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CASE

CASE # 602

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COURT OF GENERAL SESSIONS,

Part IV.

THE PEOPLE OF THE STATE OF NEW YORK	Before:
against	HON. JOHN W. GOFF,
HARRY K. THAW.	Recorder.

New York, October 16th, 1906.

APPEARANCES:

For the People, DISTRICT ATTORNEY WILLIAM TRAVERS JEROME.

For the Defendant, JOHN B. GLEASON and CLIFFORD W. HARTRIDGE, Esqs.

Peter P. McLoughlin,

Official Stenographer.

CASE # 602

MR. JEROME: Will your Honor entertain a motion?

THE COURT: Yes.

MR. JEROME: The motion has been noticed for this morning, or for yesterday, and adjourned until this morning. The caption of it is "Court of General Sessions, City and County of New York, The People against Harry K. Thaw. The People on relation of Harry K. Thaw against W. T. Jerome, as District Attorney of the County of New York."

May I ask that that, before any proceedings are taken, the appearances be noted upon the record and for what parties the appaarances are entered. Of course, personally, I appear for the People of the State of New York.

MR. GLEASON: And John B. Gleason appears for Mr. Harry K. Thaw. I appear for Mr Harry K. Thaw, and with my associate Mr. Clifford W. Hartridge, who will also appear.

MR. JEROME: It is fair that I should say to these gentlemen, before any steps be taken in regard to this motion, that in the course of the disposition of public business it is possible that the trial of this action of the People of the State of New York against Harry K. Thaw might be moved before your Honor.

This application here is one directed to practice

practically, and does not involve a consideration of the merits of the case, and while in my opinion it would, in no way, convey any information to your Honor's mind that would have any bearing upon the trial of the case should it be that the case were moved for trial before you, still I should like counsel for the defence to know that, so that if they do not desire your Honor to entertain this motion they may go elsewhere. Personally I see no relation between this motion and the trial at all, because it concerns only a question of practice in the Court of General Sessions, as I understand it.

MR. GLEASON: Upon the suggestion of the District Attorney, I ask that the relator be preset in Court.

MR. JEROME: Well, I did not make that suggestion. There is no relator in any proceedings before the Court of General Sessions. A relator can only appear before or be concerned in any proceeding in the Court of General Sessions when, under the extradition law, this Court issues a habeas corpus, and, as your Honor knows, there has been some question about its power to do so. Judge Martine did issue a habeas corpus in an extradition case. None of the other State writs apply to this Court. There can be no relator in proceedings in this Court save and except in the single case of a proceeding under a writ of

habeas corpus in an extradition case to determine the identity of the person arrested as the person named in the warrant. So that there is no relator and can be none in this proceeding.

MR. GLEASON: I am not standing on a word. I mean the defendant who is also the relator in this proceeding, and because in this proceeding constitutional rights of the defendant, as I believe, are involved, and because of the suggestion made by the District Attorney I prefer that the defendant should be in Court, if the Court should so direct.

MR. JEROME: The question that I first desire to present to your Honor is in the nature of a preliminary objection to your entertaining the consideration of this motion at all, or this application.

The preliminary or the first question that I presented to the Court, after the entry of the appearances, was whether or not counsel had any objection to this matter proceeding before your Honor, in view of the fact that--I don't say that I shall move this case for trial before your Honor, for it may be moved before any of the Judges of the Court of General Sessions, or it may be moved before a Judge of the Supreme Court--I don't know which--but in the orderly disposition of the business it

might be that the state of the calendars would be such that I should move it before your Honor. The preliminary point I wish now to make is whether counsel objects to this being heard by your Honor.

THE COURT: Have you any observation to make on that?

MR. GLEASON: My only observation is that this is a matter that I might wish to consult with the defendant upon, and the readiest way of consulting the defendant would be by having him brought in here. I could then submit to him this question. Upon the general merits of the issue, I fail to see very much, I am frank to say, in the suggestion of the District Attorney, because, non constat, any Judge before whom this application was heard might be the Judge before whom the trial shall take place as well as your Honor. In the next place, this matter has been referred by the Supreme Court to you, and not to anybody else, so that so far as the preliminary suggestion is concerned by the District Attorney I place no importance upon it, but so far as the presence of my client in Court is concerned upon this application, which affects his rights, and in which I think a constitutional question may be involved, it would seem to me that the matter was out of the ordinary procedure. I understand very well that in the ordinary motion--practically there are no mo-

tions at which a defendant has any right to be present and probably would not desire to be present. This, however, is a matter which directly affects the liberty of the defendant in that testimony is taken against this defendant for the purposes of his trial, and the claim made by the defendant here is that the taking of testimony against this defendant, whether in the form or as the result of process bearing the signature of this high Court, or in the form of depositions entitled in this Court, is an infringement of the rights of the defendant. Now, therefore, if upon this hearing, where this question arises and the question ultimately to be involved is what shall become of the testimony illegally taken against the defendant, because I assume that your Honor will feel that you are bound to follow the decisions of the Supreme Court, and hold that all the testimony that has been taken against this defendant has been illegally and improperly taken, so much so that the Supreme Court condemns it.

MR. JEROME: Pardon me if I interrupt you. As I understand it, then, Mr. Gleason does not object to the motion being entertained by your Honor. Am I correct?

MR. GLEASON: I have no objection to the motion being entertained by your Honor.

THE COURT: In view of the suggestion made by the

learned District Attorney of the mere possibility that the case may be moved before me for trial, I would prefer, if counsel could agree, that this matter should go before some other Judge.

MR. GLEASON: I prefer, as far as that goes,--I prefer to argue the case before you despite the suggestion of the District Attorney. The matter has been referred to you by the Supreme Court, and there can be no possible ground for an apprehension that anything involved in the disposition of this motion would affect your Honor's mind. I reject the suggestion on the part of my client with absolute certainty. We have no fear that our constitutional rights are going to be involved by your Honor's hearing this motion, even if your Honor should sit subsequently in the trial of this action.

MR. JEROME: With that understood, the next question is that counsel requests that the body of the defendant be brought into Court before we proceed to consider this motion. To that, sir, I object. The defendant has a right to be present upon his trial. He has a right to be confronted with the witnesses against him, that is, the witnesses called upon the trial. He has no right to be present at every interlocutory step in the proceedings. At actual things which directly concern the trial, at the in-

stant that they are concerned, the taking of testimony, the impaneling of a jury, the taking of testimony, the summing up, the rendition of the verdict and the question of sentence, the defendant has a right to be present. And also when he appears in propria personae at the argument upon an appeal. He has a right to be present there. Probably he has a right to be present on the argument of an appeal, even when he is represented by counsel, but surely a defendant has not got to be brought into Court, to preserve his constitutional rights, at every stage of the case, especially on an application of this kind. But I shall be willing to do this, sir, if you will entertain first the preliminary objection that I have to this motion at all being considered, which, if my position be sound, will result in your Honor not considering this motion at all, that will obviate any question--if after the consideration of that point you believe that this motion should not be entertained--why, then I would leave it entirely in your Honor's hands to say whether, in your opinion, fair play requires the presence of the defendant in Court to aid and assist his counsel in arguing upon this motion.

I should like, first, to interpose the preliminary objection to any motion of this kind being heard at all.

I should like to be heard on that point as preliminary to the determination of whether or not this defendant should be produced, because if this motion has no standing in this Court, and cannot be heard here and should not be heard here, then there is no cause for the production of the defendant.

With your Honor's permission I would present that preliminary objection first, as to whether or not this motion ought to be entertained by your Honor at all.

MR. GLEASON: I have no objection to that disposition and I do not request the presence of the defendant during the argument of any preliminary objection such as the District Attorney suggests. I think that it would be entirely unnecessary, and that was not within the scope of my request. My request was made assuming that the matter is to be argued upon its merits. In that event I make the request that the defendant shall be present.

MR. JEROME: Then I shall proceed with the presentation of the preliminary objection.

I believe it to be well settled law, not only in civil practice, but in criminal courts as well, that there are only two cases in which a person can have any standing in court or before the court. Either the person

must have an interest in the litigation or the subject-matter in controversy, or they must appear in the position of discharging a public duty, save when they are allowed to appear as amicus curae and, of course, the distinct entry upon the record here of Mr. Gleason shows that he does not claim to be appearing in the capacity of amicus curae. He appears here simply in the character of representing one Harry K. Thaw, indicted for the crime of murder in the first degree in this county.

Now, I take it that Mr. Gleason, as representing Harry K. Thaw, has no standing before this Court or in any court to institute proceedings, apply for process, or seek any relief in any controversy in which Harry K. Thaw has not an interest. Whether or not the person taking action has or has not aninterest is never determined in the way in which they entitle their papers. I cannot intrude myself into a controversy by entitling my papers in a certain action; I cannot intrude myself into a collateral proceeding by entitling my papers in any particular way. My papers must show, or it must be conceded, that I have some interest in the controversy, otherwise I have no standing either in a civil or a criminal court. If anyone in this city who might think that the process of the Court of General Sessions was being abused in a

particular case had a right, to use the colloquialism, to butt in, your Honor, with the experience you have had for many years, would know that there are not a few persons--and I make no reflection on counsel at all in this case, because he is not of that class--there are not a few lawyers in this city who would seek to advertise themselves by all sorts of motions and applications,--motions and applications that they would not be allowed to make as amicus curae, because they should have to obtain the leave of the Court to proceed in that way. If, as individual citizens, they tried to change the procedure of this or any other court when it did not meet with their approbation, they could not be allowed to do it just simply because they entitled their papers in the particular action then pending in the court.

Now, the facts in this case, so far as they are disclosed by the moving papers, or what are called the moving papers, are these: The moving papers show that certain subpoenas were issued and served on two witnesses commanding their attendance--and one case is illustrative of the other--commanding the attendance, in one case, of one of those witnesses before the Grand Jury at a certain time. They set forth that the witness was subpoenaed by the Grand Jury in the case of the People against John Doe et

al.

Now, prior to the date, or upon the day, that the subpoena was returnable, an application was made for an alternate writ of prohibition to be issued commanding the District Attorney, the Recorder of this Court, and the members of the Grand Jury for that Term, to show cause why there should not be a permanent writ, or why a peremptory writ should not be issued commanding them to refrain from inquiring any further into matters connected with the killing of Stanford White by one Harry K. Thaw.

That motion came on for hearing under the alternate writ before Mr. Justice McLean, by whom it was retained. He retained it under consideration ~~for quite~~ a considerable time, I think over two months, and then filed an opinion.

It would be unseemly for me to criticise an opinion, which, no doubt, will be handed to your Honor by the learned counsel in this case. In it, after expressing many views about matters which I think, with your long experience with the practice of the criminal courts, you will not concur in,--after expressing many views he ends up by not deciding the question of whether or not he should issue a peremptory writ of prohibition, but, in substance, said that he will not decide the question be-

fore him until application has been made to your Honor for such relief in the premises as your Honor may think he is entitled to.

Thereupon we are served with motion papers here, which are simply a reiteration or a reaffirmance of the motion papers upon which the alternate writ of prohibition was granted.

Inorder that your Honor may understand the proceedings down there, I might state that upon the return of the alternate writ we did not traverse the allegations of the petition upon which the writ was granted, deeming that Mr. Justice McLean was wholly without jurisdiction to issue a peremptory writ on the papers before him. We except to the legal sufficiency of these papers, so that the only question that came before Mr. Justice McLean was whether or not those papers were sufficient in law, upon the face thereof. There was nothing in those papers that covered the whole field of criminal jurisprudence and the practice and procedure of the Court of General Sessions. The practice and procedure of the Court of General Sessions is familiar to a number of Judges, but unfortunately there are a number of Judges of our high courts who are not familiar with them, and I believe when your Honor comes to examine this extraordinary peti-

tion you will see that the Justice has fallen into certain errors, owing to his lack of knowledge of our practice here, something that cannot be obtained except by experience, because it is not set down to any considerable extent in the books or in the decisions.

Now, you will see what was sought to be done by Justice McLean was to prohibit the District Attorney from issuing any more subpoenas in the case of Harry Thaw, and we are brought here on this same set of papers.

Now, all that these papers show are that two or three subpoenas were issued for persons to appear before the Grand Jury in the case of the People against John Doe and others; that the date of those subpoenas has passed by and that they are functus officio, and that anything the Court might now endeavor to do about them it has no longer any power to do. They did not attend, their default was not noted, no application was made for an attachment and no application of any kind is pending before the Court in regard to them. But the special point that I want to lay stress on is that nowhere in the papers does it appear, nor is it charged, that these persons were witnesses for the defence, that the defence anticipated calling them, nor was it charged or alleged that

the People were going to call them or anticipated calling them. It was alleged that the Assistant District Attorney had been examining a large number of witnesses under subpoenas similar in character, and that his examination of these witnesses had concerned the Thaw case.

Now, what I am driving at in this preliminary objection--because I want to present as clearly as I can all the facts to your Honor--what I am trying to point out is this, that the only person that has an interest here, as shown by these papers, are these witnesses. These witnesses were subpoenaed to come down here. If they thought that the subpoenas were improper they could have applied to this Court, as has been done on more than one occasion, to vacate those subpoenas. If this Court refused to vacate the subpoenas and their default was noted or an attachment issued, they could be arrested on the attachment and then they could sue out a habeas corpus or certiorari and test the wisdom of the Judges of this Court. If the District Attorney was oppressive, the Court had the power to correct him by vacating his process and reprimanding him, and if it had gone to such an extent as to be a neglect of duty, or if the District Attorney had committed a crime of any other character the Court could have sent it before the Grand Jury and had the Attorney

General come here to prosecute. The remedy was a remedy for these witnesses.

Now, what relation had Harry K. Thaw to any wrong that may have been committed, assuming that any wrong was committed, toward them more than anybody else. Why should not any person come in in any case, why not anybody come in and object to this. Where are Thaw's interests concerned in the abuse of process, assuming it to be an abuse of process, on the part of the District Attorney towards the persons whom he does not swear are his witnesses, whom there is no evidence they expect to call, whom there is no evidence we expect to call, and for all that appears in the papers it was a mere matter of prurient curiosity on the part of the Assistant District Attorney to call these witnesses down here and find out as much as possible about this case, which certainly was--waiving for the moment all question of the use of the process--which certainly was laudable and a proper thing for an Assistant about to engage in the trial of a highly important case to familiarize himself, as far as possible with the facts and call all the persons down here whom he believed knew about the facts or that were willing to tell him, rather than go before the Grand Jury after they got here. There certainly was no crime or impropriety in

his listening to their stories and taking their stories, but assuming that there was, the witnesses were the persons that were wronged.

MR. GLEASON: I submit, if your Honor please, that the learned District Attorney is arguing the merits of this case and not any preliminary objection.

MR. JEROME: I am endeavoring to do so, and I am very sorry that my feeble efforts should not be sufficient to show you the point that I have in mind. If I have not succeeded in making it clear to counsel, the point I have in mind, why, I shall have to take more time in presenting it. The point I make is just right there, that if there has been anyone aggrieved here, so far as the face of these papers show, the persons aggrieved are the witnesses and they are not represented here, and they make no application. And so far as counsel is concerned he is merely an outsider, who, so to speak, butts into this case and interferes in regard to the examination of these witnesses, who are not his witnesses, who are not to be called by him, as far as these papers disclose, who are not even to be called by the District Attorney, as far as the papers disclose. They don't even allege, on information and belief, that we expect to call these witnesses, and, as a matter of fact, I don't think we

have any intentionof calling the particular persons named in their papers.

Now, therefore, I contend that this counsel has no standing to present this motion, because he does not represent anyone in interest, that the only persons concededly ininterest are those upon whom subpoenas were served; that as far as that is concerned the subpoenas are functus officio, and it would be a mere academic discussion, even if they were represented, but they are not represented. There is only a representation here by a party who is disconnected, so to speak, with any wrong, if a wrong has been perpetrated, and who is not entitled to any relief, because he is entirely foreign to it, and is not a party in interest, and he is not entitled to be heard in an application so extraordinary as this where an application is made to a common law court for an injunction. In order to do that he must show that he is a party in interest and entitled to be heard.

MR. GLEASON: The point suggested by the learned District Attorney was argued at greatlength upon the briefs submitted in the Supreme Court, and it seems to me, if your Honor please, that the great vice in this entire proceeding is that the District Attorney of the County, with all his familiarity and knowledge of the criminal

law, has been so indurated by this evil that he cannot see the evil of it, or that the defendant is prejudiced by it.

The position of the District Attorney upon the argument in the Supreme Court was that Harry K. Thaw could not be, in any way, prejudiced by an examination by the District Attorney in a fictitious proceeding of each and every witness in the United States who might, by any possibility, testify against him.

Now, I can fairly say that that is not the law of the case. I have cases upon my brief that lay down the proposition that it is a severe wrong to a defendant, or to a party in a suit, to take the testimony of any witness, whether by the form of deposition, or affidavit, unless they are intended to be directly used in some proceeding in which the deposition, upon notice, or the affidavit, upon notice, may be used. And the Court laid down the reason for that rule as this: That these affidavits, these depositions, entangle the conscience of the witness and prevent the witness upon the trial of the action from giving that fair, unprejudiced testimony that the witness would give but for the affidavit. And I submit to your Honor that it is unnecessary to particularly argue upon that branch of the case. When a witness is taken down

into the office of the learned District Attorney and confronted by one of his ingenious and able assistants, and under threats of prosecution, under references to the character of the witness, a statement is drawn up as to all the circumstances that this witness is supposed to know and is signed by this witness, and the witness goes away, and then upon the trial is produced as a witness, he or she knows that the District Attorney sits there with this paper of which the witness has no copy, ready to pull up to the witness upon any question which may come up which exhibits inconsistency, or to indict the witness for perjury if he or she chances to make an incorrect statement, or indict the witness for perjury if she happens to contradict a statement made to the detriment of my client under the suggestion of an able and zealous Assistant District Attorney. I do not need to argue at all to show your Honor the great wrong done to my client. I denounce it as an outrage, a severe outrage, and that is what has been done here. I don't need to refer to the long line of decisions, because I think the Supreme Court has spoken in this very case of Harry K. Thaw. I don't wonder that the District Attorney severely comments upon and criticises the opinion of Mr. Justice McLean. The District Attorney would have it

understood that Mr Justice McLean is not familiar with the procedure of these courts. Well, it is not a question of procedure. It is a question of the constitutional rights of my client, which have been invaded. I say he has no right to take the testimony of any witness excepting upon notice to the defendant, and that is the position I am going to argue when I get to the merits.

Now, Mr Justice McLean says that "the relator here is injured far more than the inconvenience of witnesses not knowing their rights, or knowing them prefer to run on the lines of least resistance and who, the People erroneously would have it, can alone complain. Mr Justice McLean in that one sentence disposes of the preliminary objection raised equally in the Supreme Court as here, that Mr Harry K. Thaw had no right to object. He says that Mr Harry K. Thaw is more inconvenienced, more imperiled in his rights than is any witness.

I say that the preliminary objection raised by the District Attorney against the consideration of this matter has been disposed of in the Supreme Court upon a similar suggestion, and the decision of Mr Justice McLean is correct and should be upheld by your Honor.

THE COURT: I shall not rule upon the preliminary objection. I will hold it in abeyance and hear the motion on its merits.

MR. JEROME: The question then comes up on the pres-

ence of the defendant. I submit that to your Honor for such disposition as you deem wise.

THE COURT: The presence of the defendant on the motion is not necessary. On the suggestion of Mr Gleason that a consultation with the defendant would be necessary or advantageous to him, opportunity should be given to Mr Gleason to consult with his client, and if time is required for that I shall grant it.

MR. GLEASON: I desire to except to the ruling of your Honor in so far as you deny the right of the defendant to be present, but so far as the argument of the motion is concerned I do not feel that I need the advice and assistance of my client or so much so that I should ask the Court to delay this proceeding.

I wish to hand up to your Honor the papers in this matter.

Harry K. Thaw applied, upon the 17th day of July, last, for a writ of prohibition addressed to this Court and to the District Attorney and to the August Grand Jury, to prohibit the taking of any testimony against him with reference to the slaying of Stanford White.

An alternate writ was granted, restraining this Court and its officers, the Grand Jury, in that particular regard; not from the taking of any evidence for the purpose of showing that any other person than Harry K.

Thaw was guilty of this offence, but for the purpose of connecting Harry K. Thaw with it, And the theory upon which this application was primarily based was that the Grand Jury was functus officio, by reason of its having found an indictment against Harry K. Thaw; that, conceding the inquisitorial rights of the Grand Jury to examine into the circumstances of this alleged crime so fully as might be, and to compel the attendance of witnesses by any process designated by it, whether entitled in a fictitious proceeding, whether entitled in the matter of an investigation into the alleged crime of killing Stanford White, or in any other way, that the Grand Jury should see fit, admitting the right of the Grand Jury to do that, the June Grand Jury had done it, and as a result of their labors and investigation had indicted my client, Harry K. Thaw, for this alleged crime. The cases upon this branch of the case need not be argued by me, because it is directly controlled by the decision of your Honor in the Morse case in the 42d Miscellaneous, which your Honor undoubtedly fully remembers and I need not refer to any more than that. But your Honor in that case distinctly held that the Grand Jury, having rendered an indictment, was functus officio and could not proceed

under the guise of an investigation to take testimony against the defendant. That was the theory upon which this application was made.

Now, upon the return day the Court of General Sessions the District Attorney and the Grand Jury, interposed its return of which copies are submitted here.

On the matter coming up for final settlement Mr.Justice McLean handed down a decision in which he decides that the right of the relator to this writ is established by the papers before him.

I have a copy of the decision which I will hand up to your Honor, but that, I understand, to be the scope of the decision of the learned Justice.

Now, I will say that the reason why I understand the significance of the decision of the learned Justice is in the first place because of the vigorous language used by the learned Judge, and in the next place it became unnecessary for Mr Justice McLean to consider the effect of the return and the sufficiency of the papers presented by the relator, and in that consideration Mr Justice McLean decides that the papers presented by the relator are sufficient and establish the acts complained of, and that the acts complained of

constitute a severe wrong to the relator and that they should be enjoined.

Now, under the section of the Code with reference to the proceedings upon the return, that section of the Code declares that if the acts related by the relator are not controverted upon the return the relator is entitled to his absolute writ. Mr Justice McLean holds that the facts set forth by the relator are not controverted and that he takes them to be true, and taking them to be true, he certainly does say a great many hard things against my ancient and honorable friend John Doe with which this Court will fully agree.

Now, when we come to the question of an absolute writ of prohibition, the Court is confronted with the further suggestion made that the application for this order might properly have been made in this Court, and that is the suggestion of the learned Justice which was stated upon my brief upon this application. I stated in the application for a writ of prohibition that no reflection upon this Court or doubt as to its justice was suggested by the application to the Supreme Court, but the relator was confronted with a practical difficulty, and that was the time was too short to make the application to both Courts.

My papers show that it was only a few days before this application that I knew of the taking of the testimony sought to be prevented; I knew a couple a days before the witnesses were subpoenaed, and I only had time on the following day, to prepare these papers, and that they were not fully prepared until upon the morning when the witnesses were subpoenaed.

Now, I am frank to say, your Honor, that I understood and took the fact to be that these John Doe proceedings which have gone on in this Court from time immemorial, although protest has been made and the public's attention has been directed to them, neverthless they have gone so far that I understood that these proceedings were, in fact, taken with the patent approval of this Court. So that should I apply to this Court to have these proceedings condemned my application would be denied, and it would be then impossible for me to apply to the Supreme Court because the testimony of the witnesses sought to be takenwould have been taken.

Of course the application for this writ is not directed simply against the taking of the testimony of the two witnesses named in the subpoena. Those two witnesses are cited as evidence of a proceeding pending, of an investigation claimed to be unlawfully begun by the Grand

Jury.

The papers allege and the Court has substantially found an intent upon the part of the District Attorney to take evidence in an unlawful manner. For the purpose of bringing this fact before the Court I put in the subpoenas addressed to these two witnesses, and for the purpose of showing the urgency of the writ, I explained the fact that they were two witnesses whose testimony was to be taken on the very day that this writ was applied for.

Now, I said in the Supreme Court that but for the exigency of this matter I would have applied in this Court for a direction to the District Attorney and the Grand Jury--because my regard for the law and for this ancient and Honorable Court is as great as that of anyone, --I have no criticism to make upon this Court or any officer of it. I recognize the great service that this Court daily does in this community, and it would be the height of folly and impertinence in me by any suggestion to have it inferred that I had any actual distrust of this ancient and Honorable Court. Not at all, but when I see this Court, through its officer and its Grand Jury proceeding in a certain manner, and have no time to apply both to this Court and the Supreme Court, I was compelled to say, "I fear that these proceedings are taken with the

approbation of the Court of General Sessions, and if they are, why, then it is idle for me to go before that Court." So that I applied to the Supreme Court in the first instance, but stated that if time were given me I would apply to this Court as well.

Now, in considering that question, Mr Justice McLean, exactly as I expected that he would, recognized the fact that I did not have time, in the preliminary proceeding, to apply to this Court, and he recognized the fact that the learned and ingenious District Attorney would say, "If Mr. Gleason had applied in this Court he might have obtained the relief asked, non constat, that the application to the Supreme Court was unnecessary, because, of course, in obtaining the writ of prohibition I must show that the thing sought to be prohibited could not, in the ordinary course of procedure in the lower Court, have been obtained, So that in answer to the suggestion of the District Attorney that if I had applied in this Court, in the first instance, your Honor would have made an order equivalent to a writ of prohibition, I am here now in the nature of an application nunc pro tunc, though not in fact nunc pro tunc, because the existence of these proceedings, the existence of this intention upon the part of the District Attorney to take this testimony, was

admitted in the proceeding, and what I ask your Honor to do is to make an order, following the order of the Supreme Court, that the taking of testimony against my client in any form or way in this Court without notice to him shall be prohibited. That is the broad general principle which I ask your Honor to lay down by an order to be made upon this application.

Now, your Honor, in support of that application I think it proper to say that this application was referred to by the District Attorney, upon his preliminary objection, as simply an endeavor to stop the taking of the testimony of two witnesses, and that these two witnesses--nothing appears in the record as to what has become of those two witnesses, but he says that the time for calling them has gone by. That was not the scope of this proceeding. I argued in this proceeding and the Court has ruled upon my right to have the taking of any testimony against my client enjoined by an order of this Court, or by an order of the Supreme Court, unless this Court, under the suggestion made, and as I think most properly in view of the decision of your Honor in the Morse case,--unless this Court shall decide that if the application had been made in the first instance this Court would have granted the relief sought, and this Court in kindness to counsel

I think will recognize the fact suggested in my papers showing the absolute practical impossibility that I should apply to this Court in the first instance.

Now, the learned District Attorney upon his brief said that I had no right to interfere with the District Attorney's preparation for trial, by taking out a writ of prohibition, yet he has so far succeeded in temporarily embarrassing me, and his obvious purpose is to permanently embarrass me, and I desire, and a part of my application is, to hand up the brief of the District Attorney upon the argument before Mr Justice McLean as a concession upon the part of the District Attorney that but for this writ, and the exigency of it, he would proceed to take testimony against my client, Harry K. Thaw, in the preparation of his trial. That is conceded upon the very face of the brief handed in in this proceeding, that I have succeeded, the District Attorney says, in temporarily embarrassing him. And I have succeeded in temporarily embarrassing the District Attorney by preventing the issuance of an illegal subpoena of this Court to bring witnesses down to his office, against their will, and securing, in that way, testimony to imperil the rights of my client and send him to the electric chair. I have suc-

ceeded in temporarily embarrassing him. I hope I have, and I hope I will continue to succeed in embarrassing him, and I doubt not that the order of this Court will be that the District Attorney has not the right to take evidence against Harry K. Thaw, whether before the Grand Jury or whether in any other way or manner, that it is contrary to the spirit of our laws and the spirit of our institutions.

Now, your Honor, I do not think it is necessary in view of what your Honor decided in the Morse case, for me to argue that these John Doe proceedings before a Grand Jury which has already found an indictment,--that these John Doe proceedings are absolutely void. I do not doubt, as I said before, but that the June Grand Jury in the exercise of its proper inquisitorial powers might have entitled this examination as "In the Matter of the investigation into the alleged crime of slaying Standford White", but the law would have special regard as to how the June Grand Jury should endorse this subpoena, and that it would be in excess of its power, it seems to me, if it entitled it in the name of "The People against John Doe", because such an action is upon its face fictitious unless it could be identified as against an actual defendant; otherwise there is no such action and the

subpoena becomes absolutely void.

Now, I have a very interesting illustration of that, because, whenI was in the country, when I was counsel for the Townof Hancock, in an action against all the bondholders of the Town of Hancock, I made use of all the bondholders that I could think of or could find, and then desiring to get them all in I made about twenty defendants by the name of John Doe, Richard Roe and other members of this family, describing them as fictitious names, and saying that "the persons intended are real owners or holders of said bonds who are unknown to plaintiff and are thus designated under section 451 of the Code of Civil Procedure."

Now, in the Code of Civil Procedure, section 451, we have an express recognition of a fictitious designation. I had obtained an injunction in the lower courts and various orders for examination. Now, when this matter got up into the Court of Appeals, in the 93d of New York, Mr Justice writing the opinion, says that an action must be against an actual defendant. Even in the face of the language of section 451, the Court of Appeals unanimously said I was wrong in that I could not designate as a defendant in the action a person named John Doe, even though I might use a description tending to iden-

tify him--that that was not the intention of the section or the spirit of our law.

Now, if in a civil case where the rights of a defendant are not so guarded, if in a civil case where the use of fiction from time immemorial has been recognized, more or less, if in a civil case the use of the term John Doe in designating a defendant is condemned by the higher Courts, how much more should it be condemned in a criminal case. But I think the opinion of Mr Justice McLean goes far enough on that subject, and I would like to submit it to the consideration of this Court and to my learned and ingenious opponent, the District Attorney, for whose opinion no man has greater regard than I, and I desire to say here that no possible criticism of the District Attorney or of any member of his office, has been made by counsel for the defendant, nor will be made. The District Attorney is proceeding in this matter according to the precedents set by him and others. The newspapers, have undertaken from time to time to testify, and that was the thing that I severely complained of,--that the testimony of all these witnesses was spread out before the public, but the District Attorney and his assistants have never given out any testimony of any witness who has come down, and no such thing is claimed by me. I do not say that

the District Attorney personally is to be criticised in any way, shape or manner. I, on the contrary, applaud the zealous endeavor of the District Attorney's office in seeking to obtain evidence even in this case, but I condemn this method of procedure. What I wish now to say and submit to your Honor and my friend, the learned and able District Attorney, is this: Can it be possible that the cause of truth, that the majesty of the law can be vindicated by a sacred fraud and a holy lie? Can it be both said that under the guise of a fictitious proceeding an actual defendant should be struck at and cut down by an officer of the law. I say no. I say the reputation of my learned opponent, than whom no man has a greater reputation, ought to call upon him to be the first man to condemn these John Doe proceedings, and to say, "Why, If I have anything against Harry K. Thaw I will come out with it against Harry K. Thaw and I will proceed and take my testimony against Harry K. Thaw and I will convict him if I can." I think that on reflection the District Attorney would want to be in that position, and I rather expect, and certainly I hope, that upon this hearing the District Attorney will say that however indurated this practice has become, "I cannot shut my eyes to the glaring vice of this procedure so ably exposed by a Justice of the

Supreme Court. Now, I am entirely willing to say that I will never take any more testimony in that way, either against Harry K. Thaw or anybody else." That is the course that I hope my learned and ingenious friend, the District Attorney, will take. That is the position that I hope that the District Attorney will take in this case.

Now, I say that upon this application the only question before the Court is, What it would have done if I had made my application in the first instance. Will this Court say that these papers show a purpose upon the part of the District Attorney to take testimony to be used against Harry K. Thaw, and that taking of testimony this Court will condemn. That is all I ask. Now, it is too late, at this late day--as I assume, if the Court please, that upon the argument of this motion strict honesty prevails--that it might be conjectured that somebody else would be indicted. It cannot be urged, and I do not think it will be urged that the District Attorney seriously, or in any way, shape or manner, desired to go before the Grand Jury and take any testimony for the purpose of indicting anybody else for this alleged crime. After that testimony has been taken against my client, is it possible for the District Attorney to arise here and say, "I desire to take testimony before the Grand Jury for the pur-

pose of indicting some other person. That is not what I seek to prohibit by this writ. I don't ask or seek to prohibit the District Attorney from investigating before the Grand Jury just as much as he pleases as to the guilt of anybody else. If the District Attorney has an honest belief that he can indict anybody else in this matter, I am not seeking to prevent him from investigating it. I am only saying, under the process of law, you are not authorized to take testimony against my client, except by giving him notice and allowing him to be confronted with the witnesses; and, therefore, I ask that you shall not take any testimony against my client without giving him these statutory and constitutional privileges. That is all that I ask.

I think that it may be proper for me to call your attention to a clear line of demarcation in the statute which shows the absolute justice of my position. The statute declares, in the first instance, that the Grand Jury may examine into any crime alleged to have been committed in the county. Under that, I understand, that they have practically inquisitorial powers; that they may bring in, by any process they see fit, anybody that they see fit, and they may interrogate that person, and when they have done that they are required to file an indict-

ment, and upon that indictment they are required to indorse the name of every witness who has appeared before them and whose testimony has been taken against the defendant.

Now, if your Honor please, this is a most important and salutory provision which has been grossly disregarded in this case, to such a degree that I fear that the constitutional rights of my client have been directly invaded. The purpose of that provision need hardly be explained here. A defendant upon trial for his life has a constitutional right to be confronted with the witnesses against him. Now, the law says that he must be given notice of every one of the witnesses and that upon the very indictment which the Grand Jury brings into Court there must appear a statement of the names of every witness whose testimony was considered in the framing of that indictment. Now, if your Honor please, the theory of the learned and ingenious District Attorney was that he might go before the Grand Jury and put before them three or four, or perhaps five, witnesses, and that then he might proceed before a subsequent Grand Jury and at a time when his proceeding was arrested had taken, one way or the other, the testimony of several witnesses in the case for use against my client at his trial.

MR. JEROME: Don't misstate the facts. We have taken no depositions to be used at the trial. There never has been a single deposition taken in the case of the People against Harry K. Thaw for use at the trial or which can be used at the trial. None has been taken in the form required by the statute. There is no conceivable theory of law that I ever heard of propounded by the veriest tyro that could make competent for one moment any one of these depositions, or that they could, in any way, shape or manner, be introduced by the District Attorney upon the trial of the case as evidence.

MR. GLEASON: Now, my friend the District Attorney has made his statement and I heartily concur with it, and it shows his absolute misapprehension of the point made by me. Depositions or sworn statements of these witnesses are taken in these proceedings, they are not legal evidence, of course, because if they were intended to be legal evidence they would have to be taken under section 229, I think it is, and notice would have to be given to this defendant. They are not good as depositions, certainly not. But what are they good as then? They are good as sworn statements of witnesses to entangle their conscience, as is said by the Court in a case cited upon my brief, so that at the trial the testimony of this wit-

ness will be entangled, and the defendant may not be able to elicit the truth by reason of the fear of these witnesses that they will then be indicted by the District Attorney if their statements should turn out to be contrary to the statements contained in these private depositions. That is the wrong that I complain of and denounce, because these proceedings are secret here, because no matter how much I may rely upon the testimony of a witness, no matter what he may say to me, when I put him upon the stand and he testifies, he is going to expect the learned and able District Attorney to say, "Upon the 18th day of July I had you in my office, and you swore to this, did you not?" and the witness says, "Well, that wasn't true. My impression at the trial is to the contrary, but I must have told the truth when in your office. I retract the testimony and I do not wish to have it recorded unfavorably to this defendant."

MR. JEROME: Why imagine a lot of things. I told the counsel that none of these witnesses are going to be called by us on the trial of this action.

MR. GLEASON: None of those you have taken at all?

MR. JEROME: No, sir; none at all.

MR. GLEASON: Then I ask, if the Court please, that upon this application that each and every of the deposi-

tions and the affidavits taken in this proceeding, or in any proceeding subsequent to the indictment of Harry K. Thaw, may be brought into Court and spread before your Honor upon the argument of this motion. I do not think, from the suggestion made by the District Attorney, that he should object to that.

MR. JEROME: I will consent to that if the statements taken by the defence, affidavits sworn to before notaries public, not before any judicial officer,--I will consent to that if defendant's counsel will bring into Court the memorandum that he has taken from persons whom he expects to call, or who might be called as witnesses in the trial of the case. If he will do that I will file these depositions at once in Court. What is sauce for the goose is sauce for the gander. I am prepared to file every statement that we have taken.

MR. GLEASON: If I had taken any of my memoranda by use of the process of this Court, then I would be called upon to do exactly what the District Attorney says. I would like to say, as Mr Justice McLean said, that the vice of this proceeding is that it is open to the District Attorney and if it is a valid proceeding, I ought to have the benefit of a similar star chamber proceeding, and that is what Mr Justice McLean condemned. Now, any

unauthorized testimony that I have taken I am willing to produce. The question before the Court is not as to any testimony that I have taken at all. When that question comes up I will meet it, but the suggestion is that unauthorized testimony has been taken by the District Attorney, and if he questions it, then I say let him produce the testimony and let us have a look at it. I do not ask for a private memorandum, but I insist upon the production of all the testimony and affidavits on file in this Court in this proceeding or in any proceeding against the defendant, Harry K. Thaw, and I say that we have a right to them.

MR. JEROME: That is not this motion.

MR. GLEASON: No, but the Court must find that in this proceeding all the matters have been decided in favor of the relator, except the single question. If I had applied to this Court in the first instance, would not this Court have granted me the relief, and therefore, does not courtesy require that I should have asked your Honor in the first instance. Now, I say that I agree with that statement fully and completely, but my moving papers show that only the exigencies of the case prevented me from applying to this Court. I have no fear or distrust of this Court, and having confidence that the rights

of this relator will be protected by this Court, I now ask your Honor to make the order which I ask.

MR. JEROME: If your Honor please, let me call your attention to what we are now discussing.

Mr. Justice MacLean has rendered not a decision of any kind, he has rendered an opinion upon which he won't make any order , because he says in concluding, "Application for prohibition of the acts claimed to be illegally prejudicial, although but in continuance of a long indurated practice of the office of prosecutor and of his predecessors well might have been first made to that tribunal. Action upon the application to this Court will be deferred to give opportunity for a motion in the same behalf before the learned Recorder of the City of New York.

In other words, he has not decided anything. He has delivered himself of an essay upon John Doe proceedings which have no application to this case at all. The use of subpoenas by the Grand Jury, where the name of a defendant is not known, and that they may entitled "John Doe" or by a fictitious name, is provided for by the statute, and they have not anything to do with the John Doe proceedings, as you and I and every one familiar with the practice of the criminal law understand. A John Doe

proceeding is simply inquisitorial in its form. An action is usually initiated or instituted before a Magistrate, and that is very different from a mere designation in a subpoena of the Grand Jury of some one as John Doe, whose real name is unknown.

Now, I will call your attention to the notice of motion in this case, which shows exactly the relief which is being sought for in this Court.

"Please to take notice that on the annexed affidavit of John B. Gleason, verified October 2d, 1906, and all papers and proceedings in the Supreme Court in the matter of writ of prohibition on relation of Harry K. Thaw, notice of which papers, copies of which papers have been heretofore served upon you, and the decision of Mr. Justice MacLean x x x shall make an order that the Grand Jury and the District Attorney shall refrain from any further proceedings in the matter of the investigation of the question of the killing of Stanford White, and the issuance of any subpoena in connection with aforesaid matters before the Grand Jury, in an action of the People against John Doe or John Doe et al, and for such other relief as shall be just."

Now, if your Honor please, there is no one that concurs more heartily in the views expressed by your Honor

in the case of the People against Morse than I do. I do not believe that the District Attorney has got the right, after the finding of an indictment against a defendant, to issue process calling for witnesses to appear before the Grand Jury, where the sole purpose is in investigation or preparation for trial. He has a right to talk with such witnesses as he expects to use, if he can get them to come to him; he has a right to reduce to writing any statement, and he has a right to have him swear to them. All this talk about entangling of consciences is absurd. We know something about the entanglement of the consciences of some witnesses. We have seen on more than one occasion where consciences have been entangled very much, so that when they get to the trial their conscience would not allow them to give the same testimony that they gave in the Police Court, or would not allow them to give the same testimony that they gave before the Grand Jury. It is very essential, with that class of witnesses that we see in this Court, that we should find out whether that conscience is going to be a fixed quantity or whether it is to be a fluctuating quantity to be sold to the highest bidder. It shows the propriety of taking a written statement from a witness and of having him sign it, because to some people even an extra judicial oath seems to

have a binding effect upon their conscience. But I concede that it is not proper, when a person has been indicted, to use the process of the Grand Jury for that purpose. The Grand Jury process is for inquisition into crime committed; it is not for the purpose of preparing a case for trial. And when Morse was brought before your Honor in the proceeding in which your Honor wrote that opinion, it was more than anything else, not so much that we thought that we were right to examine him there, but he had refused to answer, and he was brought before you to get a ruling that we might have an authoritative decision on that point, because it was being continually suggested by one side "You can't examine this person and you can't examine the other person", and your Honor's ruling put that at rest, and you stated in a public manner that it could not be done,--that when a man was indicted, simply for the preparation of the case, the District Attorney had no right to use the Grand Jury subpoena.

And now, in this proceeding it is not asked simply that the District Attorney shall not use Grand Jury subpoenas, but that he shall refrain from any further proceeding in the matter of the investigation into the question of the killing of Stanford White.

Now, your Honor knows that not infrequently a super-

seding indictment is found, either because of some technical defect in the first indictment, in which case all the witnesses are often summoned anew before another Grand Jury, or it sometimes occurs that there is a grave reason to believe that some person other than the indicted person was concerned in the commission of a felony, and the Grand Jury is asked to reconsiderthe evidence and the further evidence to see whether or not a joint indictment should be found. I say here that it is no fiction in this case, in my judgment, and the knowledge that I have of this case is such, sir, that I am by no means clear in my mind that there is not another who could, perhaps, properly be coupled with Harry K. Thaw in the commission of this offence. It is no fiction, sir. The statute which provides that one who aids or abets, counsels or advises or solicits another to commit a crime, whether present or absent, is a principal, is one of wide scope. It does not appear where this man got his revolver from, this man that killed. It does not appear whether words had been spoken that urged him on to do the deed that he did. And to come into this Court and ask this Court to grant an injunction against the District Attorney and the Grand Jury in this broad, sweeping way,-- I have never heard of such a proposition.

If Mr. Garvan, in the excess of his zeal, has issued any subpoenas simply for the purpose of preparation, Mr. Garvan should not have done that. He knows the opinion which your Honor has rendered, and he knows the attitude that I take on that subject. I have made it very plain to my associates in my office that that is not the proper course of procedure, but to come in here and ask your Honor to enjoin the District Attorney from taking any further testimony before the Grand Jury, from issuing any subpoenas to inquire into the matter of the killing of Stanford White, and from taking any evidence before the Grand Jury as to the guilt and responsibility of the defendant, Harry K. Thaw, is to ask of your Honor something which your Honor, with all due respect, has not the power to do, even if you were so inclined, and it is preposterous that the Court should have such an inclination, but as your Honor well knows, your Honor sits with common law powers, or has such inherent powers as a court of record has. There is a marked and clear distinction in the law, between a stay of proceeding and proceedings after a stay. Where a court has power to entertain the matters incidental to that power, it may grant a stay in proceedings before it, but where a proceeding is instituted for the purpose of a stay alone, in other words, when the

stay is not an incidental matter conferred by the inherent power of the Court, but is the direct aim and object of the application, it then can only be granted or issued by a court of equity, and so far as the procedure has provided for that, under our system, it must be either prohibition or injunction, neither one of which your Honor has the power to issue. Your Honor can intimate that it would be unseemly for the District Attorney to do this, that or the other thing, but you cannot prohibit him or enjoin him from doing it. Your long and honorable service for many years, and your wide experience, would make the District Attorney inclined to bow to your opinion, unless he felt that he was distinctly compelled, in the discharge of his duties, to act counter to it and take the consequences. If the District Attorney abuses the process of this Court, I take it that your Honor has power to punish him. If the process is abused and application is made for relief, your Honor may take such steps as are necessary in your judgment. If your Honor should be in error in refusing relief under any subpoena that might be issued, application might be made by habeas corpus or certiorari when the attachment is executed. What is the question upon which we come into Court? We are here on papers; we are here,

not on any rambling discussion about the facts, but we are here distinctly on papers that ask for the enjoining by a common law court of the District Attorney from proceeding to investigate the guilt of a man charged with murder in the first degree further than he has already done. The constant practice of the Court shows that superseding indictments require just that to be done, whether the superseding indictment is for the purpose of adding a joint defendant or whether it be for the purpose of remedying some technical defect.

There is no contention, for one moment, on the part of the District Attorney that he has any power or right to use the subpoena of the Grand Jury for the purpose alone of preparing a case for trial, where a man has been indicted. He concedes that that is a misuse of process. If any of these subpoenas have been issued for any such purpose it was a misuse of those powers, but the remedy for that misuse is not in an injunction, and this Court has not the power to grant an injunction, and I take it that your Honor would not on papers that simply show what these do. In the papers upon which this was presented to the Supreme Court all that bore on the point was this: "The prosecution of the case against Thaw is in the hands of the District Attorney and his assistants

and deputies for the purpose of preparing the case for trial. Subpoenas are made by the District Attorney addressed to witnesses requiring them to appear and testify before the Grand Jury in an investigation. These subpoenas are not made for the purpose of procuring any new indictment for the killing of Stanford White, but for the purpose of procuring evidence to be used against the defendant at the trial."

That is not alleged on information and belief. That is a distinct affirmation under oath. Now, how can it be known for what purpose these subpoenas were issued, by this defendant or his counsel. He may infer, he may say that upon information he believes that such is the purpose of it, but how does he know? How does he know that subpoenas in the future will be issued for that purpose alone. And there is no information in these papers that there are going to be any issued in future. Now, it seems to me if we get right down to what this application is, that this Court shall make an order that the Grand Jury and the District Attorney shall refrain from any further proceeding in the matter of the investigation of the question of the killing of Stanford White and from taking any evidence before the Grand Jury as to the guilt or responsibility of the defendant, Harry K.

Thaw, with reference to the death of Stanford White, and from the issuance of any subpoenas in connection with the aforesaid matter before the Grand Jury, in the matter of the People against John Doe or John Doe et al x x x in the action of the People against John Doe or John Doe et al".

Now, I say your Honor has not the power to grant it, I say that if your Honor is of the opinion that you have the power to grant it it is a preposterous request.

MR. GLEASON: Upon the question of want of power of this Court, upon my brief in the Supreme Court I argued, and was of the opinion, that the suggestion made by the learned District Attorney right here and now was correct, and as far as I could investigate I was unable to discover any equity power in this Court, and the suggestion I made in the Supreme Court was that it was idle for me to apply to this Court for the use of this equity power if the Court did not have it. But I understand that Mr. Justice McLean believes differently because he has referred the matter distinctly to you. Now, if your Honor shall conclude that you have not the power to grant my application and refer it back to the Supreme Court upon that ground, why that is one thing, but it seems to me that your Honor will feel that the reference to this Court by the Supreme

Court of the application to be made and its determination in this very matter is to be taken as a decision by the Supreme Court that your Honor has power to make the exact order asked for. Now, whatever criticism may be made upon the language of any order asked for by me, what I ask for cannot be misunderstood. I ask for relief against any taking of testimony against Harry K. Thaw, or implicating him. That is all that my original application asked for. It is all that the application here asks for. It is not that the District Attorney be restrained and enjoined from taking evidence against anybody else. I don't ask any order restraining him from doing that. But if in the preparation of my previous order or in my argument or by necessary implication, it appears that I asked for that, I disclaim it, and all that I ask is that he not take testimony against my particular client, Harry K. Thaw, without notice to him, which the statute allows him.

MR. JEROME: That is equivalent to saying that your Honor should presume that the District Attorney is going to abuse the process of this Court and in order that he won't abuse the process of this Court your Honor is going to issue an injunction. I have stated in Court here that I bow entirely to your Honor's decision, not only because it is the law, but because it has my hearti-

est approval. But is there any basis for the assumption that the District Attorney is going to abuse the process of the Court?

MR. GLEASON: It is not any statement of counsel, but a proceeding in the Supreme Court in which this decision has been made. Now, it might be thought that perhaps I should have entered an order upon the opinion of Mr Justice McLean, which order should have recited what is held as against the District Attorney's contention, that the relator has established his case, and this and that, and that only the question of the original application was now referred to the Recorder. It seems to me, if your Honor please, that fairness to this Court called upon me to apply to this Court, upon the suggestion of the Supreme Court, without seeking to constrain this Court in any way by any order entered upon the opinion of Justice McLean. If your Honor should have any doubt upon that subject, I shall ask your Honor to allow me to have Justice McLean make such a recital in his order and submit such question as was in the mind of the learned Justice, because the proceeding is still pending before him. In other words, I desire that the proceedings should be so conducted that orderly conduct as between the Supreme Court and the Court of General Sessions, and the comity

existing between those two courts shall be fully preserved, and I know that that is the wish of your Honor.

MR. JEROME: I think, under the statute, all that Judge McLean could do would be to make an order granting a peremptory writ.

THE COURT: I think, gentlemen, that it would have an illuminating effect upon the question if Justice McLean was applied to for an order in some form. If you wish to apply to Mr Justice McLean, I think it would be proper to have you do so, asking him to embody his views in an order that will contain some direction to this Court.

MR. GLEASON: That consideration appealed to me rather forcibly, and I started to prepare such an order, and then it occurred to me that I should have applied to this Court in the first instance. I am entirely willing to procure such an order. Upon the suggestion made by your Honor I am entirely willing to submit to the District Attorney the draft of such a proposed order.

THE COURT: As it is now the proceeding is in the situation of being suspended. I think that possibly it would bring the question up in more concrete form if an order is entered. If Mr Justice McLean does not see fit to enter such an order, of course you can inform the District Attorney, or inform me, and I will proceed to act as

well as my light will enable me to act upon the application before me.

MR. GLEASON: I will inform Mr. Justice McLean of the suggestion of your Honor.

THE COURT: I would prefer that some such order would be drawn.

MR. JEROME: I take it that your Honor is not looking for anything that would simply embody the views that Mr. Justice McLean has. The application now is made to this Court. I take it that he has no authority to direct this Court except by a writ of prohibition to refrain from doing something. I don't see how that could be put in an order. He has no power to refer anything to this Court. He can express his views in an opinion, but this Court being a court of coordinate jurisdiction in all these matters, common law jurisdiction of crimes, he can only control this Court by a writ of prohibition. So I take it that your Honor's suggestion does not extend to the matter of an order referring this matter to you, but some order on the motion before him which may be illuminating to this Court when it is presented.

THE COURT: That is my idea.

MR. GLEASON: I will apply to Mr. Justice McLean for such an order and a statement that the attorney for

the relator has leave to apply to your Honor. All I understand that Justice McLean will do will be to give me leave to apply to your Honor to see what your Honor will decide.

MR. JEROME: That is, you don't contemplate an order which will decide the motion?

MR. GLEASON: No.

THE COURT: Hand up your papers on both sides.
