

START

756

CASE

957

January 27th, 1908.

-: I N D E X:-

	<u>DIRECT</u>	<u>CROSS</u>	<u>RE-D.</u>	<u>RE-C.</u>
Jacob Vogler	2	7		
Dimintre Ioanowicz	21	33	42	
James J. Brehick	43	45		
Charge	50			

.....

756

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

-----X
THE PEOPLE OF THE STATE OF NEW
YORK

-against-

HARRY WILSON and FRANK CUSICK
-----X

: B e f o r e :
: Hon. Joseph F. Mulqueen, J
: And a Jury.

New York, January 27th, 1908.

Indicted for Attempted Robbery in the First De-
gree; attempted grand larceny in the first degree;
assault in the second degree.

Indictment filed December 12th, 1907.

A P P E A R A N C E S:

For the People, Assistant District Attorney, William
S. McGuire.

For the Defense, R. M. S. Putnam, Esq.,

A jury was duly empanelled and sworn.

James E. Lynch,
Official Stenographer.

756

J A C O B V O G L E R, being called and duly sworn as a witness in behalf of the People, testified as follows:

(All witnesses were excluded by direction of the Court.)

DIRECT EXAMINATION BY MR. MC GUIRE:

Q Mr. Vogler, you are a cook? A Yes sir.

Q And live at 177 Knickerbocker Avenue, Brooklyn, this City? A Yes sir.

Q Where are you employed as a cook? A At that time I was employed in 42nd Street.

Q In this city and county? A Yes sir.

BY THE COURT:

Q By whom in 42nd Street? A Rigg's restaurant.

BY MR. MC GUIRE:

Q That is near Sixth Avenue? A Yes sir.

Q On the night of the second and third of December, 1907, were you on Third Avenue, this City and County? A Yes sir.

Q Did you at that time see these defendants or either of them, either of these two men here (indicating)? A I did not see them before.

Q Well, did you see them that night? A Yes sir.

Q Whereabouts did you see them that night? A Between 23rd and 24th Streets.

Q And about what time of night was it? A About four

756

o'clock in the morning.

Q In the morning of the third of December? A The 4th of December; the third and fourth.

Q Was that the third of December? A The 4th of December, Tuesday.

Q What day was it? A On Tuesday morning.

Q That is the third of December? A Yes sir.

Q It was Tuesday morning? A Yes sir.

Q What did these men do when you first saw them?

A One got me around the neck and the other one went through my front pockets.

Q Which one of these two men got you around the neck?

A I can't say that.

Q Can you say which one got you around the neck? A No sir.

Q Can you say which one went through your pockets?

A No sir.

Q How do you know these were the two men who did it?

A Because the policeman caught them after that.

Q At the time they went through your pockets did you see their faces? A No sir, I did not see their faces in that time, because it was dark in that block. They are building a new house there, and I could not see.

Mr. DEAN: Now, I move to strike out all the witness's testimony relating to the identity of these two men.

0947-756

CASE

He says he did not see their faces.

MR. MC GUIRE: I will connect it.

Motion denied. Exception.

Q What did you have in your pockets? A Well, I had pretty near thirteen dollars.

Q In which pocket? A In the back pocket.

Q Of your pants? A Yes.

Q Did they put their hands in your pocket, in that pocket? A No sir.

Q What pockets did they put their hands in? A In the two front pockets.

Q Of your pants here (indicating)? A Yes sir.

Q Was there anything in those two front pockets? A No sir, only a bunch of keys.

Q Did they take the bunch of keys from your pocket?
A I don't know that. I missed them from that time.

MR. PUTNAM: Counsel is going on and stating what these defendants did, when in no manner have they been identified.

THE COURT: Well, he said these were the two men that held him up. The witness has sworn these were the two men that held him up.

MR. PUTNAM: Yes, but the District Attorney immediately thereafter asked if he saw their faces and he said no.

THE COURT: That may weaken the force of his identi-

CASE 756

5
fication. He said he knew them because they were arrested right away. It is a question for the jury to determine how much weight to give his identification.

MR. PUTNAM: Your Honor will pass on my motion?

Motion denied. Exception. X

Q After the two men you refer to had held you and gone through your pockets, what did they do; where did they go?

A I went on the other side of the street.

BY THE COURT:

Q Where did they go? A I can't say that.

BY MR. MC GUIRE:

Q Did you see them after they left you? A No, I did not look at them. I went on the other side because over there I saw somebody.

BY THE COURT:

Q Well, you went on the other side? A Yes sir.

MR. PUTNAM: I ask to strike out that last answer.

THE COURT: Strike it out.

BY MR. MC GUIRE:

Q When did you leave your work that day? A At ten o'clock.

Q What did you do after you left your work? A I was with a couple of friends in the house.

Q Drinking? A Yes sir.

Q Had you had much to drink that evening? A Well, I

756

6
guess so.

Q And did you have anything in your hand? A I had a bundle in my hands, my laundry.

Q You had your laundry in your hands when you were walking down Third Avenue? A Yes sir.

Q Where had you come from when you saw these two men that you speak of? A From 24th Street.

Q Had you been in a saloon on 24th Street? A No sir, not in that time.

Q How long before you met these men was it you had been in a saloon? A About an hour before, I guess.

Q And you had drunk something in that saloon? A Yes.

Q You had been drinking pretty steadily from ten o'clock on until three, hadn't you? A Yes sir.

Q Were you under the influence of liquor at the time? A Well, I know everything what happens to me.

BY THE COURT:

Q Well, were you under the influence of liquor? A Yes sir.

BY MR. MC GUIRE:

Q After these two men that you speak of went through your pockets, did you at any time after that see these defendants? A No sir.

Q That night, didn't you ever see them again? A Yes, in the station house.

997
756

Q How long after that, how long after these two men went through your pockets did you see the defendants at the station house? A Well, I guess about 15 minutes; something like that.

Q Before you got to the station house did you see them any place? A No sir.

Q Did you go to the station house with them? A Yes.

Q Did you see them when you went to the station house with them? A I saw them, yes sir.

Q You saw them on the way to the station, did you? A Yes.

Q And on the way to the station house, was immediately after these two people you speak of went through your pockets, was it? A Yes sir.

CROSS EXAMINATION BY J. PUTNAM:

Q You say you are a cook, Mr. Vogler? A Yes sir.

Q Where do you work? A Forty second Street, Riggs' restaurant, near Sixth Avenue.

Q What time did you leave your work that night? A About ten o'clock.

Q Did you go away from the restaurant alone? A Yes sir.

Q Did you meet anybody in front after you left? A I went in the house to a friend of mine.

Q Who is the friend? A In 43rd Street.

957-756

Q What was his name? A Well, I don't know his name; I know his business.

Q You don't know his name? A Cuchek, something like that.

Q How long did you stay there? A Until about one o'clock.

Q Had you had any drink in his house? A Yes.

Q What did you drink? A Beer.

Q All beer? A Yes sir, nothing else.

Q You left there about one o'clock? A Yes sir.

Q Where did you go from there? A I went in a couple of saloons then, after that.

Q You are quite sure you did not leave his house until after one o'clock? A Not after, no sir.

Q Not until after one o'clock? A Not after, no sir.

Q Did you leave after one or did you leave before one?

A Before one.

BY THE COURT:

Q How much before one? A Well, I can't say that. I did not look at the time.

BY MR. PUTNAM:

Q It was nearly one o'clock? A Something like that, yes.

Q And you went to a couple of saloons after that?

A Yes.

756

CASE

Q Do you remember where the saloons were? A Well, it was in First Avenue.

Q In First Avenue? A First Avenue, yes sir.

Q Where was the house of this friend, what avenue?

A Between First Avenue and Avenue A.

Q And you went into one saloon near First Avenue?

A Yes.

Q On what street was it? A I can't say that. I guess 43rd Street or 44th.

Q And this was near 43rd Street, this saloon you went into? A Yes sir.

Q On First Avenue? A Yes.

Q Where was the second saloon you went into? A Somewhere in Third Avenue.

Q About what street? A Maybe in 30th Street or something like that.

Q Were you on your way downtown then? A Yes.

Q Were you walking? A Yes sir.

Q Did you go into any more saloons before you met these men whom you say attacked you? A Not that I know of.

Q In other words, if we have this straight, after leaving the restaurant, you went to the house of a friend, where you drank until about one o'clock? A Yes.

Q Then you came out and went into two saloons, one of which was about First Avenue and 43rd Street, and the other

CASE 756

was on Third Avenue somewhere about 30th? A Yes.

Q And that was -- those were all the places you went until you were attacked? Now, you were pretty drunk that night, weren't you? A Well, I was pretty drunk. I know anyhow what happens to me.

BY THE COURT:

Q But you were or were not drunk? A Yes sir I was.

BY MR. PUTNAM:

Q Was anybody with you when you were walking down Third Avenue? A No sir.

Q Did you or do you remember when it was you met these two men? A Yes sir.

Q Where? A Between 24th and 23rd Streets, on the east side of the street.

Q You are quite sure about that? A Yes sir, I am.

Q Did you notice which way the men were going? A I don't know how the men were standing there at the time.

Q Where, when you first saw them, between 23rd and 24th, where? A On the sidewalk.

Q Were they standing out near the curbstone? A In the middle of the sidewalk.

Q Right midway between the curbstone and the store front? A Yes sir.

Q Which one of them made the first move towards you? A I can't say that.

CASE 756

Q You do not know? A I can't say that.

Q Are you sure that either one of them put his hands in your pockets? A Yes sir, I am sure of that.

Q Which one? A I cannot say that either.

Q How do you know either one of them put his hands in your pockets? A No sir, I don't know who put it in.

Q You do not know? A No sir.

Q Did you have any money on your person that night?

A Yes sir.

Q How much did you have? A About thirteen dollars.

Q Where was it, what pocket? A In the back pocket of the pants.

Q The hip pocket? A Yes.

Q Which one, right or left? A Right.

Q What was it, bills? A Bills and change.

Q Do you mean to say you carry silver in your right hand hip pocket? A No, I have the silver in the coat pocket.

Q Which coat pocket? A Right here (indicating).

Q How much silver was there? A I cannot say that. Something over a dollar.

Q How much did you have when you left the restaurant that night? A I had about fifteen dollars.

Q Did you spend anything at the house of this friend?

A Yes sir, a couple of pints of beer.

CASE 756

Q Did you send out for the beer? A Yes sir.

Q The rest of your money was spent in those two saloons? A Yes sir.

Q Do you know how long you stayed in the saloons, how many drinks did you have in the first saloon? A I guess three.

Q Were you all alone? A Yes sir..

Q Did you speak or have anything to do with anybody in the saloon? A No sir.

Q You took three drinks all by yourself? A Yes.

Q How many drinks did you have in the second saloon?
A I guess one.

Q Was this all beer? A Yes sir, all beer.

Q So the money you had in your pocket when you met these two men here, or whoever they were, represents the change out of the fifteen dollars that you had when you left the restaurant, is that right? A Yes sir.

Q All bills in your pocket or in your righthand hip pocket? A Yes.

Q And the change was in your change pocket of your coat? A Yes.

Q Were the bills in a pocket book or were they loose?
A They were loose.

Q You are not able to say which one of these defendants put his hand in your pockets? A No sir.

942756

Q Are you able to describe either one of the two men who put his hands in your pockets? A No sir.

Q Did you feel the hand of anybody in your pocket?

A Yes.

Q Which pocket? A Both.

Q Which pocket did you feel the hand in? A They went from the one pocket to the other one in the front.

Q No, but I want to know which pocket did you first feel anybody's hand in? A In the pocket book (indicating)? In this pocket here (indicating.)

Q Which pocket was the first pocket you felt a hand in? A The right.

Q Of what, the vest, coat or pants? A No, the pants.

Q You first felt a hand in your right hand pocket of your pants? A Yes.

Q And then what next? A The other one.

Q Of your pants? A Yes.

Q Did you feel a hand anywhere else, any other pocket?

A No sir.

Q Did anybody strike you? A No sir.

Q Did anybody hit you or attack you in any way? A No

si.

Q You only felt the hands of a man first in

the right pocket and then in the left? A Yes.

Q Were you alone at the time these two

756

men that you speak of met you? A No sir, not on this day.

Q Did you see anybody anywhere around at all? A I saw somebody on the other side, and I went over there.

Q On the other side of Third Avenue? A Yes sir.

Q Did anybody come up when these men went away from you?

MR. MC GUIRE: Come where?

Q Come up from anywhere? A I didn't see anybody, only I saw that one on the other side.

Q Well, do you know what made these men leave you at all? A I don't know that.

Q There was no hands put in any other pocket but these two? A No sir.

Q And these men went right away from you without anything further happening? A Yes sir.

Q There was no policeman around? A I did not see none.

Q And no other person came up or approached prior to their leaving you, before they left you? A Not that I see. I saw somebody on the other side.

Q On the other side of the street? A Yes.

Q In other words, these two men, or some person put their hands in one of your pockets and then they walked away and left you? A Yes sir, that's right.

Q Did you make any complaint to anybody? A I went on

and told that one.

957-756

Q Whom did you see on the other side? A A young man.

Q What did you say to the young man? A I told him they tried to rob me on the other side.

Q Did you make any complaint to any police officer?

A I did not see none.

Q How did you happen to say -- how did you happen to go to the police station? A Well, if they had them two, they got me too.

Q How did you happen to go to the police station?

(No answer.)

BY THE COURT:

Q Why did you go to the police station? A I did not go to the police station.

Q You did not go at all? A No sir, I go with the policeman; he arrested me too.

Q Where did he take you to? A The police station.

Q You just said you did not go to the police station?

A Well, I was there.

BY MR. FURMAN:

Q When did the policeman arrest you? A In the station house; I had to stay there in the station house.

BY THE COURT:

Q What did he do to you? A He did not arrest me.

He took me to the station house.

BY MR. FURMAN:

967-756

Q Where was this? A Well, I guess one block further down.

BY THE COURT:

Q Twenty third Street and Third Avenue? A Yes sir, I guess 22nd Street.

BY MR. PUTNAM:

Q Where did you first see the policeman? A I saw the policeman after he had them two men.

Q After he had the two men? A Yes.

Q Where was that? A Well, I was so excited I don't know how many blocks it was away. I run away. I was scared, afraid.

Q Was it downtown or uptown? A Downtown.

Q And the first you saw of the policeman he had these two men? A Yes, two policemen.

Q What did he say -- were there two policemen? A Yes sir, two policemen.

Q Now, as a matter of fact, there might have been three policemen? A No sir, there was only two.

Q Sure there were only two? A Yes.

Q Isn't it a fact that you are a little bit cloudy about what happened that night? Do you remember anything that happened that night very well? A Yes sir, I am pretty sure.

Q But you are not really certain about anything, not

756

absolutely positive? A I am positive them two fellows held me up. That's all I know.

Q You are just positive two fellows held you up, but you are not positive of anything else? A Well, I don't know. I went on the other side and told that man.

Q You are sure you saw two policemen? A I saw two policemen. Every one had one of them. They was on the way downtown. Which corner it was I don't know. I was scared and I ran away.

Q What did the policeman or either one of them say to you? A They told me I had to go to the police station with them.

Q Did you say anything to these two men, or about these two men robbing you to the policemen? A I didn't say anything to the policemen. I said it in the station house.

Q But the policeman first said to you, you have got to go along to the station house? A He told me to go with him to the station house.

Q And that was before you said anything about being robbed or touched at all, is that right? A That's right.

Q You did not make any complaint about being robbed until after you got to the station house? A That's right.

Q Did you know the man that you went across the street and told him? A I know him --
BY THE COURT:

967-756
CASE

Q Well, did you know him? A No sir, that time I never saw him before.

BY MR. PUTNAM:

Q How long did you talk to him? A Only about half a minute. I only told him that they tried to rob me, and I ran away. I was scared.

BY THE COURT:

Q You told him, or you thought maybe he would rob you too, is that it? A Yes sir.

BY MR. PUTNAM:

Q And when you left him, did you go down the east side of the street or did you cross back? A I crossed the street to the west side.

Q And when you left him and went on down, did you stay on the west side? A Yes sir.

Q Did you have any talk with anybody else? A No sir.

Q How long after that was it you met the two policemen with the two men? A A couple of minutes after.

Q Now, you did not lose any money, did you? A No sir.

Q You had all the money with you when you got through that you did when you started? A Yes sir.

BY THE COURT:

Q Now, how can you swear positively these are the men that you say assaulted you? A Well, I can't swear it because I did not see them.

756

Q You never saw them before? A I never saw them before.

Q You paid no attention to them that night? A No sir, just on that side they build a house, and it was very dark there.

Q Building a house on which side? A Just on the same block where they caught me.

Q On the east side? A On the east side.

Q Well, they are not building a house on the east side; they are building a house on the west side. You do not know east from west, do you? A Yes sir.

Q Which is the east side of Third Avenue there? A The down side.

Q You were coming down? A Coming down on the left.

Q Now, which would be the east side? A The left.

Q And you think they were building a house there that night? A They made anyhow something. I guess they built a new store or something like it.

Q On the west side they are building? A On the east side.

Q You did not notice what they were doing on the west side? A No sir, because I wasn't there.

Q Did you pay no attention to these people at all? A No

, did they have you in their hands,

their clutches there? A Not long. A couple of seconds.

Q They did not knock you down? A No sir.

Q Did not hit you at all? A No sir.

Q Did not say anything? A No sir.

Q Now, it was pretty dark at that time, was it not?

A Yes, just on that side, that's the reason I went on the other side, because there was more light and I saw somebody over there.

Q I know, but it was very dark at four o'clock? A Four o'clock, yes sir.

Q Very dark? A Yes sir.

Q And the Elevated railroad is there? A Yes sir.

Q And that makes it dark? A Yes sir.

Q And yet you say you saw a man on the other side of the street? A On the other side, on the corner.

Q What was he doing there? A He was standing there.

Q And what did you say to him? A I went on his side where he was standing and told him that two men up there tried to rob me.

Q "Up there, tried to rob me"? A Yes sir, on the other side.

Q Over there, you mean? A Yes sir.

Q But you cannot swear now that these are the men that stopped you? A No sir, I cannot.

D I M I T R E I O _ A N O W I C Z, being called and duly sworn
as a witness on behalf of the People, testified as follows:

DIRECT EXAMINATION BY MR. MC GUIRE:

Q Where do you live? A I live in 32nd Street, 158.

Q Where do you work? A I work in Rector's restaurant.

Q What is your work there? A Waiter.

Q On the night of the second and third or in the early
morning of the third of December, about what time as nearly
as you can recollect did you leave your place of business?

A I have been out on this day.

Q That was your day off? A Yes.

Q What time were you returning home? A I returned
at five o'clock in the morning.

Q And at that time, were you walking along Third Ave.?

THE COURT: No, ask him what he was doing.

Q What were you doing? A I was in the Irving Place
theatre, and after the theatre I was to Tammany Hall at a
ball, and then at a quarter past three I have been in the Co-
lony restaurant and I took a glass of beer.

Q Yes. A And I went to go home, and my friend said
"Come and walk with me a little bit down on Eighth Avenue."
I walked with him down and after I said good night.

BY THE COURT:

Q Now walk with him down to 14th Street and Eighth
Avenue? A Yes.

Q How many drinks did you have there? A One drink.
I come back to Third avenue.

Q You went along 14th street? A Yes, I came back on
Third avenue and on 23rd street I see in the light, one small
man, drunk. He come down, and two men took this fellow.

Q Wait, now. Two men? A Yes, sir, two men sprang
from the new building house.

Q From the new building house? A Yes, from a dark
house, a dark place. One gave the old man this way (in-
dicating) on the head, and at the same time he put his hand
in the pocket, and another one he put his hand in the pocket,
and he looked for money, and then they took the hands from
the pocket, and he dropped a key on the floor. When I go for-
ward to this man --

Q You ran over to the man, did you? A Yes.

Q You ran right over? A Yes, I wanted to help him,
and he took his pocket from the hands. He looked in the
pocket and could not find nothing in the pocket, and just in
one minute I saw a policeman come forward at 25th street, and
I told him right away. The policeman catch him, and the
other fellow ran away, and another policeman he catch him on
27th street.

BY MR. McGUIRE:

Q When you started across the street, what did the two
men do?

CASE 756

THE COURT: Well, he had not got up to the street yet. Where was he?

Q, When you crossed Third avenue --

THE COURT: He has not said he crossed Third avenue.

Q When you ran over to the man, what if anything did the two defendants then do?

MR. PUTNAM: I object to that.

MR. McGUIRE: Question withdrawn.

Q When you ran across to the complaining witness, what, if anything, did you see the two men who had hold of him do? What did they then do when you came across? Did they go any place? A Yes, and the man, he walked back.

BY THE COURT:

Q No. What did these two people there do? Don't you understand that? A Yes, sir.

Q Well, now, just say what they did? A I could not understand that word. I speak Italian or German or French.

Q Well, you spoke pretty well up to date. What did these two people do? A He wanted to rob the man on the street.

THE COURT: Strike that out.

BY MR. McGUIRE:

Q After you went across the street, and after you saw these two people put their hands in the complaining witness's pocket, what did you see them do next? A He make with the hand like that on his head (indicating), and after

he walk up, and on 27th street, in this one minute I see the policeman.

BY THE COURT:

Q That will do, now; we will get that later. What did you see them do? A He put his hands in the pocket.

Q And after that? A And after that he say he could not find anything.

Q He said he could not find anything? Did you hear him say he could not find anything? A Yes, sir, he speak --

Q You were close enough to hear him say that? A Yes.

Q You were right near them? A Yes.

BY MR. McGUIRE:

Q How far away were you? A I have been on 23rd street.

BY THE COURT:

Q But how far away were you? Do you know what that means? Do you know what a meter is? Do you know what a foot is? A From here to the door (indicating).

Q That is a foot, is it? A Yes, sir.

MR. McGUIRE: I think it is evident that the witness has difficulty, your Honor.

THE COURT: I know, but the witness is too willing. He wants to make a great speech about this matter. His testimony does not corroborate the other man at all, who

997
756

swore that this man was standing on the other side of the street.. Now, this witness says he ran over to the two men and him, together.

BY THE COURT:

Q Just say what you saw and did, and nothing else?

A (No answer).

BY MR. McGUIRE:

Q What did you see these two defendants do, after you crossed the street, and what was the nearest, how far were you from them when you say you saw them walk up Third avenue? When they began to walk how far away were they? A The first time when I see, he was -- I have been between 23rd and 24th street block. When I walk up, the man, and these two men--

BY THE COURT:

Q Walk up where? A I walk up to this man.

Q Which side of the street were you on? A I was on the west side, or the east side.

Q Well, which was it, now? A (No answer).

BY MR. McGUIRE:

Q Your right hand side or left? A On the right hand.

Q Going up? A Yes.

Q And on which side did you see the complaining witness? A I saw the complaining witness from the west side, from the elevated station.

Q He was on the west side? A Yes.

Q But you were on the east side? A Yes, and I walk

756

on the east side and in the light I saw these two men.

Q Now, just answer the question. You were on the east side, and all this happened on the west side? A Yes. No, no -- he was on the east side and I was on the west side, and after I walked on the east side too.

Q Now, you were walking up Third avenue? A Yes.

Q Now, were you on the right hand side or the left hand side of the avenue? A When I walked on Third avenue I have been on the left side.

BY THE COURT:"

Q Up? That is west, yes? A Yes, sir.

BY MR. McGUIRE:

Q That is on this side here (indicating)? A Yes.

Q And on which side did you see the complaining witness, this little man, which side was he when you first saw him?

A I saw him on the east side, the right hand, in the new building house.

BY THE COURT:

Q How do you know this is the complaining witness?

THE COURT: He has not been identified at all. I will strike out the last question and answer.

MR. McGUIRE: Can I bring him in for purposes of identification?

THE COURT: No, not yet; just ask him to describe the people he saw there.

756

BY MR. MCGUIRE:

Q Describe the man that you saw, that you say you saw two men going through the pockets of; describe as nearly as you can the man through whose pockets you say you saw two men going? A Just as I saw the man, and I called a policeman right away.

THE COURT: Strike that out.

A (Continuing): I couldn't understand that word.

BY THE COURT:

Q How long did you stay on the west side of the street going uptown? A About a couple of minutes, I think that was.

Q And what sort of looking man was this man you say was coming down when he was stopped by these other two men?

A Vogler, the little fellow, he was drunk.

Q He was what? A He was drunk.

Q Have you seen him since? A No, after I speak with him.

Q Have you seen him since? A (No answer).

BY MR. MCGUIRE:

Q Have you seen him to-day? A Yes, I saw him to-day.

Q Whereabouts? A In court.

BY THE COURT:

Q Did you see him yesterday? A No, never saw him before.

756

CASE

Q Never saw him before to-day? A Never saw him before.

Q You are sure, you know what you are saying? A Never,
only here in court.

Q You never saw him before? A No.

Q In any place? A Not any place, only here in
court, and the Police Station.

Q Well then, you did see him before? A No, never.

MR. McGUIRE: Before what day?

THE COURT: Before to-day.

MR. McGUIRE: I think it is obvious that he is labor-
ing under a disadvantage.

THE COURT: But he is too willing. We do not want
witnesses here to convict anybody improperly. I think
he is altogether too willing. It is a very serious mat-
ter.

MR. McGUIRE: Your Honor is of the opinion that it
is a false statement he makes when he says he never had
seen this man before the night of the arrest, because
if your Honor is, I should be most solicitous to inves-
tigate that side of it? I think we should have an inter-
preter.

THE COURT: He understands English. Go on with
the case. I am trying to do justice here, but we must
have competent evidence before we will deprive any man
of his liberty on a charge like this.

937
756

CASE

MR. McGUIRE: Your Honor, I presume, is sufficiently aware that that is the only class of men that these people will try to rob --

THE COURT: Strike that out.

BY MR. McGUIRE:

Q After you crossed the street, what did you see the two men do; where did they go to, if anywhere?

THE COURT: Now, that is leading, ask him what they did.

A I could not understand very well English.

BY THE COURT:

Q Now, you will get along all right? A (No answer).

BY MR. McGUIRE:

Q After you crossed the street, what, if anything, did you see those two men do? A When I crossed the street, this man --

Q I mean the two men, not the one man? A He was with the hands in the pocket, and Vogler make (indicating); he could not speak; he could not make a noise, and I walk up and I saw he put the hands in the pockets.

Q Vogler told you, did he? A No, I say it, and after I go to Vogler, and Vogler say, he says to me "I got my hands in the pocket, the back pocket."

THE COURT: I object to that.

THE COURT: Strike it out.

997
756

BY MR. McGUIRE:

Q Where were the other two men at the time Vogler said that? A He was about half a block, far on 26th street.

Q Walking in what direction? A Third avenue, 26th and 27th streets.

Q What did you do then? A I spoke with Vogler, and Vogler said --

THE COURT: Strike out what Vogler said.

Q What did you do? A I go to the policeman right away. I told to the policeman "You didn't see anything over there?"

THE COURT: Strike that out.

BY THE COURT:

Q Tell what you did? A I goes to the police, and tell the policeman --

THE COURT: Strike out what he said.

Q What did you do, not what you said? (No answer).

BY MR. McGUIRE:

Q What did you do after these men walked up the avenue? A I told the policeman and the policeman arrested them.

Q Did you at any time after you saw these two men with the complaining witness Vogler, at any time lose sight of them until they were arrested? A No.

MR. PUTNAM: I object to that. He can state what he did.

THE COURT: Objection sustained. Strike it out.

Q Did you at any time lose sight of them?

THE COURT: I do not think he understands that question. It is leading, too.

MR. McGUIRE: I submit, your Honor, that with the difficulty the witness is laboring under, we should have an interpreter.

THE COURT: There is a direct contradiction of evidence between him and the other man. The other man said he was on the other side, and he says he came over.

BY MR. McGUIRE:

Q When you saw these men walking up the avenue, as you say, towards 26th and 27th streets, what did you do next, immediately? A When I see this over there--

BY THE COURT:

Q What did you do?

MR. McGUIRE: I withdraw my question.

BY MR. McGUIRE:

Q After you saw these two men walking up Third avenue, as you say, towards 26th or 27th streets, where did you go, if any place? A I go right away to the man, and ask him, Vogler, and he told me --

756

MR. PUTNAM: I object to that.

Q Do not say what Vogler said. After you spoke with Vogler, but do not tell me what you said to him, where did you 'hengo? A Right over to the policeman.

Q Where was the policeman? A On 26th street corner.

Q When you went towards the policeman did you see the two men? A Yes, sir.

Q And where were they? A He was on 26th street, half a block forward.

Q Did anybody else -- are you sure of that? A (Interrupting) No, nobody else.

Q Were you there when the policeman arrested these two men? A Yes, sir.

Q Did you then see who they were? A Yes, sir.

Q Can you tell me whether or not these two defendants were the two men you saw the policeman arrest? A The policeman arrested them.

THE COURT: Well, there isn't any doubt that the policeman arrested them.

Q Can you now swear that these two men that the policeman arrested were the two men who had had their hands on Vogler? A Yes, sir.

THE COURT: Well, that is his opinion.

MR. McGUIRE: That is a matter of absolute evidence.

997-756

CROSS EXAMINATION BY MR. PUTNAM:

Q You can swear to that positively? A Yes.

Q There is not the slightest doubt about it? A No, sir.

Q To whom have you talked about the evidence you gave in this case? A I don't understand that.

Q You do not understand what I ask you, do you? A I don't understand.

Q How long have you been a waiter in Rector's?
A About a year.

Q You have to do with all people that come in there, to eat, don't you? A Yes.

Q You wait on a regular table? A Yes.

Q And you take orders? A Yes.

Q You talk English when you take orders? A I understand it very well to take orders, but I could not speak no conversation. We talk only French over there.

Q When you first saw the complaining witness Vogler that night, where were you? A I was on 23rd street.

Q Is that Third avenue? A Yes, sir, Third avenue.

Q On what corner? A On the corner from 23rd street.

BY THE COURT:

Q Downtown or uptown corner? A On the west side.

Q Yes, but on the downtown or uptown side? A Downtown.

Q Now, you are sure of that? A Yes.

Q There is no doubt about that? A No, sir.

Q That is right by the bank? A On the left side,
when I walk up.

Q You were by the Fifth National Bank? A Yes, sir.

BY MR. PUTNAM:

Q On the left side as you walk up, and on the downtown
corner? A Yes.

Q And what time was that? A A quarter to four.

Q And where was Vogler when you first saw him? A Vogler,
just he walked down on the right hand, on the right side.

Q On the right side going up? A Yes.

Q Between what two streets? A Between 24th and 25th
streets.

Q He was between 24th and 25th streets? A Yes.

Q Sure about that? A Yes, sir.

Q And you were on the southwest corner of 23rd?
A Yes.

Q So he was a block and a half away from you? A Yes,
only half a block.

THE COURT: Well, that is a matter of calcula-
tion.

Q Now, there is an elevated railroad on Third avenue,
isn't there, and posts up and down the street? A Yes,
sir.

CASE 756

Q And you were right under the station, weren't you?

A Yes.

Q When you first saw Vogler were the two men that you saw with him? A Yes.

Q They were there with him when you first saw him?

A Yes.

Q What were they doing when you first saw them?

A The block --

BY THE COURT:

Q What were they doing when you first saw them?

A They spring to Vogler and give him on the head, one over the head (indicating), and right away put their hands in the pockets.

BY MR. PUTNAM:

Q Did you see what pockets they put their hands in?

A Yes, I see here (indicating).

Q Of course; then, tell the jury just what pockets they put their hands in? A Yes.

Q Now, tell the jury? A In the front pockets, they put their hands (indicating), and the other fellow he put his hand (indicating).

Q He put hands in both side pockets? A Yes.

Q Did he do it, both at once? A No, here in the coat pocket, he put the hand (indicating).

Q Yes, but on both sides? A No, on one side, with

756

the right hand.

Q Did they take anything out of the coat pocket?

A He dropped something on the floor, and I walked up.

Q You saw him drop something on the floor? A Yes.

I did not see it drop, but the key dropping made a noise.

I did not see the key.

BY THE COURT:

Q Well then, how do you know? A Well, he makes a noise when he drops (indicating).

BY MR. PUTNAM:

Q You heard the noise? A Yes.

Q And after you got up you found out what it was?

A Vogler told me the key.

MR. PUTNAM: I move to strike that out.

THE COURT: Strike it out.

Q But you heard a noise on the corner where you were standing? A Yes, sir.

Q How long after that was it before you went over to where Vogler was? A Right away.

Q How long do you suppose it took you to get over there? A Only a second.

Q You went from a corner where you were and to where he was standing, or did he come towards you, or did he stand where he was? A He collect his things and his clothes from the street.

957

Q What was there on the street? A His pockets, you know, with the dress, with the shirts and some pants and something else.

Q He was picking up the contents of this package, is that right? A I could not see right.

Q And when you came up to him he was in the same position? A Vogler?

Q Yes? A Vogler was drunk. He wanted to make a noise, to cry (indicating).

Q Where did you see the policeman first; where were they when you first saw them? A When, right away I spoke with Vogler.

Q No, where were the policemen? A On 25th street corner, on the other side.

Q On the west side? A No, on the east side.

Q And you were on the east side then? A Yes..

Q And the policemen were across the street? A Yes, the policemen just was coming on this side, to Third avenue.

Q The policemen were at 25th street? A Yes.

Q Which corner, uptown or downtown corner? A Uptown corner, just he walks.

Q Yes, they were on the northwest corner of 25th street and Third avenue? A Yes.

Q On the left hand side going up? A Yes.

Q And you? A The policeman, no, on the right side the

756

CASE 756

policemen was.

Q They were on the right hand side? A On the right hand side, yes.

Q And that was on the corner of 25th street and Third avenue? A Yes.

Q And you were in the middle of the block? A Yes, sir. This man, he was forward, these two men.

Q Now, you saw these two men go away from Vogler? A Yes.

Q Where were you when they let go of Vogler and went away from him? A I spoke with Vogler?

Q You were talking to Vogler when the two men left him? A No.

BY THE COURT:

Q That is what he asked you? A Just when they left, then after I spoke with Vogler. I could not speak at this moment.

BY MR. PUTNAM:

Q I want to know when the two men left Vogler and went away from him, where were you then? A I was about from here over there (indicating). I walk right away to him. I wanted to help him.

Q Did you run or did you walk? A I ran. I ran right up to him to help him.

Q You wanted to help him? A Yes.

Q You wanted to catch these two men? A I could not catch; I wanted to help the man.

Q Did these two men run away or walk? A They run away with big feet, you know, quick, like a soldier.

Q They went up Third avenue on the right hand side?
A Yes, sir.

Q And you stopped to talk to Vogler? A Yes.

Q Did you help him pick up his things? A No, sir.
Right away I see the policemen, right away I call the policemen.

Q How soon after these men walked from Vogler did you see the policemen? A Right away. The policeman he said something; the policeman he say --

Q Where did he say it? Where was he when he said it?
A The policeman, he said, "My God, I think it is something come to my eyes(indicating)."

BY THE COURT:

Q The policeman said he thought he saw something in his eyes? A Yes, he saw something, and he speak.

Q Did the men have anything on their faces? A No, not anything on the face, but they looked wild.

Q They looked what, and the policemen said what?
A He saw something, and spoke.

BY MR. PUTNAM:

Q Did the policeman say that to you? A No, I believe

that.

Q Did the policeman say that to you? A The policeman say to me, "I see something, my God."

MR. MCGUIRE: I submit, your Honor, that the witness is having great difficulty in expressing himself.

THE COURT: Well, he had not any difficulty on the direct.

BY THE COURT:

Q What nationality are you? A I am a Roumanian.

Q How long have you been in this country? A Two and a half years, and I am a married man.

Q You are sure you are not the man that held this man up? Where did you ever see a man held up before? A Oh, I never see it before.

Q Never saw it before? A Never saw before.

Q And on this dark morning, from the southwest corner of Third avenue, you could see right through the elevated, all this business? Did not some one tell you all that?
A It is not true.

Q It is not true? Is it not dark at four o'clock in the morning? A No.

Q Why, that is the darkest hour of the twenty-four, is it not? A Well, this was a new house; only there it is a dark place, but it was light all over the street.

Q Very light? A Light, only this place it was dark.

CASE 756

THE COURT: Well, I have been on Third avenue at different hours of the night, and I think it is about as dark a place as you could find, and I passed that corner every day of my life for sixteen years, going to the City College, and I do not believe anybody could see from the southwest corner of Third avenue, in front of the Fifth National Bank, and describe the thing as he does. The witness said he was on the southwest corner of 23rd street. Now, that is a wide street, and there are elevated pillars there in the middle of the street, and there is a station there. He might have seen something happen on the other side of the street, but how he could see one man holding him up, and going through one pocket, at that distance, and the other going through his other two pockets, is impossible for me to believe. I do not know what the jury think of it. The other man swore that the hands were only put in his pants pockets.

THE WITNESS: The block from Third avenue are only three or four houses.

BY THE COURT:

Q 23rd street is one of the widest streets in New York. Don't you know it is the same as every block in New York, and 23rd street is a hundred feet wide, while an ordinary street is only sixty. You think that is an alley there, do you?

A The block from 23rd to 24th?

756

Q That is just the same as every block in New York?

A Yes, I passed there.

THE COURT: They are 200 feet, by law, laid out since 1870, just the same distance. Now, his other testimony appears to be just as reliable as that.

MR. PUTNAM: I have no further questions.

RE DIRECT EXAMINATION BY MR. McGUIRE:

Q This is Third avenue (indicating) running up here; now, this is 23rd street here (indicating). A Yes.

Q 24th street here and 25th here? A Yes.

Q Just indicate with a pencil the corner on which you were standing when you saw Vogler? A I was here (indicating).

Q Where was Vogler? A This is a small block here (indicating).

Q Where was Vogler at the time? A Vogler, he come down from here, and he come to here (indicating), and here on the corner is a big electric lamp.

Q Just exactly where was Vogler? A He was here, and just the man spring from the new building house, and he catch Cogler there (indicating).

THE COURT: In answer to my question, the witness said he was in front of the bank. Now, the bank is a monument, and you cannot mistake that.

J A M E S J. B R E N I C K, being called and duly sworn
as a witness on behalf of the People, testified as follows:

DIRECT EXAMINATION BY MR. McGUIRE:

Q Officer, what Precinct were you attached to on the morning of the 3rd of December, 1907? A The 18th, the old 18th. It is the 21st now.

Q Did you see these defendants on that morning?

A Yes, sir.

Q At about what time in the morning was it? A About, well it was between four and twenty-five minutes past four.

I had them in the station house.

THE COURT: Strike that out.

BY THE COURT:

Q He asked you when you first saw them? A Well, I would say ten minutes past four.

BY MR. McGUIRE:

Q Where were you standing at the time? A On the southeast corner of 25th street and Third avenue.

Q Whereabouts on that corner? A Just down a little bit from the corner, on the street. My post was on the street, on 25th street.

Q And where did you see these two defendants? A I saw them passing up Third avenue. They had passed me. They were going up Third avenue, on the east side of the avenue.

Q And had you seen them before that? A No.

Q What, if anything -- where did they go? A Where

Q Yes, how far past you did they go? A They had gone half a block past me.

Q And what happened then? A (No answer).

BY THE COURT:

Q Were they walking or running? A Walking.

44

BY MR. McGUIRE:

Q Do not say any conversation you had. What, if anything, happened then? A A man came up.

Q Do not say what he said. A man came up?

A And caught me by the arm.

Q Now, do not tell what he said. Have you seen that man in court to-day? A I didn't see him in court. I saw him outside.

Q What is his name? A Ioanowicz, or something like that.

Q And after this man caught you on your arm what did you do? A I ran up Third avenue.

Q Yes. A After the two defendants. When I was within about five or ten feet of them they both turned and saw me coming. They both ran across Third avenue.

Q Yes. A ³Toward the west side.

Q Yes. A Before they got to the car track I had my hand on both their necks.

Q Yes. A They both crowded up against me, and Wilson gets down around my left leg.

THE COURT: Well, that is immaterial. Strike that all out.

MR. McGUIRE: Flight, your Honor?

THE COURT: No, not flight, but getting around his left leg.

997
756

CASE

MR. McGUIRE: Struggling to get away?

THE COURT: Well, if that is what you want to show, very well.

Q Now, say what you did and what they did? A They both struggled to get away, and Cusick, I had with the right hand, but I only had hold of him with one finger and he gets away. I held on to Wilson.

Q What did Cusick do when he got away? A He ran across to the west side of the avenue, and I saw officer Mullen just coming to 26th street corner, and I hollered to him. He ran after him and he got him at 27th street.

Q What did Wilson do? Did you have any conversation with Wilson? A Not until Cusick came back, until we brought Cusick back.

Q And what was that conversation? A Told them what they were accused of.

Q And what was that you told them they were accused of? A That they were accused of robbing a man.

Q And what did they say to that, either of them? A That they did not do it.

Q That is what they said? A Yes.

Q Did you have any other conversation with them? A That was all.

CROSS EXAMINATION BY MR. PUTNAM.

Q Were you in full uniform that night, officer? A Yes.

756

CASE

Q And you stated that you were at the southeast corner of 25th street and Third avenue? A Yes.

Q And in fact, a little ways down Third avenue? A No, down 25th street.

Q So that you were hidden by the corner of the building? A Yes, sir.

Q When these men passed you they were walking? A They were walking, talking about a job or something.

Q When you started after them, they ran? A yes, sir.

Q And when you caught them, they struggled? A Yes, sir.

Q They tried to get away? A Yes, sir.

Q Did you see either of these two defendants have anything to do with Vogler, the complaining witness in this case? A No, sir.

Q When did you first see Vogler that night? A After I brought the prisoners back.

Q Where did you bring them back to? A Down to 21st street.

BY THE COURT:

Q To 21st street? A Yes, sir.

BY MR. PUTNAM:

Q How did you happen to bring them back there? A Vogler ran away. I understand he was --

BY THE COURT:

Q Nevermind what you understand. A Yes, sir.

756

BY MR. PUTNAM:

Q What was it that happened that induced or made you bring these prisoners back to 21st street and Third avenue, after you and the other officer had both of them? A I was informed that when they caught the man by the neck and held him by the neck, one of them, and another man went through his pockets.

Q Who informed you of that? A Ioanowicz, this witness.

Q And did he tell you where the man was that had been gone through? A Yes, sir.

Q Did he tell you it was at 21st street and Third avenue? A No, sir.

Q Well, how did you happen to go back there? A Looking for the man that was robbed.

Q And you found him there? A Yes.

Q What was he doing? A He was trying to get away from there. He was afraid we were going to arrest him.

MR. PUTNAM: I object and ask to strike that out.

THE COURT: Well, I should think you would want that in.

Q He was trying to get away from you? A Yes, he was all scared.

Q Was he running? A No, sir.

BY THE COURT:

Q You do not know whether Ioanowicz held this man up himself? A No, sir.

Q Held up Vogler? A He did not, because he followed me up the avenue.

Q You do not know of your own knowledge whether he did or not? A No, sir.

Q Didn't you ever hear a thief cry, "Stop thief"?
A I guess I did.

Q And it is quite a common trick, is it not? A I guess it is, your Honor.

Q How long have you been on the police force? A Five years.

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

MR. PUTNAM: If your Honor please, I move to dismiss the indictment, and that your Honor take the case from the jury and direct a verdict for the defendant, on the ground that the People have failed to make out a case. The case is conflicting, and there are no two of the witnesses who agree with each other. The People's main witness, the complaining witness, states that only two of his pockets were entered, and he entirely fails to identify either of the two defendants. He also states that he was in such a condition that he probably did not know anything about it. At least, that may be fair-

997
756

ly inferred from the nature of his testimony and the history of his doings on that evening; and I submit that the testimony of the Roumanian witness is absolutely unworthy of belief. He first states he was on the southwest corner of Third avenue, which would put him a block and a half from the place where the so-called hold-up occurred. He then said he was on the northwest corner. He stated that it seemed to be pitch dark that night, under the shadow of a tall building and yet he states that at a distance of a block and a half, he heard a key fall. Now, it seems to me the Court may take judicial notice of the bearing of a witness on the stand, when the People are bound to prove their case beyond a reasonable doubt.

THE COURT: I will let it go to the jury.

MR. PUTNAM: Exception. We rest, your Honor.

If your Honor please, I wish to renew my motion on all the grounds stated.

Motion denied. Exception.

(After the summing up by counsel, the Court admonished the jury in accordance with Section 415 of the Code of Criminal Procedure, and took a recess until 2 o'clock p.m.)

756
997
CASE 756

After recess.

Trial resumed.

THE COURT'S CHARGE.

Gentlemen of the jury, the defendants have been indicted by the Grand Jury on three counts, first, attempted robbery in the first degree; second, attempted grand larceny in the first degree; third, assault in the second degree, the allegations of the first count being that Harry Wilson and Frank Cusick, of the Borough of Manhattan, City of New York, on the 3rd day of December, in the night time, with force and arms, in and upon Jacob Vogler, did make an assault, and the sum of \$12 attempt to take from the said Vogler, the said Harry Wilson and Frank Cusick, and each of them, being then and there aided by an accomplice actually present, to wit, each by the other, and by a certain other person or persons to the Grand Jury unknown.

Under our law, an attempt to commit a crime is defined as follows: An act done with intent to commit a crime and tending but failing to effect its commission, is an attempt to commit that crime.

Robbery is defined as: The unlawful taking of personal property from the person or in the presence of another, against his will, by means of force or violence

997
756

or fear of injury, immediate or future, to his person or property, or the person or property of a relative or member of his family, or of any one in his company at that time, and robbery in the first degree is defined as: The unlawful taking or compulsion, if accompanied by force or fear, in a case specified in the foregoing sections of this chapter. It is robbery in the first degree when committed by a person aided by an accomplice actually present. Those acts, under our law, constitute robbery in the first degree, and an attempt has been defined, as I have already told you, as the doing of an act with intent to commit a crime and tending but failing to effect its commission.

Now, an attempt to commit grand larceny in the second degree is alleged in the second count of the indictment, the time and place and the general allegations being the same as the other, except as to the use of force or violence. That is the difference between larceny as defined, larceny from the person or larceny in the first degree, in the night time, and robbery in the first degree.

It is not necessary for me to repeat the section of the law regarding an attempt, as you have that fresh in your minds, but I will read to you the section of the law which makes larceny a crime; and the definition of

CASE 756

larceny in the law is: That a person who, with intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker or of any other person, takes from the possession of the true owner, or of any other person, personal property, steals that property and is guilty of larceny. The elements of the crime, as laid down in the law, are the intent to deprive or defraud the true owner of his property, and the actual taking of the property with that felonious intent. That constitutes the general crime of larceny. Grand larceny in the first degree is defined by our law as: A person is guilty of grand larceny in the first degree who steals or unlawfully obtains or appropriates in any manner specified in this chapter, property of any value, by taking the same from the person of another in the night time; and an attempt to commit grand larceny is, as I have told you, an act done with the intent of committing the crime, but failing in the accomplishment of it.

The third count is assault in the second degree, alleging that these persons did wilfully and wrongfully strike, beat, cut, bruise and wound, with intent then and there by the means aforesaid to commit a felony, to wit, with intent the goods, chattels and personal property of the said Jacob Vogler, from the person of the said Jacob

CASE 756

Vogler, to take from the said Jacob Vogler. Assault in the second degree is defined in the law as: A person who, under circumstances not amounting to the crime of assault in the first degree, with intent to injure, willfully and wrongfully wounds or inflicts grievous bodily harm upon another, either with or without a weapon, or assaults another with intent to commit a felony -- the allegation in this case, in the indictment being, that the assault was made with the intent to commit a felony, -- that is, the crime of larceny in the first degree or robbery in the first degree -- is guilty of assault in the second degree.

Those are the provisions of the law defining the offences which have been charged against these defendants. As you know, all persons who are accused of crime and brought to trial, are presumed to be innocent of the crime until the contrary is established by legal evidence, and that presumption of innocence so strong that the evidence must be of sufficient weight, not only to overcome that, and to create a doubt in your minds of their guilt or a suspicion of their guilt, but you must be satisfied beyond a reasonable doubt of their guilt; and a reasonable doubt is one which reasonable men might entertain after a fair and careful consideration of all the evidence.

CASE 756

Now, in this respect, I wish to say to you that it does not make any difference to you what the opinion of the Court on the evidence is, or what the opinion of the prosecuting attorney is, or what the opinion of counsel for the defendant is. There is a sharp line of demarcation between your duty and the duty of the Court, and of the prosecutor and of counsel for the defense. It is the duty of the prosecutor, when the Grand Jury finds an indictment, to diligently examine into the matter and present such evidence as may be called to his attention, and it is the duty of the Court to see that defendants receive a fair trial, and that the evidence be sufficient to warrant conviction. In matters of doubt, where there may be some doubt about the guilt or innocence, or the sufficiency of the evidence, it is the province of the jury to take that evidence and weigh it carefully, keeping in mind that all the presumptions of law favor innocence, and that the burden of removing that presumption is on the prosecution, and that you must apply to the consideration of evidence the same reason and prudence and discretion that you would apply in the weighty and important affairs of your own lives. After that consideration, if you are convinced to a moral certainty that the prisoners are guilty, then it is your duty to so declare. If there remains any doubt in your mind as to their guilt,

997-756

that is a reasonable doubt. If you are not satisfied, if you are not willing to say freely, fully and without reserve, after the consideration of the evidence, that the defendants are guilty as charged in the indictment, if you have any doubt on that subject, a doubt so strong that you would not act on it in the weighty and important affairs of your life, that is a reasonable doubt, and the prisoners are entitled to the benefit of that doubt. That is what is meant by saying that a defendant is entitled to the benefit of the doubt. It is not enough that the evidence creates a possibility of their guilt, or a probability of their guilt, or a strong suspicion of their guilt.

Now, each juror must take this evidence under consideration, and make up his own mind. That does not mean that one man, two men or ten men on the jury should be satisfied of it, but that each juror owes it to the prisoners and to our laws, and the spirit of our law, to be satisfied beyond a reasonable doubt. It means the reasonable doubt of each juror, and each man should vote on that question as his conscience and judgment dictate. If, as I said, after the consideration of all the evidence, you can say that you are satisfied to a moral certainty, that you have a firm conviction of the guilt of the accused, then it is your duty to so report. As

CASE 756

has been said, you occupy a very important position in the administration of justice. You are the sole judges of the facts. No one's opinion as to the facts must influence you. If you are not satisfied of their guilt beyond that reasonable doubt, if you have not a firm, an abiding conviction of their guilt to a moral certainty, then you should declare the prisoners not guilty.

You have heard all the evidence of the complaining witness, and after giving a description of his night, he says he was on Third avenue between 23rd and 24th streets. He was very sure about that. He says he was intoxicated and that suddenly two men sprang upon him. I do not recall whether he said anything about a man taking him by the throat or not, but he said that one man held him while the other twice searched his trousers pockets. You will have to consider whether a man in that condition could have such a vivid recollection of the transaction as to remember that two men searched, or at least that one man twice searched his trousers pockets, and did not search any other pocket of his clothes. The truth of the matter is that he was drunk. That he was on his way, we know not where; he was wandering down Third avenue. He says he was alone. He made no charge that he had been robbed, or rather, he said that after these men left him, it does not appear from his evidence

CASE 756

that anybody interrupted these men, that after they left him he saw a man standing on the corner of 24th street and Third avenue, and that he went over and told him. It does not appear that he had ever seen this man before. He was not afraid that that was another robber, but he went across the street and told, or made a complaint, to that man, and then this man took up the matter. The complaining witness testified that he did not see the prisoners any more until he saw them in 22nd street. The officer said 21st street. That he went on about his business. Then, you have the evidence of this man who says he is a waiter in Rector's, who gives an account of his exploits that night; of his being around; he was sure he was perfectly sober, and you heard the conflicting statements as to where he was. He was quite positive when the Court examined him that he was standing on the southwest corner of 23rd street and Third avenue, in front of the bank, and that he was standing somewhere might be inferred from the statement made by the complainant; but then he said he was walking uptown, and when he was shown a diagram by the District Attorney, that he was between 23rd and 24th street, on the west side of the street. Now, this was four o'clock in the morning of the 3rd of December. You will have to consider the time and the condition of the street there; the elevated

railroad station, and you will have to consider whether it was possible for any man to see so clearly what this witness said he saw. He said it only took a second, the whole transaction, and the complaining witness said it only took a short time. He said that he ran over to the person who is alleged to have been robbed or assaulted, or upon whom an attempt was made to rob or assault or commit larceny, and that he saw two men walk away from this position, wherever he was, across Third avenue, that * he could see one man putting his hand in the man's trousers pockets and the other man putting his hand in the coat pockets, of which the complainant made no allegation at all; that he saw two men walking away; he was not sure whether it was between 24th and 25th streets or between 23rd and 24th. The other witness, the complainant, was quite sure that he was assaulted between 23rd and 24th streets.

Now, I go into all these details because, as I told you, the prisoners are entitled to the benefit of the doubt. They had as much right to be on the street as the complaining witness, or as this Roumanian who testified. The law permits every man to be lawfully on the street, and there is no presumption that his presence on the street was innocent, and that of the prisoners charged was guilty. On the contrary, the presumption is

756

PAGE

that the men at the bar were on the street for an innocent purpose, unless there is strong enough evidence here to satisfy you to the contrary.

Now, I would have taken this case from your consideration only for the testimony of the police officer, and I ask you to remember that the complaining witness made no complaint to that police officer. He wandered on about his business; but this other person who alleged that he had seen this transaction from the various positions which he was in, says he saw these men walk up the street, and that he followed them, and on 25th street he saw a police officer, and while not allowed to testify to what he said, the result of his conversation was that the police officer ran after these men. Now, the police officer testifies that they ran, broke across the street, and that he caught them, and one of them got away. Flight is always a suspicious circumstance, but you will have to consider whether two men, walking on the street at that hour of the morning, and having as much right to be there as anybody else, whether the evidence that when this policeman was near them, they broke and started to run across the street, is sufficient to convict them of this charge, taken in connection with all the other evidence in this case. If they were innocent, they had a right to resist arrest without a warrant. They had a right to ask the

CASE 756

policeman what he was charging them with. That is our law, and you must take all these circumstances that have been testified to with you, and consider them carefully, according to the rules of law as I have laid them down. The statutes provide what constitutes the crime of robbery, of larceny in the first degree, and also of an attempt to commit those crimes, and also of assault in the second degree. You will have to take that evidence and weigh it, keeping in mind the presumptions of innocence, that the prisoners are entitled to the benefit of the doubt. If, as I said, you are satisfied beyond a moral conviction, - you are to apply the ordinary rule that you apply in your own important and weighty affairs, and if you are satisfied from a careful, deliberate consideration of the evidence, and free from any bias, keeping in mind the presumptions of innocence, and that the prisoners are entitled to the benefit of the doubt -- if you feel that there is no doubt in your minds, that you are morally satisfied of their guilt, it is your duty to declare it; and if, after this consideration, there remains that reasonable doubt in your mind, you are also bound on your oaths to declare it.

The case is now with you.

MR. McGUIRE: Will your Honor instruct the jury that they are to disregard any opinion that your Honor may have

CASE 756

expressed as to the credibility of the People's witnesses?

THE COURT: I have already told them that they were the sole judges of the facts; that they were not to be influenced by the opinion of the Court or your opinion or your statement, about only drunken men being attacked by such men. There is no evidence that these men are of bad character. The presumption is that they are men of good character.

MR. McGUIRE: I beg your Honor's pardon. That is a matter of affirmative proof.

THE COURT: The presumption is that they are innocent. The presumption that they had as much right on the street as your witnesses, and that they were lawfully on the street.

MR. McGUIRE: Correct. I am just speaking of good character.

THE COURT: And otherwise, gentlemen of the jury, you are the sole judges of the facts. What my opinion is or the opinion of the prosecuting attorney has nothing to do with you. You are to consider the evidence and nothing but the evidence that has been brought here before you, and remove from your minds everything that has been said by the prosecutor or the counsel for the defense on generalities. We do not convict men of crime on generalities. We want strong enough evidence to remove

957
756

CASE

any reasonable doubt that they are guilty. We have no "Bloody Assizes" in this country. We have fair trials. Is there anything further?

MR. McGUIRE: No, that is all, your Honor. May I ask your Honor, with the consent of the attorney for the defendants, as one of the jurors has expressed a desire to have this diagram, that they be allowed to take it?

THE COURT: There is no evidence that that diagram is correct. It is not in evidence. The juror should make all requests of the Court.

MR. PUTNAM: If your Honor please, I would like to make one request of your Honor to charge the jury, and that is, that your Honor should charge the jury that the defendants nor either one of them, is bound to explain the facts brought out by the People in the case, and that unless the People make out a case, the jury must not convict the defendants, and that the defendants are not bound to go upon the stand, and no presumption is to be had against them on that account.

THE COURT: That is our law. The presumption is that the prisoners are innocent. They are not obliged to go upon the stand, and the burden is on the prosecution of overcoming that presumption by evidence strong enough to convince you of their guilt beyond a reasonable doubt.

947
756

You must not be influenced in any way in arriving at your verdict by their failure to go upon the stand.

The jury returned the following verdict:-

We find the defendants guilty of attempted robbery in the first degree, the first count of the indictment.

MR. PUTNAM: If your Honor please, I move to set aside the verdict and for a new trial, on all the grounds set forth in the Code of Criminal Procedure, and especially on the ground that the verdict is against the weight of evidence, and not sufficient evidence to sustain it under the law.

THE COURT: I deny that motion now, with permission to renew it later.

MR. PUTNAM: Your Honor will entertain a motion at the time of sentence?

THE COURT: yes. Renew the motion on the day of sentence.

MR. PUTNAM: I ask for a week, your Honor.

THE COURT: Make it a week from to-day. Make it February 4th, in Part IV.

CASE 756