minute or two before the gun went off.

Q. This was a minute or two before any gun went off?

A. Yes, sir.

Q. Your husband had been gone a minute or two before the gun went off?

A. Yes, sir.

Q. And this statement was made prior to your husband leaving the porch, wasn't it?

A. What do you mean?

page 286 } Q. This statement that you have just said you heard Harvey make was made before your husband left the porch.

A. Yes, sir.

Q. And he left the porch a minute or two before any gun was fired, is that right?

A. Yes, sir.

By the Court:

Q. Was it made after the controversy arose?

A. I don't know what you mean.

Q. Had the row started before he made this statement?

A. Who, Harvey?

Q. Yes. In other words, did you hear some words?

A. I didn't hear any words but the car had done come up in there before Harvey made the statement.

CROSS EXAMINATION.

By Mr. Martin:

Q. Was that right after Tom first came to the house?

A. When Harvey called me?

Nancy Kerr.

Q. When this statement that you just made to the jury was made by Harvey.

A. He had been there a good while.

Q. Before that remark was made by Harvey?

A. Yes, sir.

Q. He had been there a good while?

A. Yes, sir.

Q. Hadn't gone home?

A. Oh yes, he had done come back. He come there the first time and had gone back home.

page 287 } Q. And he had been there a good while?

A. The last time he had been there a good while.

Q. And you had heard no disorder?

A. No, sir.

Q. No fussing?

A. No, sir.

Q. No cursing?

A. No, sir.

Q. Nothing?

A. Nothing.

By Mr. Martin: (addressing the court) How could that be part of the *res gestae*? She had heard no part of the fuss or anything.

By Mr. Thompson:

Q. Mrs. Kerr, did you know what Harvey was talking about when he said if you didn't go out there that there was going to be trouble?

A. No, sir.

Q. Did you hear the shots?

A. Yes, sir.

Q. How soon after that was the shots fired?

A. In just about three minutes, I would say.

Q. What were you doing?

A. Sitting on the front porch with a baby in my arms.

Q. Did you know about the previous disturbance that they had there earlier in the evening?

A. What do you mean by the first?

page 288 } By Mr. Martin: Your Honor please, all that is evidence in chief.

By Mr. Thompson: This is simply to show the *res gestae*.

By the Court: Don't ask her what happened the first time.

Nancy Kerr.

By Mr. Thompson: Then that is all I wish to ask her.

By the Court:

Q. Did you see Tom Mitchell when he came back the second time?

A. No, sir.

Q. Did you see George Lindsay and Annie Lindsay go out to where he was when he came back the second time?

A. No, sir.

Q. Do you know where they were when he came back the second time?

A. No, sir.

Q. Well, where were you when he came back the second time?

A. I was on the front porch.

Q. Who was on the front porch with you?

A. Wesley Kerr.

Q. And Harvey Mitchell was lying on the couch in the front room?

A. Yes, sir.

Q. Do you know why he called attention to the page 289 } fact that somebody better go out there or there might be trouble? Do you know why he said that?

A. No, sir.

Q. What did he do when he said that?

A. Nothing.

Q. Did he seem to be concerned? Did he show any concern or did he indicate there was some trouble back there in the back of the house from the way he talked?

A. I don't understand what you mean.

Q. He said you had better go back there. Did you think he thought some trouble was going on back there?

A. I didn't know.

By the Court: (addressing the jury): Gentlemen, I strike all of her evidence out, and you gentlemen will disregard the evidence of this witness.

By Mr. Thompson: I have another question to ask her yet.

Q. When did Harvey Mitchell get up off of that day-bed in the front room, before or after the shots went off?

A. Well, after the shots went off I was so excited I don't know what happened.

Nancy Kerr.

Q. Do you know whether he was on the day-bed up to the time the shots were fired or not?

A. No, sir.

By the Court: I think, gentlemen, I will strike page 290 } all of her evidence because it is too indefinite and she doesn't know anything

You gentlemen of the jury, will disregard everything she said.

By Mr. Spencer: I think her evidence, the—

By Mr. Overbey: (interposing) Your Honor please, do you think these questions should be raised before the jury and the evidence discussed pro and con? The jury is liable to get the matter confused.

By the Court: Mr. Overbey, I don't think so, but that is a question for you to raise. If you want to we will take it into chambers.

By Mr. Overbey: I hate to keep on objecting to so many matters. Your Honor has already decided the point.

By Mr. Thompson: Are you going to rule out the statement that she made with regard to "Hop" Elliott?

By the Court: Let's go back in chambers.

Note: The court having heard arguments in chambers returned into the courtroom and made the following remarks:

By the Court: Gentlemen of the jury, the court wants to correct a statement and make clear a misunderstanding page 291 } standing that it had at the time it ruled on the evidence of Mrs. Nancy Kerr. I did state in broad terms that all of her testimony would be stricken out and should not be considered by you gentlemen of the jury. I did not, however, mean to state that her testimony with reference to a statement made to her by the witness, "Hop" Elliott, at the Memorial Hospital in Lynchburg should be stricken out. I merely meant that her testimony with reference to a statement made in her presence at the DePriest home by Harvey Mitchell about the time of the shooting should be stricken out. The court therefore tells you now that her evidence as to the incident or the conversation with "Hop" Elliott at the Memorial Hospital is not to be stricken out but that you shall consider that statement merely for the purpose of contradicting or impeaching the testimony of the witness, Elliott. Of course it has no probative value. It

Wesley Kerr.

proves nothing and disproves nothing relative to this case except that it goes to the weight of the testimony of the witness Elliott and you shall use it and consider it merely for that purpose. You shall disregard all of her testimony as to the declarations made in her presence by Harvey Mitchell at the DePriest home about the time of the shooting. However, you may consider and shall consider her statement with reference to where Harvey Mitchell was after the arrival or return of Tom Mitchell the page 292 } second time, and just immediately prior to the shooting. Now, you gentlemen clearly understand the witness Harvey Mitchell testified he *was* immediately upon the return of Tom Mitchell to the DePriest home the second time and immediately prior to the shooting he went out to where he was and was standing a few feet from where the shooting took place. Mrs. Kerr testified that he was on the couch, or gave some evidence as to where he was; that he was on the couch in the front room, and you shall consider what she said with reference to where he was, where Harvey Mitchell was, but not to consider what she said with reference to the declaration made by Mitchell.

The witness stands aside.

WESLEY KERR, recalled.

DIRECT EXAMINATION.

By Mr. Thompson:

Q. I just want to ask you who got to Mr. DePriest first after the shooting.

A. George was there when I got there.

Q. Was Harvey there?

A. The first time I seen Harvey he was in his car and we had toted Mr. DePriest and put him part of the way in the car and Harvey told me to fix his light and I told him I couldn't fix them.

Q. Did Harvey help to pick Mr. DePriest up and help to carry him to the car?

page 293 } A. He did not.

Q. Did you see a knife on the ground around the place Mr. DePriest fell at all?

A. It was too dark to see a knife.

Q. What kind of night was it?

Wesley Kerr.

A. It was dark.

Q. Cloudy?

A. I wouldn't say whether it was cloudy or clear.

Q. Could you see anything around the car at the time of the shooting without the aid of a light?

A. I could not.

The witness stands aside.

By Mr. Thompson: The Commonwealth rests.

By Mr. Overbey: We are through.

End of all testimony.

page 294 }

IN CHAMBERS.

By Mr. Martin: May it please the court, while we think that at the time the witness, Miles, was testifying and referred to a statement made by Mr. DePriest at the hospital at 11:00 o'clock in the morning that we at the time objected to its admissibility as a dying declaration on the ground that the deceased had not been at that time told by his physician of any impending death. Still, whether we then objected or not we now wish to ask the court to direct the jury to disregard in its entirety the testimony of Jack Miles relative to statements alleged to have been made to him by the deceased at the hospital at approximately 11:00 o'clock A. M., on the ground that at that time the deceased had not been advised by his physician of any impending death, nor by anyone so far as the evidence is concerned that death was likely.

By Mr. Thompson: If your Honor please, my understanding of the law in regard to dying declarations is that it is not necessary that the declarant be informed by a physician that he is going to die. All I deem it to be necessary is that the declarant himself realizes that he is going to die and has given up hope of recovery. Now, Mr. Miles testified that at this particular time Mr. DePriest told him that he knew he couldn't get well and after making that statement he then made a statement to Mr. Miles. Therefore, I think it is clearly admissible under the rules of evidence governing a dying declaration.

page 295 }

By Mr. Spencer: My recollection of Mr. Miles' testimony was in effect and substantially that he said this: "Mr. DePriest seemed to want to tell me about

it and he said, 'Mr. Miles, I know that I can't get well' '' and he then proceeded to give him the account which Mr. Miles recited, and in addition to that Mr. Miles was asked did he believe or think from all indications and from what the man said that he actually believed that he was then going to die and Mr. Miles said that he did. Now, I think the jury is entitled to weigh that, and if they believe it accept it and if they don't believe it to disregard it.

By Mr. Martin: Our reply to that is that a belief or opinion on the part of the deceased that he would die does not render a statement admissible under the rules of dying declarations. I myself now believe that I am going to die but there is no belief on my part that death is imminent and impending and that I am *in extremis*, and there is no evidence here to show by anybody any belief on the part of the deceased that death was imminent and impending and from every expression, even as stated by the witness Miles, there is nothing in there to indicate that the man thought that death was immediately impending and that he would die promptly or quickly. It was simply an expression that he didn't believe or didn't feel that he would get well.

page 296 } By the Court: You gentlemen went over this very same question when the matter was presented to the court and passed upon by the court and the court was at that time of the opinion that proper foundation had been laid; that the evidence given by the witness, Sheriff Miles, was to the effect that the declarant realized his condition and that he could not get well and he didn't expect to get well. The court doesn't understand the rule to require that a man must think he is going to die now or at any particular time if at the time he makes the declaration it is sufficient if he is laboring under a sense of impending death and has abandoned all hope of recovery. I am of the opinion that the effect of the evidence given by the witness Miles lays that foundation. At the same time, while I am of the opinion that the statement made by the declarant to Sheriff Miles prior to the time that the declarant was advised as to his condition by his physician, Dr. Hurt, yet, as I recall, the effect of the statement to Sheriff Miles is embraced in the written declaration which was given after the declarant had been advised, yet it is merely cumulative and I don't see any prejudice to the Commonwealth if I strike it out; although, if the Commonwealth insists on having it remain in the record the court thinks it is admissible, but I don't think any prejudice could accrue by having it stricken out.

By Mr. Thompson: We do insist upon it.

By the Court: Then the motion is overruled.
page 297 } By Mr. Martin: It is the view of the counsel
for the defendant that when we adjourned to the
Judge's chambers to consider the admissibility of the dying
declaration the only dying declaration considered or offered
was the written dying declaration and that we were not ad-
vised at that time of any proposal to introduce an oral dying
declaration taken prior to the written one, and the question
of admissibility of that oral declaration, as testified to by
the witness Miles, was not considered by counsel or the court
at the time the court ruled on the admissibility of the written
declaration. We were surprised when in the taking of the
evidence a wholly different dying declaration was offered in
addition to the written one.

By Mr. Spencer: I think it should appear of record in
some form, at least the statement of counsel or the court both,
that in considering the matter the court heard Sheriff Miles'
statement and it was perfectly clear then that he was not
present at the taking of the written statement and that there-
after Sheriff Miles was introduced as a witness. I don't think
that appears of record.

By the Court: Of course it appears from the transcript
of the record that he did appear and testified as to the state-
ment made to him by the declarant before the arrival of Dr.

Hurt at the hospital and before the declarant was
page 298 } advised by Dr. Hurt, and the court admitted it.

All of that evidence was taken, the evidence on
the admissibility of the dying declaration was taken in cham-
bers and of course the same evidence was repeated in the
presence of the jury, which is in accordance with the gen-
eral practice, in order that the jury may weigh the evidence
on the question of the dying declaration.

By Mr. Martin: On behalf of the accused this counsel ex-
cepts to the ruling of the court on the above matter and saves
the point.

By the Court: We will now take up the instructions.

Note: The court having given counsel for the Common-
wealth and counsel for the defendant ample opportunity to
be heard in regard to the instructions offered made the fol-
lowing remarks:

By the Court: The Court on motion of the Commonwealth
grants instruction No. 1, as amended; grants Instruction No.
2, as amended; grants Instruction No. 3, as offered; grants
Instruction No. 4, as amended; grants Instruction No. 5, as

amended; denies Instruction No. 6, as offered; denies Instruction No. 7, as offered; grants Instruction No. 8, as offered; grants Instruction No. 9, as amended.

page 299 } The court on motion of the accused grants Instruction A, as amended; grants Instruction B, as offered; grants Instruction C, as amended; grants Instruction D, as amended; grants Instruction E, as offered; grants Instruction F, as offered; grants instruction G, as amended; grants instruction H, as amended; grants Instruction J, as amended; grants Instruction K, as amended; denies Instruction L, as offered by the accused, and the court, of its own motion, gives as a substitute, Instruction O; denies Instruction M, as offered; denies Instruction N, as offered, and the court, on its own motion, gives Instruction O, as a substitute for Instruction L, which was denied; denies Instruction P, as offered; grants Instruction Q, as amended; grants instruction R, as offered, and denies Instruction S, as offered.

By Mr. Martin: The accused, by counsel, excepts to the action of the court in giving Commonwealth's Instruction No. 4, on the ground that it is not applicable to this case, and upon the further ground that it imposes upon the prisoner the duty of showing extenuating circumstances, where, under the law, there is no such duty on him, and the evidence of the Commonwealth itself might raise such doubt as to the circumstances as to entitle the prisoner to an acquittal without the prisoner showing anything.

The defendant, by counsel, excepts to the action of the court in granting Commonwealth's Instruction No. 5, on the ground that it is not a correct statement of the law. It imposes a wrongful burden upon the prisoner in regard to evidence, especially as he is under this required to show existence of a state of facts from the evidence that he acted lawfully when in truth he may have acted unlawfully in a slight degree and be entitled to an acquittal on the ground of excusable homicide as contrasted with justifiable homicide.

The accused, by counsel, excepts to the action of the court in granting Commonwealth's Instruction No. 9, because it permits the jury to reach conclusions therein mentioned by mere belief from the evidence of the existence of the facts set forth without requiring that they believe same beyond a reasonable doubt. Further, this instruction requires that the jury believe that he in good faith declined further combat and indicated his intention to withdraw from combat and retreated as far as he could with safety to himself, when if the jury had

any reasonable doubt of any one of these elements it would be their duty to acquit him. This instruction also is very confusing and misleading, especially in the light of the other instructions given in the case.

The accused, by counsel, excepts to the amendments and changes made in Defendant's Instruction C, as amended. The instruction is erroneous in law. It is misleading to the jury and is prejudicial to the defendant. It centers attention upon murder in the first degree. Instruction C, as offered by the accused, should have either been given as offered or refused as offered. The amendment and changes in the page 301 } Instruction C, as made by the court, renders that instruction wrong in law and as above stated is confusing. It centers attention upon murder in the first degree.

The accused, by counsel, excepts to the action of the court in refusing Instruction L, offered by the accused, as that instruction is a proper statement of the law applicable and should have been given and no other instruction given adequately or fairly states the principles therein involved. The error in refusing this Instruction L is not cured by the instruction No. O. given by the court on its own motion. The accused is entitled to have the jury told positively and unequivocally that there is no burden of proof on him to prove that he acted in self-defense and that all that is necessary is that the evidence as a whole leave a reasonable doubt in the mind of the jury as to whether he acted in self-defense or not.

The accused, by counsel, excepts to the action of the court in refusing Instruction M, offered by the accused, on the ground that that instruction is proper, is a correct statement of the law, and is applicable to the case, and especially is all this true with relation to the particular dying declaration as admitted in this case and the circumstances surrounding the taking of same.

The accused, by counsel, objects to the court's action in refusing his Instruction No. N, for the same reasons stated in relation to Instruction M.

The accused, by counsel, objects to the court's page 302 } action in refusing Instruction P, offered on behalf of the accused, as that instruction is a correct statement of the law, is applicable to the case, and is not adequately nor fairly covered by any other instruction given in the case.

The accused, by counsel, likewise objects to the court's refusal to give Instruction S, offered by the accused, for the

same reasons stated in the accused's objections to the court to give Instruction P.

And to the court's actions in all of the above things in giving the instructions offered by the Commonwealth which were objected to by the accused upon the grounds aforesaid, the accused, by counsel, excepts.

Likewise to the action of the court in refusing to grant certain instructions offered by the accused, as above pointed out, and to the action of the court in offering its own instruction O, and to the action of the court in amending Instruction C, offered by the accused, over the objections of the accused, upon the grounds above stated, the accused excepts.

page 303 } *Commonwealth's Instruction No. 1 (Granted—
No exception):*

"The Court instructs the jury that one of four verdicts may be found under the indictment in this case, if the evidence in the case so warrants: (1) Murder in the first degree. (2) Murder in the second degree. (3) Voluntary manslaughter. (4) Not guilty.

"The Court instructs the jury that murder in the first degree is any willful, deliberate and premeditated killing of one human being by another with malice; murder in the second degree is such killing with malice but without being willful, deliberate and premeditated.

"Voluntary manslaughter is killing in the heat of sudden passion upon reasonable provocation or in mutual combat.

"The Court further instructs the jury that murder in the first degree is punishable by death, or confinement in the penitentiary for life or any term not less than twenty years; that murder in the second degree is punishable by confinement in the penitentiary for a term of not less than five years and not more than twenty years; that voluntary manslaughter is punishable by confinement in the penitentiary for a term of not less than one year nor more than five years.

"The Court further instructs the jury that if the evidence as a whole fails to convince you beyond a reasonable doubt that the defendant is guilty of either of the degrees of crime defined above, you should find him not guilty."

page 304 } *Commonwealth's Instruction No. 2 (Granted—no
exception):*

"The Court instructs the jury that malice as applied to the law of homicides is used in a technical sense and includes

not only anger, hatred and revenge, but every unlawful and unjustifiable motive. It is not confined to ill will toward any one or more particular persons but is intended to denote that state of mind which prompts one person to kill or seriously injure another without just provocation or under circumstances indicating a heart regardless of social duty and fatally bent on mischief; therefore, malice is implied in law from the wrongful and unjustifiable deliberate use of a deadly weapon."

Commonwealth's Instruction No. 3 (Granted—no exception):

"The Court instructs the jury that to constitute a willful, deliberate and premeditated killing, it is not necessary that the intention to kill or do serious bodily harm should exist for any particular length of time prior to the actual killing; it is only necessary that such intention should have come into existence for the first time at the time of such killing or at any time previously."

Commonwealth's Instruction No. 4 (Granted—Exception taken):

"To constitute murder in the first degree the accused must have been incited to the killing by malice and the killing must have been willful, deliberate and premeditated; however, a mortal wound given with a deadly weapon in the previous possession of the slayer, without any, or very slight provocation, is *prima facie* willful, deliberate and premeditated killing and throws upon the prisoner the necessity of showing extenuating circumstances. Therefore, if the jury believe from the evidence beyond a reasonable doubt that the accused shot and killed the deceased with a deadly weapon in his previous possession without any or very slight provocation and that there were no extenuating circumstances, then they may find the accused guilty of murder in the first degree."

Commonwealth's Instruction No. 5 (Granted—Exception noted):

"The Court instructs the jury that where a homicide with a deadly weapon in the previous possession of the accused is proved, the presumption in this Commonwealth is that it is murder in the second degree; and the burden of proof is upon the Commonwealth to show, if it can, that the killing

was willful, deliberate and premeditated and is, therefore, murder in the first degree, and it is incumbent upon the slayer to show the existence of such a state of facts from the evidence as a whole as may be sufficient to raise a reasonable doubt in the minds of the jury as to whether the offense is only voluntary manslaughter or that he acted lawfully and is therefore not guilty."

Commonwealth's Instruction No. 6 (Refused):

"The Court instructs the jury that one who without reasonable provocation assaults another with a deadly weapon may expect resistance on the part of the person assaulted or some member of his family or immediate house-
page 306 } hold, and may not be heard to say that the stress of action carried him beyond his original purpose; if one deliberately and willfully assaults another with a deadly weapon without reasonable provocation and in such manner as to reasonably result in resistance on the part of the person assaulted, or his family, and as a natural and probable result of this resistance, kills such person or a member of his family lawfully intervening or interceding, then he may be guilty of murder, even though he did not originally intend to kill or seriously injure the person assaulted or the member of his family intervening."

Commonwealth's Instruction No. 7 (Refused):

"The Court instructs the jury that if they believe from the evidence beyond a reasonable doubt that the accused, Tom Mitchell, in the early part of the evening of August 17th, 1940, while visiting at the home of the deceased, R. W. DePriest, Jr., engaged in an altercation with George Lindsay, a son-in-law of the deceased, and that the deceased separated them and ordered the accused off of his premises, and that the accused, after being so ordered from the premises, departed and returned some time later, armed with a pistol, and that the accused pointed the said pistol in a threatening manner at the son-in-law of the deceased, and that the deceased appeared upon the scene as he was thus committing an assault upon his son-in-law, then the accused became and was a trespasser upon the premises of the deceased, and the deceased had the right to use all force necessary to
page 307 } eject him from his premises, and to intervene to prevent a further assault or the commission of a felony, even to the extent of taking his life; and if the jury

further believe from the evidence that the accused, after having been repeatedly ordered from the premises by the deceased and that the deceased thereupon started towards the accused, either for the purpose of ejecting him from the premises, or to prevent what reasonably appeared to be the commission of a felony, and that thereupon, the accused, without having retreated as far as he could with reasonable safety to himself, shot and killed the deceased, then they may find him guilty of murder in the first degree."

Commonwealth's Instruction No. 8 (Granted—no objection):

"The Court instructs the jury as a matter of law that in considering the case the jury are not to go beyond the evidence to hunt up doubts nor must they entertain such doubts as are merely trivial or conjectural. A doubt, to justify an acquittal, must be a reasonable doubt and must arise from a candid and impartial investigation of all the evidence in the case, and unless it is such that, were the same kind of doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty. If, after considering all the evidence, you can say that you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt."

page 308 } *Commonwealth's Instruction No. 9 (Granted—Exception noted):*

"The Court instructs the jury that if the accused was in fault in bringing on or sought the encounter giving rise to the necessity relied upon to excuse the fatal use of a deadly weapon, he cannot lawfully be acquitted upon his plea of self-defense unless the jury believe from all the evidence that before firing the fatal shot the accused did the following things:

First—In good faith declined further combat,

Second—Indicated his intention to withdraw from further combat by such means as were reasonably available under the circumstances, and,

Third—Retreated as far as he could with safety to himself,

Fourth—Fired the fatal shot under the reasonable honest belief that it was necessary to do so to save himself from death or grave bodily injury at the hands of the deceased."

Defendant's Instruction A (Granted as offered):

"The Court further instructs the jury that if they believe from the evidence in this case that the accused was on the land of Robert DePriest without authority, and that Robert DePriest approached the accused, with a drawn knife, and threatened the said accused with great bodily harm and injury and even ordered him off the land of DePriest, and the prisoner refused to go, the said Robert DePriest had no right to resort to unnecessary force to move the accused. And if they further believe from the evidence that the said Robert DePriest then approached the accused in a threatening manner, and that the accused believed that the said Robert DePriest was going to inflict bodily injury upon him, then the accused had a right to resist such an attempt and meet force with force to save himself from the expected bodily injury, and if the killing of the said Robert DePriest resulted from an attempt on the part of the accused to defend himself against the expected injuries to him, then he was justified in shooting the said Robert DePriest, and is not guilty as charged in the indictment."

Defendant's Instruction B (Granted as offered):

"The Court further instructs the jury that if they believe from the evidence in this case that Robert DePriest approached the accused with a drawn knife, and the prisoner stepped back from Robert DePriest and told Robert DePriest not to come to him, this is not such a threat on the part of the accused as would warrant Robert DePriest in proceeding further, and if he did so it was at his own peril."

Defendant's Instruction C (Refused as offered):

"The Court instructs the jury that if they should have any reasonable doubt as to any fact necessary to convict the accused of the offense charged, then they are to give the accused the benefit of any doubt and acquit him, and if there be any reasonable doubt whether the accused had willfully, deliberately and meditately killed Robert DePriest, they ought not to find him guilty as charged in the indictment."

Defendant's Instruction C (Granted as amended by the Court and exception noted):

"The Court instructs the jury that if they should have any reasonable doubt as to any fact necessary to convict the accused of any offense charged, then they are to give the accused the benefit of any doubt and acquit him, and if there be any reasonable doubt whether the accused had willfully, deliberately and premeditatedly killed Robert DePriest, they ought not to find him guilty of murder in the first degree."

Defendant's Instruction D (Granted—no exception):

"And the Court further instructs the jury that even though they may believe from the evidence in this case that the accused was a trespasser upon the lands of the deceased Robert DePriest, and that the deceased had made an attack upon the accused with a deadly weapon, under the circumstances calculated to excite in the latter's mind a reasonable fear of death or great bodily injury to himself, under which he killed his assailant, he is entitled to avail himself of the plea of self-defense. And the jury should find him not guilty."

Defendant's Instruction E (Granted—no exception):

"The Court further instructs the jury that upon the trial of this case, if a reasonable doubt of any fact necessary to establish the prisoner's guilt, as charged in the indictment, be raised by the evidence, or lack of evidence, page 311 } such doubt is decisive and the jury must acquit the prisoner, since a verdict of not guilty means no more than that the guilt of the accused has not been demonstrated in the precise, specific and narrow forms prescribed by the law."

Defendant's Instruction F (Granted—no exception):

"The Court further instructs the jury that, if upon the whole evidence in the case there is any rational hypothesis consistent with the theory that the killing of DePriest was excusable or justifiable on the grounds of self-defense, they must find the accused not guilty."

Defendant's Instruction G (Granted—no exception):

"The Court further instructs the jury that if they believe from the evidence in this case that the accused was not the aggressor, or being the aggressor retreated as far as to him

reasonably appeared safe, shot DePriest under an honest and reasonable apprehension that his life was in imminent and immediate danger, or that he was in imminent and immediate serious danger of bodily harm, he was justified in so doing though such danger did not exist. The question for the jury in this case is not whether the taking of the life of the deceased might have been safely avoided, but whether the defendant, under the circumstances in which he was placed, might reasonably have believed it necessary to use the defensive action which resulted in the death of the deceased either to save his own life or to avoid serious bodily harm to himself."

page 312 } Note: Although the Court in stating which of Defendant's instructions offered would be given as offered, given as amended, or refused, stated that the Court would grant Defendant's Instruction H, no instruction so designated was given, as shown by the written instructions filed in the Clerk's Office, and no instruction so designated was read to the jury, as shown by the stenographer's notes; all instructions read to the jury being those which are incorporated in this transcript.

Defendant's Instruction I (Granted as amended—no exception):

"The Court instructs the jury that if they believe from the evidence in this case that the deceased, R. W. DePriest, was advancing on the accused with a drawn knife, and threatening the life of the accused, with vile epithets, and the accused honestly and reasonably believed himself in imminent danger of being killed or sustaining great bodily injury, and being without fault in provoking the affray, he, the accused, was not required to retreat but had the right to repel force by force, if need be, to the extent of slaying the adversary."

Defendant's Instruction J (Granted as amended—no exception):

"The Court further instructs the jury if they believe from the evidence in this case that there was sudden provocation or sudden quarrel between the deceased and the accused, and that the accused had not spoken to or moved to—
page 313 } wards the deceased, and that the deceased was shot by the accused, while the deceased was ad-

vancing on the accused, with drawn knife, accompanied by vile threats against the life of the accused, and that the accused pleaded with the deceased to cease his actions towards the accused, and that the accused reasonably and honestly believing himself in imminent danger of being killed or sustaining great bodily injury killed the deceased, the killing was justifiable and the jury should acquit the accused."

Defendant's Instruction K (Granted as amended—no exception):

"The Court further instructs the jury that as a matter of law that one threatened with danger must determine from appearances and the actual state of things and his surroundings at the time as to the necessity of resorting to self-defense; and if he acts from reasonable and honest convictions, he will not be held responsible criminally for a mistake as to the extent of the actual danger, where other and judicious men may have been alike mistaken."

Defendant's Instruction L (Refused and the court of its own motion gives in lieu thereof Instruction O—exception):

"The Court instructs the jury that the burden of proof is not on the defendant to prove that he acted in self-defense but that if after considering all the testimony, a reasonable doubt remains as to whether the assault was in self-defense, then the jury must find the defendant not guilty."

page 314 { *Defendant's Instruction M (Refused—exception noted):*

"The Court further instructs the jury in this case that as a matter of law, they are entitled to consider the declarations of the deceased in the light of all the evidence in this case, the absence of opportunity for cross examination of the mental condition of the declarant, and all the circumstances under which they were made."

Defendant's Instruction N (Refused—exception noted):

"The Court further instructs the jury that the law does not regard the declarations of the deceased, R. W. DePriest, as of the same weight and value as the testimony of a witness given in open court under the safeguards provided for the discovery of the truth; that the testimony of the

witness, where he is seen, heard, and cross-examined, is of greater weight than the statements of a dying man, whose condition the jury could not observe and whose statement was not subjected to the corrective and explanatory test of cross examination.”

Defendant's Instruction O (Given by the court of its own motion in lieu of Instruction L):

“The Court further instructs the jury that if they believe from all the evidence in this case that there is a reasonable doubt that the accused acted in self-defense, you must acquit him.”

page 315 } *Defendant's Instruction P (Refused—Exception noted):*

“The Court further instructs the jury in this case that the question for the jury in this case is not whether the killing of the said DePriest might have been safely avoided, but whether the defendant, Mitchell, under the circumstances in which he was placed, might reasonably have believed it necessary to use the means he did which resulted in the killing of said De Priest, either to save his own life or to avoid serious bodily harm to himself.”

Defendant's Instruction Q (Granted as amended—no exception):

“The Court further instructs the jury that the accused never has to prove any fact either beyond a reasonable doubt, or by a preponderance of the evidence. All he has to prove in any case is such a state of facts as will raise a reasonable doubt in the minds of the jury as to the existence of the fact or facts necessary to establish the guilt of the accused.”

Defendant's Instruction R (Granted as offered):

“The Court instructs the jury that the law presumes the accused to be innocent until he is proved guilty beyond a reasonable doubt, and if there is upon the minds of the jury any reasonable doubt of the guilt of the accused, the law makes it their duty to acquit him, and that mere suspicion or

probability of his guilt, however, strong, is not sufficient to convict, nor is it sufficient if the greater weight or preponderance of evidence supports the charge in the indictment. But to warrant his conviction, his guilt must be proved so clearly, and the evidence thereof must be so strong as to exclude every reasonable hypothesis of his innocence."

Defendant's Instruction S (Refused—Exception noted):

"The Court further instructs the jury that where a person is assaulted, and is guilty of no unlawful act, and reasonably apprehends that his assailant will do him bodily harm, has a right to repel the assault by all the force he deems necessary, and is not compelled to retreat from his assailant, but may, in turn, become the assailant inflicting bodily wounds until his person is out of danger."

page 317 }

CERTIFICATE.

I, Charles E. Burks, Judge of the Circuit Court of Campbell County, Virginia, who presided over the foregoing trial of Commonwealth of Virginia *versus* T. R. Mitchell, in said court, at Rustburg, Virginia, October 23-24-25, 1940, do certify that the foregoing is a true and correct copy and report of the evidence, all of the instructions offered, amended, granted and refused by the court, and other incidents of the said trial of the said cause, with the objections and exceptions of the respective parties as therein set forth.

And I do further certify that the attorney for the Commonwealth of Virginia had reasonable notice in writing, given by counsel for the defendant, T. R. Mitchell, of the time and place when the foregoing report of the testimony, instructions, exceptions and other incidents of the trial would be tendered and presented to the undersigned for signature and authentication.

Given under my hand this 16th day of December, 1940, within sixty days after the entry of the final judgment in said cause.

CHARLES E. BURKS,
Judge of the Circuit Court of Campbell
County, Virginia.

page 318 } I, C. W. Woodson, Clerk of the Circuit Court of Campbell County, Virginia, do certify that the foregoing report of the testimony, instructions, exceptions and other incidents of the trial in the case of Commonwealth of Virginia *versus* T. R. Mitchell, all of which have been duly authenticated by the Judge of said court, were lodged and filed with me as Clerk of the said court on this 28 day of Dec., 1940.

C. W. WOODSON,
Clerk of the Circuit Court of Campbell
County, Virginia.

page 319 } CERTIFICATE.

I, Charles E. Burks, Judge of the Circuit Court of Campbell County, Virginia, at Rustburg, Virginia, who presided over the trial of Commonwealth of Virginia *against* T. R. Mitchell, to the record, testimony, instructions, exceptions and other incidents of which said trial this certificate is attached, do hereby certify that the foregoing is a true and correct copy of all testimony and other incidents which were introduced or that occurred during the said trial, including all instructions, requested, amended, given and questions raised, and all rulings thereon, including exceptions, grounds of objections for the omission and exclusion of evidence, granting and refusing instructions.

I further certify that the said case was tried in the Circuit Court of Campbell County, at Rustburg, Virginia, on the 23rd, 24th and 25th of October, 1940, and completed on the 11th day of November 1940, and it appears in writing that S. J. Thompson, Commonwealth's Attorney for Campbell County, Virginia has had reasonable notices of the time and place when this testimony and other incidents of the trial would be tendered and presented to the undersigned for certification which is certified within sixty days after the final judgment.

Given under my hand and seal this the 16th day of December, 1940.

CHARLES E. BURKS (Seal)
Judge of the Circuit Court of Campbell
County, Virginia.

Virginia:

In the Clerk's Office of the Circuit Court of Campbell County,
Virginia, the 28 day of December, 1940.

I, C. W. Woodson, Clerk of the Circuit Court of Campbell
County, Virginia, do hereby certify that the fore-
page 320 } going is a true and correct copy of the record
in the case of Commonwealth of Virginia *against*
T. R. Mitchell upon an indictment for murder, pending in
said Court, and that notice for said transcript was given as
required by law.

Teste,

C. W. WOODSON, Clerk.

A Copy—Teste:

M. B. WATTS, C. C.

INDEX TO RECORD

	Page
Petition for Writ of Error and <i>Supersedeas</i>	1
Record	17
Indictment	18
Jury Impaneled	18
Verdict and Motion to Set Aside	19
Judgment, November 11, 1940,—Complained of.....	20
Stenographic Report of Testimony, &c.	21
Dr. H. H. Hurt	21, 38
Sheriff J. L. Miles	28, 40, 182
S. J. Thompson	31, 42
C. O. Deaner	35, 47
D. S. Withers	45
Mrs. D. E. Bryant	48
George Lindsay	51
Mrs. Annie Lindsay	67
Wesley Kerr	72, 196, 205
Katie L. DePriest	78, 180
Dr. G. S. Bowers	87
Fulton (Hop) Elliott	89
John Goodman	107
Harvey Mitchell	135
T. R. Mitchell	152
R. K. Tucker	168, 182
E. L. Mayberry	169
Ottie Moore	170
Leonard Moorman	175
John Board Bailey	177
Jack Moorman	177
Mrs. Katherine Johnson	179
Holcomb Morris	187
Luther Moses	188
Ottie Tucker	189
Herbert Moore	190
Jake Gibson	191
Lucas Morris	192
Walter Morris	193
John Mattox	195
Nancy Kerr	197
Argument of Counsel (In Chambers)	206
Objections to Instructions	208
Instructions	211
Judge's Certificates	220, 221
Clerk's Certificates	221, 222