

START

1808

CASE

CASE #1808

INDEX

	Direct	Gross	Re-direct	Re-gross
Timothy D. Lehane,	9	11	17, 24	23
Charles Mc Intosh	25			
Dennis Mc Carthy	26			
Paul Schmidt	29	31		
Walter H. Voekening	32			
Mrs. Anna Smith	34	36	36	
Dennis Mc Carthy (re-called)	37			
Bernard Winkle	38	43	46	
William J. Deneen	48	66	79	

CASE #1808

INDEX

	Direct	Cross	Re-direct	Re-cross
Horace E. Auringer, M.D.,	83	86	88	
Thomas Allison Smith, M.D.	88	95	106	
John Edwin Hagmeier, M.D.	111	113	120	
John Edwin Hagmeier, M.D. (resumed)		122		
George Francis Cahill, M.D.	123	125		
" " (recalled)	131			
Francesco Gorgoni	136	146		
Arturo Ortensio	155	160	167	
Paolo Nigro	170	172		
William J. Deneen (recalled)	179			

2202

3

CASE #1808

101

COURT OF GENERAL SESSIONS OF THE PEACE,

City and County of New York.

THE PEOPLE

against

FRANK GORGONI.

2202

Indictment filed 14th day of November, 1913.

Indicted for Murder in the first degree.

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

For the People,

ASSISTANT DISTRICT ATTORNEY WASSERVOGEL and

ASSISTANT DISTRICT ATTORNEY BRECKENRIDGE.

For the Defendant,

AUSTEN G. FOX, ESQ. and

FRANK J. RYAN, ESQ.

Tried before HON. OTTO A. ROSALSKY, Judge, and a
Jury, on the 5th day of January, 1914.

Thomas W. Osborne,
Official Stenographer.

CASE #1808

THE CLERK: Frank Gorgoni, if you desire to challenge an individual juror, you must do so when he appears and before he is sworn. Do you waive the further giving of this notice?

MR. FOX: Yes.

(The jury are thereupon selected and sworn).

MR. FOX: If your Honor please, I am going to ask your Honor to have the District Attorney's opening taken down, because when he gets to a certain point, there is a question as to the admissibility of certain facts, in my mind, and I am going to ask your Honor to postpone ruling as to whether it is relevant or not, until the evidence is offered. I do not think that would interfere with the statement of the case, but it might be, if you should hold it was irrelevant, that the statement made to the jury might have an effect upon their minds, and it ought not to be made.

THE COURT: Would it not be better to avoid making any statement to the jury which admits of doubt.

MR. WASSERVOGEL: Only such statements will be made by Mr. Breckenridge in opening the case which are relevant, and which will be proven. Is there any objection to the witnesses remaining in the room; if so, they can go outside.

MR. FOX: Being assigned, I rather think we will take the course of having them outside. I think it is my duty to suggest that the witnesses be kept outside.

CASE # 1808

3
THE COURT: The witnesses will retire.

MR. BRECKENRIDGE'S OPENING ADDRESS TO THE JURY IN
BEHALF OF THE PEOPLE.

If your Honor please, and you Mr. Foreman, and each of you gentlemen of the jury: On the 28th of September, in the year Nineteen hundred and thirteen, the defendant, Frank Gorgoni, was arrested at 19th street and 2nd avenue on the southbound platform of a 2nd avenue elevated railway. On the 6th of November, 1913, he was arraigned before HON. HERMAN HOLZHAUSER, Coroner of this Borough, and held to await the action of the Grand Jury. On the 14th of November of the same year, he was indicted by the Grand Jury for murder in the first degree.

The People will show you that at about 6:45 P.M. on the 28th day of September, in the year Nineteen hundred and thirteen, Sergeant McNierney, the deceased, and Patrolman William Deneen, both members of the Municipal Police Force, boarded a southbound 2nd avenue elevated train at 86th street and 2nd avenue. After riding for some time, they noticed two girls --

MR. FOX: If your Honor please, I conceive it my duty to ask your Honor to instruct the learned District Attorney that the occurrences alleged or contended, as I understand, by the prosecution, to have occurred on the elevated train some time prior to the alleged assault which resulted in the

CASE #1808

death of the police officer, are too remote and are irrelevant on the question involved in the trial of this indictment. I raise that point now, in the hope that the prosecution might be willing to postpone, until the evidence is offered, the necessity of your Honor ruling as to the relevancy of such proof. Then your Honor will be in a little better position to determine the relevancy of the proof.

There was an altercation undoubtedly which resulted in the stabbing of the officer who died. That occurred, as has been said, on the station platform at 19th street. But, these other matters of which I have been informed, I shall feel it my duty to contend are irrelevant and too remote. If the course I suggest be followed, it would remove any difficulty at present, but if not, it is my duty to make an objection now.

THE COURT: Can a statement of the facts be outlined to the jury in a way so as to give to them an intelligent idea of what you intend to prove without offering this evidence, which the defense claims is objectionable.

MR. BRECKENRIDGE: I think not. I merely propose to outline chronologically the events as they transpired, for the purpose of leading to a clear statement of the case.

MR. FOX: If I may be pardoned for a moment, the District Attorney has gone far enough. He is about to talk of occurrences as far north as 86th street, while the stabbing

102
CASE # 1808

5
is alleged to have occurred at 19th street.

THE COURT: If the circumstances show some relationship between that transaction and the transaction on trial, then under the case of The People against Govenale, 193 N.Y., the evidence is competent, and, when I receive the evidence, I will receive it under instructions to the jury as to what effect this evidence should have upon the main charge. Proof of any other act is no evidence of the defendant's guilt of the crime laid against him in the indictment, but, should receive from the jury such consideration as the Court will instruct them to give to it. In the Govenale case, with which you are familiar --

MR. FOX: I am quite familiar with that and I quite appreciate the difficulty in which you are put.

THE COURT: It is difficult to rule at this time.

MR. FOX: I quite understand the difficulty in which it places the Court, and that was the reason I hoped it might be avoided. Being assigned by the Court, it is my duty to take this course and save the defendant's rights, in the event that your Honor's ruling should be adverse.

THE COURT: I will allow the District Attorney to make the statement with instructions to the jury at this time that they must not accept the District Attorney's statement as proof of the facts, but, when the evidence is received and admitted by the Court, they will give unto it such con-

102
CASE #1808

6

sideration as in their judgment they believe the facts and circumstances are entitled to. The mere fact that the District Attorney now, in his opening, will make certain statements as to what he intends to prove, should not be accepted by them as proof of the facts.

MR. FOX: Your Honor feels constrained to overrule my application?

THE COURT: Yes, on the authority of The People against Govenale.

MR. FOX: I will save an exception.

MR. BRECKENRIDGE (continuing) After riding for some distance in this elevated train, Deneen and McNierney noticed two young girls, one about the age of eighteen and one about the age of ten. These two girls got up from their seats on the west side of the elevated train and crossed over to a seat on the east side. This defendant changed his seat immediately afterwards. The girls then again changed their seats and went to the rear of the car and took the place in the motorman's box. The defendant then again got up and followed them. He said something to them which could not be heard. The girls then said to the defendant "Mind your own business". Sergeant McNierney at this juncture arose from his seat and went over to the girls who were sitting in a position near to that occupied by the defendant, and said to them "Is this man" --

1023

CASE #1808

7
THE COURT: I will not allow that.

MR. BRECKENRIDGE: It was in the presence of the defendant.

MR. FOX: He does not speak English.

THE COURT: I sustain the objection. Even if the defendant spoke the English language, under a recent case in the Court of Appeals, Coon and Freedman, 205 N.Y., it would not be admissible, unless he participated in the conversation.

MR. BRECKENRIDGE (continuing) I will change that and say that Sergeant McNierney said something; took his policeman's shield from his pocket and showing it, said something to the girls and they left the position they then occupied and went to the other side of the car and sat down by the officers. The defendant, at this time, was on the rear platform of the car, leaning against the easterly door jamb, with his head projecting a little ways into the car. The officers were sitting on the west side of the car, near the door. At this juncture the defendant said something to the officers which they did not understand. Then Sergeant McNierney arose, went out on the platform and placed the defendant under arrest. The train was then coming into the 19th street station of the 2nd avenue elevated, which is at First Avenue and 19th Street. Two companions of the defendant came up and urged him to go away with them. Officer

102
CASE #1808

Deneen struck one of the companions of the defendant, and those two men then left and were not seen afterwards. Sergeant McNierney retained his hold on the defendant, and while Deneen was struggling with the companion of this Gorgoni, the defendant, he heard the Sergeant ejaculate "Bill, he has stabbed me". The Sergeant was crouching with his hands across his abdomen, and Deneen then ran to the defendant and grappled with him and attempted to get hold of his left arm, in the hand of which arm he had a knife. Deneen, during the course of the struggle, received stab wounds also in the abdomen.

MR. FOX: Is that relevant, if your Honor please. He is indicted for stabbing McNierney.

THE COURT: It is, under the case of The People against Pallister, 138 N.Y., and The People against Johnson.

MR. FOX: I will save my objection until the proof is offered.

MR. BRECKENRIDGE (continuing) Deneen then took the knife away from the defendant and turned him over as a prisoner to Officer Schmidt of the 21st precinct. Sergeant McNierney was removed to Bellevue Hospital, at which place he languished until the 3rd of October when he died.

Now, gentlemen, on the evidence in this case, and upon all the circumstances surrounding it, the People will ask you for a verdict of guilty of murder in the first degree.

CASE #1808

9

MR. WASSERVOGEL: Mr. Fox, if you have no objection, I will offer in evidence a diagram of the platform of the station at 19th street. We may want to refer to it later on, and also a diagram of the car. We will have the architect here, if you desire. It is for your advantage as well as the State's.

MR. FOX: It is not a question of whether it is to our advantage, but it is a question whether it is correct or not. We will look over it and see.

TIMOTHY D. LEHANE, called as a witness in behalf of the People, being duly sworn and examined, testified as follows:

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q You are one of the Coroner's physicians of the Borough of Manhattan? A I am.

Q And have been for how long? A A period of over ten years.

Q In the last ten years you have frequently had occasion to perform autopsies? A Yes, sir, I have.

Q In how many cases would you say, roughly speaking?
A Thousands.

Q Several thousand? A Yes.

Q Did you perform an autopsy on the body of one Joseph McNierney, a police sergeant? A I did.

CASE #1808

Q When? A On October 3rd, 1913, at the Morgue, foot of East 26th street, City and County of New York, Borough of Manhattan.

Q What conditions did you find? A I found that the deceased had four stab wounds on his body. Stab wound No.1 was two inches in length; it was two inches below the umbilicus, running horizontally to the long axis of the body -- about a quarter of an inch -- starting from the median line. The same wound extended backwards perforating the intestines, and rupturing the serous coat of the intestines. Stab wound No.2 was located about one half inch down from this bone which we know as the anterior superior spine. The said wound was about four inches in length. It was a superficial wound and extended through skin and muscle, but not into the abdominal cavity. No.3 was about half an inch in length and situated on the index finger of the right hand. Stab wound No. 4 was situated about the second joint of the thumb of the right hand, about that position (indicating) and about half an inch in length. I found that the deceased had his abdomen considerably distended with blood and serum. I found that he had, in the lower lobe of his right lung, a well marked condition or stage of lobar pneumonia, and upon said examination, the result of such, I came to the conclusion that the deceased came to his death from lobar pneumonia following a stab wound of the abdomen.

CASE #1808

BY MR. WASSERVOGEL:

Q Caused by the stab wound, would you say? A Yes.

Q Who identified the body to you? A The body was identified to me by Detective Paul Schmidt of the 21st precinct and Officer McIntosh attached to East 88th street station house, or otherwise the 35th precinct.

THE COURT: Mr. Wasservogel, you had better develop what are the causes that produce lobar pneumonia.

BY MR. WASSERVOGEL:

Q Tell us what the causes were in this particular case which produced lobar pneumonia? A It was brought about by the septic condition which the individual had, resulting from the stab wound.

Q Could it have been brought about in any other way but by the stab wound? A No, sir, not in my opinion.

CROSS EXAMINATION BY MR. FOX:

Q What are the distinguishing features of lobar pneumonia as distinguished from ordinary pneumonia? A Lobar is ordinary pneumonia. We have lobar and lobular, and lobar is the ordinary pneumonia. We have a lobar and a lobular pneumonia. Lobar is where the inflammation extends, and is confined to the lobe of the lung. Lobular pneumonia is more confluent -- it involves the lobule.

Q So this man died of ordinary pneumonia? A He died from a lobar pneumonia.

808171808
CASE #

Q Which you say is ordinary pneumonia? A Ordinary pneumonia.

Q Did you see him between the time he was stabbed and the time when you made your autopsy? A No, sir.

Q How long have you been in the practice of medicine? A I have been in the practice of medicine since 1893, and am still in the practice of medicine in addition to the position I hold.

Q How old are you? A I was forty-six yesterday morning at 8 o'clock.

Q The celebration of your birthday has not had any effect in enlarging your testimony at all? A No, sir, I do not imbibe or take any stimulants to influence me.

Q You certainly do not look so, and I did not mean to imply so, but tell me, have you in your own practice seen men who died from lobar pneumonia who had not suffered any wound from a sharp instrument? A Hundreds.

Q What was the deepest wound you discovered in the body of the deceased? A The deepest wound was the abdominal wound, the one about two inches below the umbilicus, in the median line. The same wound extended backwards into the abdominal cavity, perforating the small intestines. I should say that was about anywhere from between three-quarters and an inch and a half.

Q In what, indepth? A In length.

Q What was the depth of the deepest wound? A The deepest wound was the wound, as I said, in the abdomen, and that wound

CASE #1808

had perforated the intestines, which had been sewed by the surgeon of the institution, and I should say that the instrument that inflicted that wound may be the blade of a knife.

Q Pardon me, I did not make myself understood. I ask you to give us in inches the depth of the deepest of all the wounds?
A Well, about in the neighborhood of an inch and a quarter to an inch and a half.

Q There was no perforation of the lung by any instrument, so far as you could see? A No.

Q You spoke of an infection? A Yes.

Q What fact did you discover from which you draw the inference of the existence of an infection? A From the exudate which matted the intestines down, and which was between the knuckles of the intestines, and from the enlargement of the spleen, which are characteristic of a septic, or blood poisoning.

Q What was the distance, if you can give it, between the bottom of this deepest wound, and the point in the lung where you found evidences of pneumonia? A There was no perforation of the lung or in the vicinity.

Q I understand that? A The wounds were confined to the lower portion of the abdomen.

Q Now, evidently I did not make myself understood -- what I asked you was, or meant to ask you, the distance from the bottom of this deepest wound, to which you have referred, and the point in the lung where you found evidences of lobar pneumonia?

CASE # 1808

A I should judge between ten and twelve inches.

Q Were there wounds on the hand did you say? A Yes.

Q Two? A Two.

Q And two wounds in the body? A Yes.

Q And where was the other wound, you have described one as the deepest? A The other was two inches below this anterior superior spine or the hip bone, right here (indicating).

Q That had no relation to the lung? A No, that only extended through the integument down to the muscle -- not through or into the abdominal or peritoneal cavity.

Q Then, is it a fair statement of your testimony that you draw an inference from the wound, the existence of the wound, and the existence of certain infection, that the deceased died of lobar pneumonia, is that it? A Resulting from the wound-- yes.

Q When you say resulting, that of course is necessarily your opinion, is it not? A That is correct.

Q You of course have no personal knowledge of when the pneumonia first showed itself, have you -- when I say personal knowledge, I mean no knowledge derived from your personal observation? A Except from comparing such lungs with other lungs -- thousands which I have seen.

Q I mean you had no personal knowledge based on observation of the deceased during the period between the stabbing and the death, as to the date when symptoms of pneumonia first developed, have you? A No, only comparing --

CASE #1808

Q You have answered no -- please stop -- you have no knowledge of the condition, no personal knowledge, resulting, I mean, from observation, of the conditions which surrounded the deceased between the time when he was stabbed and the time of his death, have you? A I have -- the only way I can answer that question is that I have a knowledge to this effect -- I cannot answer the question by yes or no.

Q Did you see him at all --

MR. WASSERVOGEL: The doctor says that it cannot be answered by yes or no.

MR. FOX: And I will withdraw the question for that reason.

BY MR. FOX:

Q I think I asked you this before -- did you see the deceased at all during his life, or after he was stabbed? A I did not.

Q These two wounds on the hand were evidently what would fairly be called merely superficial wounds? A They were incised superficial wounds, yes.

Q You numbered these wounds in numerical order, 1, 2, 3, 4, in your direct examination? A I did.

Q And will you again, just for accuracy, repeat your enumeration, describe the wounds? A Incised wound No. 1 was two inches in length, extending downward to two inches below the umbilicus, running horizontally to the long axis of the body,

CASE #1808

beginning at the left of the median line.

Q That is the one you described as being deeper than any one of the others? A Yes.

Q Now the other? A No.2 was two inches below this bone here or hip bone, known as the anterior superior spine.

Q That was not a mortal wound? A It could have been.

Q You do not intend to tell the jury in your opinion that was a mortal wound? A Yes, sir, a certain amount of material could have entered into that wound which would have infected the system.

Q Which could? A Yes.

Q Will you state to the jury that the second wound was, in your opinion, as matter of fact a mortal wound? A Yes.

Q Why? A Because there was an abrasion of the skin and through the epithelium which would admit the germs or bacteria, to get carried in the circulation and travel through the system.

Q That depends upon your assumption of the infection, the poison matter? A Assumption of fact which I observed in other cases and in this case.

Q So to that extent you base your opinion both upon what you have observed here and what you have observed in other cases, is that right? A As the result of my experience.

Q Is it your opinion that the deceased would have died from either one of those wounds necessarily? A It was my opinion.

Q Please answer that yes or no? A Yes, sir.

CASE #1808

Q On the first part of your examination, did you not tell the jury that it was one particular wound which, in your opinion, caused lobar pneumonia? A No.

Q Men frequently develop pneumonia and die, who never have had any wounds at all? A That is correct.

RE-DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q Now, Dr. Lehane, you told us before that you had performed autopsies in more than two thousand cases? A Yes.

Q In how many of those cases would you say was death caused by stab wounds?

Objected to as irrelevant and not re-direct examination.

THE COURT: As to the competency of the witness I shall allow it, on that ground.

MR. FOX: I did not say that -- I did not object to it on the ground he was not an expert. My objection was -- if you will hear the question read -- I maintain that testimony to the effect that other stabs not described and not before this jury, may have resulted or did result in death, is irrelevant.

THE COURT: The form of the question is objectionable.

MR. WASSERVOGEL: It is only a preliminary question.

THE COURT: I sustain the objection to the form of the question.

BY MR. WASSERVOGEL:

Q In how many of these cases, the two thousand cases wherein

CASE #1808

you have performed autopsies, was death caused by stab wounds such as you have described in this case?

MR. FOX: I object. That is allowing the witness to reject and accept such facts as he may see fit, and it is irrelevant, too remote and conjectural, and I submit to allow this witness to lay before this jury two thousand or one hundred cases, is irrelevant. It is collateral matter. It would involve cross-examination as to each of these stab wounds, and to allow the witness merely to say that two thousand or five hundred or one hundred, resulted in death, I beg to suggest is too remote and irrelevant.

THE COURT: Yes, my recollection is, in the case of The People against Pecars, 185 N.Y., certain medical witnesses took the stand and over objection the Court allowed the District Attorney to elicit from the witnesses, with a view to establishing the competency of the witnesses, their professional ability.

MR. FOX: I assume the competency of the witness. I put it on the record now.

MR. WASSERVOGEL: If that is conceded the question is withdrawn.

THE COURT: That is the only purpose of it.

BY MR. WASSERVOGEL:

Q You traced the cause of the lobar pneumonia in this case, did you not? A I did.

CASE #1808

Q Tell us in detail what you did in tracing the causes of death in this case? A The history which was given to me --

MR. FOX: I object.

THE COURT: Objection sustained.

THE WITNESS (continuing) After making my incision through the median line, and removing each of the viscera organs --

BY MR. WASSERVOGEL:

Q What do you mean by the viscera organs? A The heart, lungs and kidneys, spleen and intestines, pancreas, stomach, I carefully made a macroscopical examination, that is, an examination with my eye into each and every distinct part and particle. I found that the right lower lobe of the right lung was engorged and infiltrated and completely consolidated; I found the air vesicles were exudating considerable pus. That alone was characteristic of a lobar pneumonia. In the abdominal cavity I found considerable exudate, that is, a thin material which matted the intestines together, and, as the result of any foreign material, such as germs, admitted into the system and carried into the circulation; when I examined his spleen, on examination I found it enlarged, which corroborates and is characteristic of sepsis. As the result of which, I base my opinion that this man came to his death, as I have stated.

Q You said something in answer to a question put to you by Mr. Fox, about an infection you found -- that is the sepsis that

CASE #1808

you speak of? A Yes.

Q That was caused by what, in your opinion? A That was undoubtedly, in my opinion, caused by the entrance of the knife into the individual.

Q Is this combination of stab wounds and lobar pneumonia frequently seen? A Yes.

MR. FOX: I move to strike out the statement of the witness that the sepsis was caused by the entrance of the knife into the deceased's system.

THE COURT: Strike it out.

MR. WASSERVOGEL: He is simply giving his opinion.

MR. FOX: Am I not right -- I am entitled to have it struck out?

THE COURT: Strike it out. Repeat the question and then I will entertain the objection as an original one.

Q (The question is repeated as follows) That was caused by what, in your opinion?

MR. FOX: I object. Having been enlightened as to what the answer was going to be, which did not seem to be foreshadowed by the question. The question calls for a matter which is a question for the jury. His testimony as to what caused this, is irrelevant and improper for that reason.

THE COURT: The jury can either accept or reject the opinion of the witness. The witness is merely called upon to express his professional opinion -- what, in his opinion,

CASE # 1808

caused death.

MR. FOX: The precise rule I have in mind arose in this way -- I think it was in 177 N.Y. -- the question was, what caused the car to be derailed, and the witness against objection was allowed to state that in his opinion the cause of the derailling of the car was certain things which he stated. For that alone the judgment was reversed in the Court of Appeals. This seemed to me to be so near to a violation of that rule as to make it irrelevant and to come within that principle.

THE COURT: Was the witness an expert in that case?

MR. FOX: Yes -- this witness is an expert in medical things, but is he an expert on other things?

MR. WASSERVOGEL: Mr. Fox conceded that he was an expert.

MR. FOX: An expert medically. My point is it is not a matter for expert testimony, assuming the witness be an expert, which was the assumption in the case to which I refer. You allow him to state medically one thing and another, well enough, but to allow him to state what he is about to state, is objectionable.

THE COURT: Suppose you re-frame your question, Mr. Wasservogel. Your question as it is --

MR. WASSERVOGEL: It followed another question.

THE COURT: Repeat the last two questions and answers.

CASE #1808

Q (The stenographer repeats as follows) "You said something in answer to a question put to you by Mr. Fox about an infection you found -- that is the sepsis that you speak of? A Yes.

Q That was caused by what, in your opinion?"

THE COURT: I overrule the objection and give you, Mr. Fox, the benefit of an exception, because the witness merely is giving his professional opinion, and that opinion will be weighed by the jury in connection with all the evidence in the case. They are at liberty to weigh and reject it and give it such weight as they think it entitled to.

MR. FOX: You are ruling, having before you the benefit of the answer which has already been given.

THE COURT: The answer was stricken out.

MR. FOX: But you know.

THE COURT: I am not considering that -- that part of the answer is objectionable.

THE COURT (to the witness) Now answer the question free from legal objection -- you have had experience, answer the question.

THE COURT: The Court's ruling is sustained by the case I have in mind, The People against Pecars, -- a professional witness may state his opinion as to the cause of death.

MR. FOX: I take an exception.

BY MR. WASSERVOGEL:

Q That was caused by what, in your opinion? A That was

CASE #1808

caused, in my opinion, by a knife or an instrument perforating the abdominal cavity.

MR. FOX: I move to strike out the answer.

THE COURT: Motion denied. Exception.

MR. FOX: I move upon the grounds already stated.

BY MR. WASSERVOGEL: -

Q In your opinion can lobar pneumonia be caused by stab wounds, although the lung be not perforated? A Yes, sir.

RE-CROSS EXAMINATION BY MR. FOX:

Q When you were asked a certain question by Mr. Wasservogel, you began to say from certain statements made to you, and I checked you, do you remember that -- I asked you not to say what was said to you? A I cannot recall that at present.

Q I beg your pardon, you said from the history given to you, and I checked you -- do you remember that? A Yes, that is correct.

Q Now please understand I am not asking you to state what that history was, but I am endeavoring to get at the basis of your opinion. I am going to ask you one or two questions. I want to explain to you that I do not want you to give what the history was, but, the history that was given to you, whatever it was, you accepted as true? A No, sir.

Q You did not accept it as true? A No.

Q Did the history play any part in your forming the opinion

CASE #1808

to which you have testified? A No, sir.

RE-DIRECT EXAMINATION:

Q You base your opinion only on the facts you found?

A That I saw myself.

Q Upon what you saw at the time? A Yes, sir.

THE COURT: Gentlemen of the Jury, do not discuss this case among yourselves or permit any person to talk with you about it or form or express any opinion as to the guilt or innocence of the defendant, until the case is finally submitted to you. We will take a recess until quarter after two.

CASE # 1808

(After recess trial resumed.)

C H A R L E S M c I N T O S H, called as a witness on behalf of the people, being duly sworn and examined, testified as follows:

(35th Precinct Detective Bureau.)

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q You are a police officer of the City of New York attached to what precinct? A 35th Precinct.

Q Were you on duty on the night of the 28th of December last? A No, I was not.

Q Were you in the neighborhood of the elevated station 19th Street and Second Avenue? A No, I was not.

Q Did you see the body of Joseph McNierney, police sergeant, at the morgue, at any time? A Yes, I did.

Q Did you know Sergeant McNierney? A Yes.

Q Are you one of the officers who identified the body to the Coroner's Physician? A Yes.

Q As the body of Sergeant McNierney? A Yes, sir.

(No cross examination.)

D E N N I S M c C A R T H Y, called as a witness on behalf of the people, being duly sworn and examined, testified as follows:

(Residence: 124 East 98th Street.)

CASE 77-1808

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q What is your business? A I am a guard.

Q Elevated railroad guard? A Yes, sir; for the Interborough.

Q On the Second Avenue line? A Yes.

Q You have been for how long? A About nine months.

Q Were you employed as an elevated railroad guard on the 28th of December last year? A Yes.

Q Did you see an altercation on your train that evening at all? A When I pulled out of 34th Street--

MR. FOX: Answer yes or no.

BY MR. WASSERVOGEL:

Q Yes or no. A Yes.

Q Tell his Honor and these gentlemen what you saw and nothing else.

MR. FOX: We object as irrelevant and too remote.

Objection overruled. Exception.

BY MR. WASSERVOGEL:

Q Tell us what you saw and not what somebody told you.

A When I pulled out at 34th Street I heard two officers taking two girls from the cab--

Q You mean the motorman's seat? A Yes.

Q The motorman's box? A Yes. They took them and put them sitting near ~~the~~ ^{the} ~~cell~~ and as we went to 23rd Street the two girls got up and walked through the car and so the young Italian

CASE #1808

stopped standing in the same place until we went to 19th Street and then the train came to a full stop and he reached in his hand and called one of the officers a son of a bitch.

Q That was what man, who was that? A That was the man that was standing on the platform, the Italian.

BY THE COURT:

Q Do not refer to him as an Italian, do you recognize a person who was on the train that night? A Yes.

Q Do you see him here? A He is--

Q Do you see the person who was on the train that night? A Yes. I saw him that night.

Q Do you see him in court? A I saw him coming through--

Q Look about the court room and state if you are in a position to identify the person. A I take that man down there to be him (indicating).

Q Point him out.

MR. FOX: May he not leave the stand?

THE COURT: Step down and put your hand upon the man.

(The witness leaves the stand, goes down to the table and points to the defendant.)

BY MR. WASSERVOGEL:

Q Tell us what you saw the defendant do and what you saw the police officers do. A A police officer took the two girls from the motorman's seat and put them sitting near themselves for protection.

CASE # 1808

Q They sat them by themselves? A Yes, sir; and they said to the Italian that was standing on the platform to leave the girls alone.

THE COURT: Call him the defendant.

MR. FOX: Do you intend to rule that the declarations of the officers to the girls were relevant?

THE COURT: I did not so move.

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

THE COURT: What the officers said to the girls, if anything, will be stricken from the record and the jury is instructed to disregard the same.

MR. WASSERVOGEL: The witness may say what the defendant said at that time?

THE COURT: What the defendant said is admissible.

BY MR. WASSERVOGEL:

Q Do not say anything which the officers said at that time to them; tell us what you saw and what, if anything, the defendant said. A As we went to 19th Street, he put his hand in and called the officer a son of a bitch and wanted him on the platform to fight and they opened my gates there and they all got on the station platform.

Q You opened your gates and what happened? A They all got out on the station platform.

Q Did you see what happened there? A No, I did not be-

CASE # 1808

cause I went back to the cab to blow the whistle to call the cops.

Q Did you see what happened on the platform at all?

A No.

Q You remained, A I remained on the train.

Q Did the men go away from the place where you were?

A Yes, sir; all the platform was a big mess of people. You could not get what was doing; it was all a crowd of people.

(No cross-examination.)

P A U L S C H M I D T, called as a witness on behalf of the people, being duly sworn and examined, testified as follows:

(Detective Bureau.)

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q You are a police officer of the City of New York?

A Yes, sir.

Q Have been for how long? A The past seven years

Q Were you on duty on the night of the 28th of September last year? A Yes.

Q Were you at the elevated station at 19th Street and Second Avenue that evening? A 19th Street and First Avenue.

Q That is in the County of New York? A Yes.

Q What time did you arrive there? A Between 7:45 and 8:00

CASE #1808

P. M.

Q And when you arrived, did you see Police Sergeant McNierney there? A Yes.

Q Did you know McNierney at that time? A No.

Q Did you see officer Deneen there? A Yes, sir.

Q Did you know Deneen at that time? A No.

Q Did you see this defendant there? A Yes.

Q You did not know him either? A No.

Q Tell us where the defendant was at the particular moment when you arrived? A The defendant was in the side room of the elevated station.

Q In custody? A In custody of Officer Cullen.

Q You say you saw Sergeant McNierney; tell us what his condition was at that particular moment. A Sergeant McNierney was laying on a bench in the waiting room of the elevated station, and as I got there the ambulance surgeon arrived and was treating the sergeant for a stab wound in the abdomen.

Q Did you see the body at all as it was laying there on the bench or couch? A Yes, laying on the bench.

Q Was he bleeding? A Yes.

Q Bleeding from what part of his body? A Right across here (indicating the abdomen.)

Q Were you there when the defendant was taken to the station house? A Yes.

Q Who took ^{him} there? A I did.

CASE #1808

Q Yourself? A Yes.

Q Placed him under arrest then? A Yes.

Q Took him away? A Yes.

Q Were you there when the police sergeant was taken to the hospital? A Yes.

Q Was Deneen also taken to the hospital? A Deneen went in the ambulance to the hospital to be dressed and then went home.

Q He first went to the hospital? A Yes.

Q Did you subsequent to that date see Sergeant McNierney?

A Before that?

Q After that. A I saw him in the hospital, yes.

Q How long after that? A Between twenty minutes and half an hour.

Q Did you see McNierney after he died, his body? A Yes.

Q Where did you see him? A In the morgue.

Q Were you one of the officers who identified the body to the coroner's physician, Dr. Lehane? A Yes.

Q As the body of Joseph McNierney, Police Sergeant, whom you saw at the elevated station? A Yes.

Q On the 28th of September? A Yes.

CROSS EXAMINATION BY MR. FOX:

Q You say the ambulance surgeon arrived or had arrived at the elevated railway station before you got there? A He

CASE #1808

arrived at the same time I arrived there.

Q What did you see him do, if anything? A I saw him treating the sergeant.

Q I know-- but treated him in what way, what did you see him doing, washing the wound? A Washing and dressing the wound, preparatory to taking him to the hospital.

Q How long was the ambulance surgeon engaged in washing and dressing the wound? A I should say ten to fifteen minutes.

Q Do you know the name of the ambulance surgeon? A No, I do not.

Q Did he have instruments with him? A He had a bag there.

Q Did you actually see what he was doing? A No, sir; I was paying attention to my case.

Q Except that you know he was as a matter of fact supplying some sort of dressing or some kind of surgical or medical treatment to the deceased? A Yes.

W A L T E R H. V O C K E N I N G, called as a witness on behalf of the people, being duly sworn and examined, testified as follows:

(Residence: 116 Decatur Street.)

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q What is your business? A Architect.

CASE #1808

Q How long have you been an architect? A Over fifteen years.

Q Did you make these diagrams that I now show you?

A I did.

Q What do they represent? A This diagram represents the plan of the elevated station at 19th Street and Second Avenue, New York City. The flap indicates the position of a car in front of that station.

Q And this other diagram? A That represents the floor plan of a car, ordinary elevated car.

Q 19th Street and First Avenue? A Yes, sir-- Second Avenue line.

MR. FOX: There is no objection to the diagram as to the station, but as to the car--

BY MR. WASSERVOGEL:

Q Were these measurements made by yourself? A Yes.

Q Both of the platform and the car? A Yes.

MR. WASSERVOGEL: The platform diagram is offered in evidence.

MR. FOX: I have no objection.

(Received and marked People's Exhibit 1.)

MR. WASSERVOGEL: The diagram of the car is offered for identification.

(Marked for identification People's Exhibit 2.)

MR. FOX: What is that flap?

CASE #1808

MR. WASSERVOGEL: The location of a car.

MR. FOX: That is no part of your exhibit?

MR. WASSERVOGEL: No.

MR. FOX: We will take it off. If you will give me your assurance that the other diagram is the diagram of that particular car--

MR. WASSERVOGEL: We cannot do that.

(No cross examination.)

M R S. A N N A S M I T H, called as a witness on behalf of the people, being duly sworn and examined, testified as follows:

(Residence: 1575 Avenue A.)

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q Are you employed? A Yes.

Q Where? A 1061 Park Avenue.

Q Were you on an elevated train going downtown on the evening of the 28th of September last year? A Yes, I was.

Q Where did you board the train? A 86th Street and Second Avenue.

Q Did you see Police Sergeant McNierney on that train?

A No, I did not.

Q You did not know Police Sergeant McNierney at that time?

CASE #1808

A No, I did not.

Q Did you see any altercation, either on the train, or after the train stopped at a station later on? A Before the train got into the 19th Street station I saw two men quarreling on the platform, as I thought, and then the train came to a stop at the 19th Street station and the men still continued to quarrel, until they got on the platform. I was sitting on the other side of the train, I saw them quarreling and I stepped to the other side of the platform, to the platform side, and took a seat there in the centre and the men quarreled until they came to the window where I was sitting.

Q That is on the outside of the car? A On the outside of the platform.

MR. FOX: You are speaking of the station platform?

THE WITNESS: Yes, sir; I saw two men quarreling with one and another and fighting as I thought and I saw a knife in one man's hand. One man was facing the other; one man had a knife in this hand and the other gentleman had hold of his wrist trying to take the knife from him.

BY MR. WASSERVOGEL:

Q Which hand did he have hold of, do you recall? A He had the knife in the left hand and the other gentleman had him by the left hand-- it would be his right hand.

BY MR. FOX:

Q Whose right hand? A The other gentleman's right hand.

CASE # 1808

They were both facing one another.

BY MR. WASSERVOGEL:

Q Did you see the face of the man who had the knife in his hand? A No.

Q You were very much excited? A Yes. When I saw the knife I jumped from my seat and rushed to get off and the guard would not let me off the train.

Q That is really all you know about the matter? A Yes, that is really all I know about it.

Q Did you see any blood on the man who was stabbed or did you see a man stabbed? A No, I did not see blood at any time at all.

CROSS EXAMINATION BY MR. FOX:

Q Where did you board the train coming down? A 86th Street and Second Avenue.

Q And this altercation on the platform was the first thing attracted your attention? A Yes, sir.

Q You had been in the car all the time? A Yes.

Q That was the first thing out of the ordinary that attracted your attention? A Yes.

RE-DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q Can you describe the man who did not have the knife?
A No, I did not see anybody's face at all.

CASE #1808

DENNIS M. MCCARTHY, recalled:

BY MR. WASSERVOGEL:

Q I want to ask you another question; when you first saw the defendant, where was he with respect to the place where you were standing? A He was standing at the motorman's box, looking through the light of glass, outside on the platform.

Q Outside of the car on which you were standing? A The platform of the car.

Q How far were you from him at that time? A I could reach my hand to him.

Q Do you know the number of that car? A 373.

Q Are you sure that is right?

MR. FOX: Is there not a record of that kept by the railroad?

MR. WASSERVOGEL: Yes, but he has it wrong.

MR. FOX: If you have the record I have no objection to putting a leading question to him.

BY MR. WASSERVOGEL:

Q Was it not 1073? A Yes, 1073.

Q 1073 is right? A 1073.

BY MR. FOX:

Q Was that the first, second, third or fourth car on the train? A The fifth car.

Q How many cars on the train altogether? A A seven car train.

1054

CASE #1808

BY MR. WASSERVOGEL:

Q How far was this car from the last car? A There were two cars behind it.

BY MR. FOX:

Q A seven car train and this was the fifth car? A Yes.

Q You were on the front platform or near the front platform of the fifth car? A The fifth car.

Q On the front end of it? A Yes.

Q The downtown end? A Yes.

MR. WASSERVOGEL: Mr. Fox, Mr. Volekening has gone away. If you want him here we can bring him back but it seems to me the diagram he made shows that it was car 753-- if there is any objection we will bring him back.

MR. FOX: Put it in evidence subject to my motion to strike it out. I have no doubt you are entirely correct.

(People's Exhibit 2 for identification is received in evidence and so marked.)

BERNARD WINKLE, called as a witness on behalf of the people, being duly sworn and examined, testified as follows:

(Residence: 68 Fifth Street, Woodside, L. I.)

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q What is your business? A Merchant.

CASE # 1808

Q What line? A Metal.

Q Your place of business is where? A 228 East 41st Street and 632 East Twelfth.

Q Were you on the Second Avenue elevated train going downtown on the night of the 28th of September last year?

A I was.

Q Where did you board the train? A 57th Street.

Q Did you notice an altercation on the train or after the train stopped any certain place later on? A After the train had stopped.

Q After the train stopped, at what station did the train stop? A 19th Street.

Q What did you see? A I was standing on the--

THE COURT: 19th Street station?

THE WITNESS: Yes-- I was standing on the-- standing on the train, on the front part of the train.

BY MR. WASSERVOGEL:

Q What do you mean by that the platform? A On the platform of the train and when she pulled in at 19th Street Station, when this train pulled into the 19th Street station one man passed me followed by two others. I looked out and did not know what it was and did not see anything, and he ran down towards north, towards 23rd Street-- towards 23rd Street, and I saw sort of a wrestle and scrimmage there and in the meantime the blow of a whistle and I saw a man run away from the

CASE #1808

officers and get away a bit and an officer after him and the officer gets him. That is all I saw.

Q Did you see an officer on the platform? A I did not see any-- I did not know they were officers. There were two men.

Q Did you see one of the men outside? A Two men outside.

MR. WASSERVOGEL: Bring in officer Deneen.

(Officer Deneen is brought into the court.)

BY MR. WASSERVOGEL:

Q Do you recognize this man? A Yes, sir.

Q Officer Deneen? A I do.

Q You did not know him at that time? A No, I did not know him.

Q He was in plain clothes? A Yes, sir; plain clothes.

Q Officer Deneen was one of the officers you saw on the platform? A Yes.

Q You say he was with another person at that time? A Yes. A taller and stouter man.

Q Have you ~~xxxx~~ since that time learned the name of the other man? A I knew the name of the other man at the station-- I have.

BY MR. FOX:

Q You heard? A I have.

BY MR. WASSERVOGEL:

Q You heard it at that time? A Yes.

CASE #1808

Q That was Sergeant McNierney? A Yes.

Q Did you see the defendant? A Yes; I saw the defendant.

Q Tell us what, if anything, you saw the defendant do; what, if anything, you saw McNierney do and what, if anything, you saw Deneen do at that particular time. A Well, I did not actually see any stabbing done or any cutting, but what I saw was a commotion on the lower end of the platform. What they were doing I don't know, but then, afterwards I heard--

THE COURT: No--

BY MR. WASSERVOGEL:

Q Not what you heard but what you saw. A I saw these men wrestling and scrimmaging--

BY THE COURT:

Q What men? A Officers-- I did not know they were officers.

BY MR. WASSERVOGEL:

Q Did you see the defendant make any motion with his hand? A Yes.

Q Stand up and show the jury exactly what you saw the defendant do. A It was just like a fight; it was just like this, going like that-- that is all I saw (indicating).

Q You did not see a knife in anybody's hand? A No, I could not see the knife.

Q Did you subsequently see the defendant in the custody of a police officer? A I did.

1051

CASE #1808

BY THE COURT:

Q When you saw the defendant move his hand in the manner described by you, where was officer Deneen? A With the prisoner, struggling with the prisoner.

Q Where was Sergeant McNierney? A At the same place.

Q With the prisoner? A Yes, sir, with the prisoner.

Q What, if anything, did you see Sergeant McNierney do? A I heard the Sergeant--

Q Louder. A I heard Sergeant McNierney exclaim-- he said something-- and I did not know what he said and then the other officer went after him, because the prisoner got away.

Q Did you see at that time any weapon or thing in the hands of either Sergeant McNierney or Officer Deneen? A I saw-- at that particular time I did not see, but two or three minutes after I saw the weapon in the hands of Deneen, the officer.

Q What? A A knife.

BY MR. WASSERVOGEL:

Q Did you notice the condition of Officer McNierney?

A I did. He was cut in the-- upon the thumb and forefinger.

Q Did you see any blood elsewhere on his body? A Not on his body-- just on his fingers, but afterwards he found out he was cut--

THE COURT: Strike out the words "afterwards he found he was cut."

Q I talk of Sergeant McNierney, not Deneen. A Sergeant

CASE #1808

McNierney?

Q Yes. A I did not see any blood on Sergeant McNierney.

Q Did you look at the body? A Yes, I looked at the body. I was inside while he was being carried into the waiting room.

Q You did not observe any blood upon him? A There was not any blood.

Q You did not see any? A No.

BY THE COURT:

Q How many persons were on the platform when you were standing there?

MR. FOX: You mean the car platform?

THE COURT: Yes.

THE WITNESS: On the platform, myself and the guard.

Q When was the first time you saw the defendant? A When the train pulled into 19th Street station.

Q Did you see the defendant on the car or on the platform of the car at any time before the train pulled in to the 19th Street station? A No, I did not.

CROSS EXAMINATION BY MR. FOX:

Q So far as you could see, there were were three citizens engaged in an altercation on the station platform? A So far as I could see.

Q Nothing to you to indicate that any one of them was a member of the police force? A No, sir; I did not know.

CASE # 1808

Q Where did you say you got on the train, 57th Street?

A 57th Street.

Q Had you remained in the same car all the way down?

A Yes.

Q I do not suppose you remember what car it was with reference to the rear of the train or front of the train-- if you remember accurately-- it is not worth while to guess at it. Do you or do you not remember accurately so you can tell the jury positively in what car you were riding? A I do not know exactly what car I was riding in.

Q When you got down-- when you left the train-- which way did you have to look in order to see the altercation, uptown or downtown? A Uptown.

Q Do you know with reference to the ticket chopper's place, whether the altercation was to the south or north of that? A To the north.

Q How near the ticket chopper's place was it that the altercation took place, as near as you can tell? A 75 feet.

Q How much? A 75 feet.

Q How long would you take an ordinary car to be? A How long would I take an ordinary car to be?

Q Do not repeat the question-- just answer the question.

A About fifty feet.

Q Whether you are right or wrong as to the length of the car, your recollection is that this altercation took place

CASE #1808

the length of a car and a half to the north of the ticket chopper's place, at the station 19th Street; is that right?

A Something like that.

Q With substantial accuracy-- that is about your recollection? A That is about right.

Q Do you say that the three men who subsequently engaged in this altercation went out, passed out of the car in which you were riding on the front platform and then on the station platform? A Yes, on the station platform.

Q You had all been riding down in the same car? A I was riding on the front of the car.

Q I do not ask you what part of the car-- you had been riding in some part of the car from which these three men emerged when they got to 19th Street station; is that right? A Yes, that is right.

Q This altercation is the first thing you noticed out of the ordinary on the way down? A That was the first I noticed.

Q Had you been talking to the guard on the way down? A Yes, I had been talking to the guard.

Q Standing on the front platform? A Yes, sir; on the front platform.

Q Do you know if the door was open or closed? A I don't recollect.

Q Did you see the ambulance surgeon there at all? A I

CASE # 1808

saw the ambulance surgeon.

Q Did you see him do anything to Sergeant McNierney?

A Bandaging him up.

Q That you saw? A Yes, I saw that.

Q That was all you saw? A And a clergyman got there at the same time.

Q I was speaking of all you saw of the surgeon. A That was all.

Q You noticed no passing of remarks between the defendant and the policeman or the policeman and the defendant at all?

A No, I noticed nothing.

Q There was silence, so far as you can testify? A That was all.

Q You did not see either one of these three men on the front platform of the car upon which you were riding at any time, until the moment when they emerged or left the car to go on the station platform, is that right? A That is right.

RE-DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q Did you see the defendant brought into the station room there? A I did.

Q I mean to the place where McNierney was lying? A I did.

Q Do you know whether McNierney said anything at that time?

CASE #1808

BY THE COURT:

Q Answer yes or no. A Yes, he did say something.

BY MR. WASSERVOGEL:

Q Do not answer this question until Mr. Fox has had an opportunity to object: Tell us what he said?

MR. FOX: We ought to know the circumstances.

THE COURT: Is there an objection to it?

MR. FOX: Yes.

THE COURT: I sustain the objection. I will allow the evidence, if you can show whether or not the defendant participated in the conversation, if he made any answer or reply to what McNierney said-- otherwise the evidence is not competent.

BY MR. WASSERVOGEL:

Q Did you notice what the ambulance surgeon was doing?

A Bandaging up his body, his stomach.

Q His stomach? A Yes.

Q He was cut in the stomach? A He was.

Q You did not see the blood? A He was not bleeding.

Q You did not see any blood? A I did not see no blood.

WILLIAM J. DENEEN, called as a witness on behalf of the people, being duly sworn, and examined, testified as follows:

(17th Precinct, Municipal Police.)

CASE #1808

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q How long have you been attached to the police department? A Since December, 1907-- that is right.

Q The detective bureau? A No, I have been attached at first, when I went on, I went to the Fifth Precinct and from the Fifth I went to the 17th Precinct. I was in the 5th Precinct about six months and I was transferred to the 17th Precinct in January.

Q Were you on duty on the night of the 28th of September last year? A I was not-- excuse me-- a policeman is always on duty.

Q I mean on regular duty that night? A No.

Q Assigned to any particular work? A No, I was not.

Q Did you know Sergeant officer McNierney? A Yes.

Q Was he attached to the same precinct with you? A No, he was not.

Q Were you in the company of Sergeant McNierney that particular night? A I was.

Q Where did you meet him? A I live in the same home with Sergeant McNierney, 505 East 88th Street.

Q In his family, with his family? A Yes. I live with my family at 505 East 88th Street.

Q You mean, officer, that both your family and his family life in the same house? A Yes, I live downstairs in under him.

Q Did you board a Second Avenue elevated train that

CASE #1808

evening? A Yes, I did.

Q At about what time? A About or around maybe ten or fifteen minutes of seven.

Q Was McNierney with you at that time? A Yes.

Q You were going downtown, both of you? A Yes.

Q Do you remember which car you entered? A I do.

Q Which was it? A The second car from the rear.

Q Did you at any time on the trip downtown notice this defendant? A This man here?

Q Yes. A Yes, I did.

Q When did you first observe him? A Between 34th Street and 23rd Street.

Q And was he alone at that time when you first noticed him, I mean? A He was in a seat alone, yes.

Q What, if anything, did you see him do at that time?

MR. FOX: I object as too remote and irrelevant/
A repetition of the objection that your Honor has passed upon already.

Exception overruled. Exception.

THE WITNESS: He was in a cross seat on the west side of the car. Sergeant McN¹erney and I were in the two corner seats of the car going south.

Q On the same side he was sitting? A On the same side he was, but he was in the cross seat. There were two girls in a cross seat-- I mean the first cross seat towards us--

CASE #1808

there are four cross seats, two there and then two here and the two girls got up.

Q Where were the girls sitting with respect to the place where he was sitting? A He was sitting like that and the two girls were sitting near-- there is a cross seat--

Q Was he facing north or south? A He was facing north and the girls were facing south.

Q Sitting right opposite where he was? A Yes, in these cross seats.

Q What did you see him do, if anything? A The two girls got up and came ^{from} the west side of the car to the east side of the car and they go in a cross seat but they did not go in the same even seat but go in the one ahead. There is two cross seats, and the defendant got up and he went from the west side of the car to the east side of the car in the same cross seats which the two girls went in.

BY THE COURT:

Q Sitting opposite? A Yes, sitting opposite.

MR. FOX: I need not repeat my objection. This is supposed to be all under your Honor's ruling.

THE COURT: Yes.

THE WITNESS: Then the girls got up and they came from the cross seats and they came all the way back and went in to the little box where the motorman sits, and the defendant came all the way back to where the two girls

CASE #1808

were sitting in this little bit of a box where the motor-man sits. The defendant said something to the two girls.

Q Did you hear it? A I did not; no sir; but the girls objected to what he said and they told him to mind his own--

MR. FOX: I object.

THE COURT: Strike out that the girls objected and so forth.

BY MR. WASSERVOGEL:

Q Tell us what they said.

MR. FOX: I object.

THE COURT: This presents another question.

MR. FOX: Yes, I know it does.

THE COURT: This question was passed upon in the Bissert case. You cannot admit a part of a conversation. Strike out what the girls said to the defendant.

MR. WASSERVOGEL: He does not say.

THE COURT: The words "they objected". They are stricken out.

BY MR. WASSERVOGEL:

Q Tell us what you saw the girls do, if anything, and what you saw the defendant do, if anything. A The girls told him to mind his own business.

THE COURT: Strike that out.

BY THE COURT:

Q What, if anything, did you hear the defendant say to

CASE #1808

the girls? A No, I did not.

THE COURT: Then omit what was said by the girls to the defendant, if anything.

BY MR. WASSERVOGEL:

Q Tell us what you saw the defendant do, if he did anything at all, and what you saw the two girls do if they did anything. A He went to the girls; the girls, they were in the box, and the girls said--

THE COURT: Do not state that.

BY MR. WASSERVOGEL:

Q They said something.

THE COURT: Of course, gentlemen of the jury, while the court permits the witness to state that the girls said something, the fact that you have heard what was said must not be considered by you. Matters stricken from the record must be disregarded by you.

THE WITNESS: I mean that the girls said to mind his own business.

MR. WASSERVOGEL: You were told not to say that-- please do not say it again. What else did you see?

A I saw this man rise from the cross seat and go back to where the two girls were sitting.

Q Anything else that you saw? A You object to what I saw--

THE COURT: Omit what the girls said and state what

CASE #1808

acts took place, if any.

THE WITNESS: I really don't understand. I might be dumb but I don't understand that.

THE COURT: You are not an attorney and of course judges themselves make similar mistakes, but, what did the girls do and what did the defendant do?

THE SECOND JUROR: Would it not be well to develop if he saw the defendant touch the girls?

THE COURT: I have explained that to him-- that is what the district attorney is trying to show.

BY MR. WASSERVOGEL:

Q Tell us what you saw? Look at the jury and tell them what that was. A The defendant went to the little box where the motorman sits and then he went outside on the platform.

Q Before he went outside, what, if anything, did he do, with respect to the girls, and what did they do? A I really don't understand the question. I am up in the air, your Honor--- I don't understand it really.

BY THE COURT:

Q You said the girls said something, is that right; yes or no? When this defendant went over to the little box that is usually occupied by the motorman, the girls said something, is that right? A Yes.

Q After the girls said something what, if anything, did this defendant do; what did you see him do after that, if

1070
CASE #1808

anything? A He went out on the platform.

Q Did you hear him say anything to the girls? A I did not hear him say anything, no, sir.

Q When he got out on the platform, what, if anything, did you see the defendant do or say-- what act did he do-- did he talk, and if so, what? And what did he do and what did you hear him say, if anything?

MR. FOX: Do we understand that we have gotten the defendant on the front platform of the car or the rear platform of the car?

THE WITNESS: The rear platform of the car.

THE COURT: You had better question the witness, Mr. Wasservogel.

BY MR. WASSERVOGEL:

Q Before the defendant went out on the platform, did you step up near the motor box where the girls were sitting?

A No. He was sitting right in front of them.

Q How far were you and McNierney away from the girls?

A Right in front of the motorman.

Q Did the girls remain sitting in the same place in the motor box there? A The sergeant asked them--

BY THE COURT:

Q Did they remain seated, yes or no? A Yes.

BY MR. WASSERVOGEL:

Q Did the sergeant say something to the girls-- do not say

CASE #1808

what he said, but simply answer did he say something?

MR. FOX: Is it really relevant, that fact-- are we not getting indirectly what the law condemns?

THE COURT: You know the courts have approved of it.

MR. FOX: I will save time by objecting to it as irrelevant.

Objection overruled. Exception.

BY MR. WASSERVOGEL:

Q Did Sergeant McN¹erney say something to the girls?

A He did.

Q After he said something to the girls, did the girls change their position? A At the request of the sergeant, yes.

THE COURT: Strike out the words "at the request of the sergeant."

THE WITNESS: They did .

BY MR. WASSERVOGEL:

Q Where did they sit down? A They sat right alongside of me.

Q At or about the time he said something to the girls and in the presence of the defendant, did Sergeant McNierney show them anything? A The sergeant had his shield--

THE COURT: What he showed to the girls is immaterial.

MR. WASSERVOGEL: In the presence of the defendant.

THE COURT: We are not so clear as to that. You have the defendant out on the platform.

MR. WASSERVOGEL: I beg your pardon. He is not out

CASE # 1808

on the platform at this particular moment. I took him back again.

THE COURT: The defendant?

MR. FOX: I asked the witness if he had gotten the witness on the platform and he said yes.

MR. WASSERVOGEL: Then I took him back again.

THE WITNESS: I can clear that up-- I will show you-- here is the way the defendant stood. This is the car here. Here is the platform right here and the defendant stood like that (indicating).

BY MR. FOX:

Q That is the rear platform? A Here is the car right here; here is the door, and after the threshold, that is the platform.

MR. FOX: I asked you if it is the front or rear platform of the car. A There are two ends of the car.

BY THE COURT:

Q Was it the platform of the car in which you were?

A Yes.

BY MR. FOX:

Q Was that the platform of the car downtown platform or uptown? A The train was going south.

Q Was it the south or north end of the car? A The north end of the car.

BY MR. WASSERVOGEL:

Q I ask you, officer-- I want to know from you now how

CASE #1808

far the defendant was from the two girls when sergeant McNierney said something to the girls. A Here is the car; there is the seats, right down there (indicating). We two were sitting--

Q How far would you say that is, give us your best judgment. A It couldn't be--

Q Two feet? A It couldn't be no more than about two feet or a foot and a half about.

Q Tell us what, if anything, Sergeant McNierney showed the girls at that particular moment; showed the defendant and the girls.

MR. FOX: I object.

THE COURT: The objection is sustained to the form of the question.

BY MR. WASSERVOGEL:

Q Did Sergeant McNierney show anything to the defendant?

A Yes.

Q What did he show the defendant? A His shield.

Q Where did he have the shield? A In his pocket.

Q Stand up and take your shield off and put it in your pocket and indicate what the sergeant did? A I was sitting down and he had to rise like that-- "We are two policemen"--

BY MR. FOX:

Q To whom did he say that? A To the two girls. The defendant was standing in the door.

THE COURT: Strike it out.

107

CASE # 1808

BY THE COURT:

Q Did you converse with the defendant; did you speak to the defendant? A No, I did not.

THE COURT: You have to overcome the Koerner decision. I will strike out what was said but I will allow the act to be shown.

MR. FOX: You strike out the statement?

THE COURT: I will allow the act.

MR. FOX: As to the defendant?

THE COURT: Yes.

MR. FOX: Not as to the girls?

THE COURT: No.

BY MR. WASSERVOGEL:

Q The two girls were in the motorman's box? A Yes.

Q The defendant was standing how far away from them?

A The width of the car door.

Q That is about a foot and a half or two feet? A About two feet. He was further away then because he was nearer to us.

Q At the particular moment when the sergeant said something to the girls, and before the girls changed their seats, how far was the defendant from them? A Only in the door, just in the door. Part of his body was in the door, in the car like that (indicating).

Q How far would you say was his head from the head of

CASE #1808

yourself and Sergeant McNierney? A A foot and a half.

Q Was he looking at both of you at the time? A Yes.

BY THE COURT:

Q While the defendant was looking at you in the manner described by you, what if anything, did Sergeant McNierney do? What act-- do not state the conversation. A The sergeant showed his shield and said we were two policemen.

THE COURT: Strike out what he said and the jury will disregard that.

BY MR. WASSERVOGEL:

Q He showed what? A He showed his shield.

THE COURT: Can you show the defendant speaks English and understood what was said?

MR. WASSERVOGEL: No.

THE COURT: Then the evidence as to what was said is incompetent.

MR. WASSERVOGEL: Even though the defendant may not speak our language he knows what the meaning of "policeman" is-- by simply saying policeman-- he did not have any extended conversation with the men.

THE COURT: We do not know about that and we cannot presume that.

MR. FOX: My associates tells me he is unable to converse with the defendant, to whose defense we are assigned by the court, in any way at all except through an interpre-

CASE #1808

ter.

MR. WASSERVOGEL: I know, but if you will recall there is already in the evidence, in the record in this case, the fact that the defendant did use some opprobrious epithets which he applied to these officers at the time. He knew enough English to make use of that expression.

THE COURT: However, he exhibited a policeman's shield, and, you say the defendant was looking at Officer McNerney at that time?

THE WITNESS: Yes.

BY MR. WASSERVOGEL:

Q And did the girls change their places then? A Yes, they came over and sat right alongside of me.

Q Now officer, tell us what happened next.

THE SECOND JUROR: Will you kindly develop whether the girls pushed or struck at the defendant and whether he was following them in an ugly mood and so forth.

BY MR. WASSERVOGEL:

Q You heard the question of the juror, just answer that question. A No, sir.

Q The girls did not strike at him or anything like that?

A No.

Q You have the defendant now standing on the platform?

A Yes.

CASE #1808

Q You and the girls are sitting how far away from him?

A Here is the motorman's box and here is the two corner seats where we were sitting and--

Q How far would you say that was; suppose your seat is the platform of the train. Indicate the place where you were sitting at the time, in this court room. A Away from the girls or right opposite to one another?

Q Assume the defendant is out on the platform; where you are sitting is the platform. A Yes.

Q Indicate where you were sitting with the two girls, in this court room; walk as far as the distance that you were sitting away from them. A The girls have arisen from the motorman's box?

Q Yes. A They were sitting alongside of me.

Q How far was that from the platform? A It could^{not} have been that much difference, from there to there (indicating).

Q What is your judgment about that?

THE FOREMAN: About three feet.

THE WITNESS: If I say, two feet and a half.

BY MR. WASSERVOGEL:

Q What happened next? A Then, the two girls sat alongside of us and then the defendant, coming into 19th Street station, he was going like this and he went like that (indicating)

Q Show that to the jury. A This is the way the car is situated--

CASE #1808

Q Listen, the jury cannot see that. A Here is the side of the car-- here is the opening in the door. Part of his body was in the car. He went like that (indicating).

THE COURT: Describe it for the record. The defendant looked at Officer McNierney and the witness, and stretched out his hand, by pointing at the witness, indicating come out, is that agreeable?

MR. FOX: I so understand it.

BY MR. WASSERVOGEL:

Q Describe the features of the defendant, did he show his teeth? A Yes.

Q What did he say, if anything? A I won't lie-- I don't really know what he said because I had tried to avoid trouble. I really tried to avoid the trouble.

Q Do you remember what was said? A No, sir.

Q You don't remember what was said? A No. I tried to avoid it.

Q What was the next thing happened? A When he done like that, Sergeant got up and he said--

BY MR. FOX:

Q You mean said to the defendant? A Sir?

BY MR. WASSERVOGEL:

Q Said something to the defendant, did he?

MR. FOX: If your Honor please, I think we have a jury here so intelligent, that if you will give us per-

CASE #1808

mission, and if the evidence turns out to be inadmissible, you will tell the jury to disregard it, that they will do so, to save time.

THE COURT: Then upon consent it is admitted.

MR. FOX: With the right to move to strike it out.

THE COURT: Yes, of course.

THE WITNESS: The sergeant said I will have to lock this man up, and he went out, and this is the door here, and he went out and got the defendant by the right hand. Of course I forgot to tell about coming into 23rd Street. The other two men came up; two other men that was with Gorgoni; that was at 23rd Street, but there was nothing done there. Coming into 19th Street station, that was when he pointed to come out on the platform. So the sergeant kept hold of his arm so as to arrest him at that time, and then he pulled him out. I got up then and I went out on the platform and I got between the four of them. He pulled the sergeant all the way up into a little narrow passage. It is sort of an extension on the elevated-- could not be no more wider than that-- one persons just fairly gets through it. So I was between the four of them.

THE COURT: Is he now testifying to what occurred on the car or the platform?

BY MR. WASSERVOGEL:

Q Are you still on the car? A He pulled the sergeant

CASE #1808

off the car.

Q The train had already stopped at 19th Street? A Yes, sir; the train had stopped.

THE COURT: Proceed.

THE WITNESS: He pulled the sergeant up along until this little narrow passage and the sergeant hollered to me, "Oh, Bill, he stabbed me; Bill, he stabbed me."

BY MR. WASSERVOGEL:

Q Go on. A So I hit one of the fellows that was with him, taking a chance, because I was between three of them, to get him away, and I run to the defendant and fought the defendant the best I could. I knocked him down and I took the knife out of his hand and while I was fighting him, he was making--

MR. FOX: Does your Honor's ruling include any act of violence on the part of the defendant towards this witness?

THE COURT: Yes; under the Johnson and Pallister decision.

MR. FOX: I take an exception.

BY MR. WASSERVOGEL:

Q You say you took a knife from him, is this the knife?

A Yes, sir; I took that out of his left hand.

Q Was it open in this way at the time? A Yes.

MR. WASSERVOGEL: I offer the knife in evidence.

CASE #1808

(Received and marked People's Exhibit 3.)

Q Before you were able to take the knife away from the defendant, tell us what was happening? A He was making a jab for me with his left hand.

Q With his left hand? A Yes, with the left hand. That was the hand which I took the knife out of; the left hand, and he cut me in the stomach.

Q Have you the coat on now that you wore then? A Yes.

Q Show the jury where it was. A I am bandaged. I go to the doctor every other day.

THE COURT: Strike that answer out.

BY MR. WASSERVOGEL:

Q Show the jury where you were cut. A There is the mark in the coat there (indicating). I am bandaged to-day.

THE COURT: Strike that out.

BY THE SECOND JUROR:

Q Did he have the knife this way or this way (indicating)?

A No, sir; that way, (indicating).

MR. FOX: Give the knife to the witness.

BY MR. WASSERVOGEL:

Q Indicate to the jury how he had the knife. A This way.

Q That is held in his fist this way pointing out? A Yes.

Q Where was Sergeant McNierney at the time you were stabbed, as you testify? A The sergeant was stabbed and I ran to his assistance. So I knocked the defendant down and

CASE #1808

took the knife out of his hand.

Q How far was Sergeant McNierney from you at that particular moment? A He was no more than about-- there was four of us; I got in between the four and he was no more than about five feet away from me at the time.

Q Can you tell us about how old those two girls were?

A No, sir; I could not, but one girl was in short dresses.

Q One was quite young? A Yes.

Q And the other one you say is much older? A I could not say positively, but I know one girl was in short dresses.

Q Did you afterwards try to find those girls? A Yes, sir; I ran through the train with the knife in my hand.

Q Did you see the girls after that? A No; they had gone off the train.

Q You have not been able to find them since then? A No.

Q Did you see Sergeant McNierney again that day? A I saw him laying on the bench.

Q Did you notice his condition? A Yes.

Q Was he bleeding? A His intestines was coming through the stomach.

Q Were you taken to the hospital too? A Yes, I was.

Q With Sergeant McNierney? A Yes.

CROSS EXAMINATION BY MR. FOX:

THE COURT: Mr. Fox, is there any motion to strike

CASE #1808

out any part of the testimony given by this witness?

MR. FOX: The only part of the witness' testimony that there is any doubt about in my mind is the statement of the sergeant, "I will have to look this man up."

THE COURT: That is really the only objectionable part of the testimony.

MR. FOX: Yes, that is the only part.

MR. WASSERVOGEL: If Mr. Fox objects I have no objection to having it stricken out.

THE COURT: Do you want that struck out?

MR. FOX: Yes.

THE COURT: I will grant the motion and instruct the jury to disregard it, but, the so-called spontaneous declaration is not stricken out.

MR. FOX: I shall not object to that.

BY MR. FOX:

Q This was rather a warm night, was it not, A It was a nice evening.

Q The windows were open? A Well, the one window was open in the cross seat; I know that.

Q Is it not a fact the window were open? A I do not know if they were open or not. I know one window was open.

Q What part of the car was that, A That was in the car, after the girls got up, the defendant making out-- he looked out the window-- that was in the cross seat where the two girls

CASE #1808

were; one window.

Q You testified before the coroner's jury? A The coroner's jury?

Q Am I wrong-- well, you testified before the coroner?

A Yes.

Q That was very soon after this occurrence, was it not? I have no desire to trap you as to dates-- the date was Thursday, November 6th, 1913; you testified before the coroner?

A Yes.

MR. FOX: And we agree, Mr. Wasservogel, that it was Thursday, November 6th, 1913?

MR. WASSERVOGEL: Yes.

THE WITNESS: Yes.

BY MR. FOX:

Q When you testified, did you not testify as follows: "The windows were open"-- A I did not-- before you go any further--

THE COURT: Wait. Afford counsel an opportunity to read what is claimed to be the proceedings in the coroner's court.

BY MR. FOX:

Q Did you not testify as follows before the coroner? "The windows were open that day. It was warm and he looked out the window trying to throw it off that he was not paying any attention to the girls." By throwing off, I suppose you meant

CASE #1808

to make believe. Didn't you testify to that? A One window. I did not speak of windows. The one window in which he was sitting and that was in the cross seat.

MR. FOX: Do I read it correctly?

MR. WASSERVOGEL: Absolutely.

BY MR. FOX:

Q I read in evidence as follows from the testimony of this witness before the coroner: "The windows were open that day. It was warm and he looked out the window trying to throw it off that he was not paying any attention to the girls."

Q How big a man was sergeant McNierney, the deceased, as big as you? A Taller than I was, a bigger man than I was.

Q How much do you weigh as you sit there? A About 185.

Q And was he taller than you, the deceased? A Yes.

Q How tall are you? A Five feet eleven and one half stripped.

Q Would you mind coming down here? A Yes.

Q You are only five feet eleven and a half? A Yes.

Q How much taller than you was the sergeant? A The sergeant was over six feet.

Q Six feet one or two? A I know he was over six feet.

Q A man of large chest? A He was a big man.

Q Was he a broader man than you are as well as taller?

A He was a bigger man than I am.

CASE #1808

Q You say that the defendant pulled the sergeant up to the north end of the station platform? A Trying to get away from him, yes.

Q Answer me yes or no; if I do not state it correctly, your testimony, you correct me. Did you say in your direct testimony that the defendant pulled the deceased up towards the north end of the platform where there was every narrow space, did you say that or did you not? Please answer that yes or no. Am I right? A If I can, I could help you out in that, he was trying to get away.

THE COURT: Pay attention to the question.

MR. FOX: Will your Honor please caution the witness? Have the question read and ask him to answer the question.

THE COURT: Pay attention to the question put to you by counsel and if you don't understand the question, say so.

(The question is repeated as follows:)

Q Answer yes or no; if I do not state it correctly, your testimony, you correct me. Did you say in your direct testimony that the defendant pulled the deceased up towards the north end of the platform where there was a narrow space, did you say that or did you not? Please answer that yes or no. Am I right?"

THE WITNESS: I did.

BY MR. FOX:

Q Where were you bound that night? A 14th Street.

CASE #1808

Q Who left the car first at 19th Street, you, the deceased or the defendant? A The defendant was outside on the platform.

Q Where? A On the platform.

Q You mean the platform of the car? A Yes.

Q Please pay attention to my question; which of the three persons; you, the deceased or the defendant, left the elevated railway car first on that occasion at 19th Street?

A Your Honor, I would like to have that a little clearer.

Q Who went on to the station platform first, you, the deceased or the defendant? A The deceased got up out of the car first in order to arrest the defendant?

BY THE EIGHTH JUROR: Q Who left the platform of the car first?

BY MR. FOX:

Q Of you three? A The defendant was first.

Q The first person who left the elevated train and got on the elevated station platform, or you three, was the defendant, Gorgoni? A Yes, sir.

Q Who went next, you or the deceased? A The deceased.

Q Who came next after the deceased? A I did-- well, there were four of us; there were four of them on the platform.

Q Did anybody leave the train and go on the station platform between the deceased and you-- first went the defendant? A Yes.

Q Then went the deceased? A Yes.

CASE #1808

Q Who came next? A The two friends of the defendant.

Q Then who followed those two friends? A I did.

Q You say that you were on the fifth car of a seven car train? A I don't know if it was the fifth or not. I was on the second from the last car.

Q Now what first attracted your attention to anything out of the ordinary after you got on to the station platform at 19th Street? A It didn't happen at 19th Street, the original--

Q No, no. After you got on the 19th Street station, the platform-- put your self there A Yes.

Q What was it that you first saw or first heard that indicated to you anything was going on out of the ordinary?

THE COURT: On the platform of the station, not the car?

THE WITNESS: The sergeant was trying to arrest the defendant.

BY MR. FOX:

Q What did you see him do? A He had him by the right hand.

Q When he had him by the right hand, was the knife already in the hand of the defendant or not? A That I do not know.

Q What time in the evening was this? A Around fifteen minutes after seven.

Q So it was dark, of course? A There are lights on the

CASE #1808

platform.

Q But I mean it was after sunset. Had you heard any words passed between the sergeant and the deceased after they got on the station platfor, before you saw the sergeant with his hand on the defendant's wrist, yes or no.

THE EIGHTH JUROR: You mean between the sergeant and the defendant.

MR. FOX: Yes, the sergeant and the defendant-- did you hear anything pass, any words pass between the deceased and the defendant, before you saw the deceased hands on the wrist of the defendant?

THE WITNESS: I heard the sergeant say: "Bill, he stabbed me; Bill, he stabbed me."

BY MR. FOX:

Q You heard that then? A Yes.

Q Before you saw the sergeant's hand on the-- A No, no. The sergeant's hand was on--

Q Try to understand and pay attention to the question. Before you saw-- A I don't understand what you are getting at, before.

THE COURT: Control yourself.

THE WITNESS: I do not want to get in any ^{traps} ~~scrap~~.

THE COURT: You are not going to get into any ^{traps} ~~scrap~~.

BY MR. FOX:

Q You understand the meaning of the word before? A Yes.

CASE #1808

Q What did you mean when you said you don't understand the word "before"? A You keep your sentence going on.

Q No; I have not begun my sentence-- please listen-- I will put it this way first. Before you saw the sergeant's hand on the wrist of the defendant, had you heard anything said by either one of them, yes or no? A In placing him under arrest; otherwise no.

THE COURT: You see, officer, if you pay close attention to the question, it is a simple question and requires a simple answer.

Q After you got on the station platform. A 19th Street?

Q At 19th Street. After you all left the elevated train-- just leave the train out of your mind. Now, you are on the station platform, all of you together. A Yes.

Q Is it true the first thing you saw, so far as the deceased and the defendant are concerned, was the sergeant's hand on the wrist of the defendant; is that so? A On his right, yes.

Q You saw the sergeant grab the right hand? A He had him by the right hand.

Q At that time, these two men whom you describe I think as being with the defendant, where were they? A I was between the four of them.

BY THE COURT:

Q Where were they, on the car? A On the platform.

CASE # 1808

Q On the station platform? A Yes, sir; the station platform.

BY MR. FOX:

Q There were five altogether? A Including myself there were five.

Q How far were these two friends of the defendant-- we will call them friends of the defendant-- from the sergeant when you first saw them on the station platform? A Your Honor, they kept pushing up trying to get this man away.

BY THE COURT:

Q Answer the question; how far were they away? A I was between four of them. I was between the four of them. I cannot explain that better.

BY MR. FOX:

Q How near were you to the ticket chopper's box when you first went on the station platform? A The ticket chopper's box?

Q Yes. A That was about a good 25 or 30 feet away from the ticket chopper's box.

Q So, according to your best recollection, when you first went on the station platform you were about 25 feet or 30 feet away from the ticket chopper's box, is that right? A Yes.

Q You were north of it? A We were north of it, yes.

Q Do you recollect whether or not either the front or the rear door of the car in which you were riding was open that

CASE # 1808

evening on your way down from 23rd to 19th? A It had to be open because the defendant stood init -- stood in the doorway.

Q Then your answer is that the door was open? A The door was open.

Q And do you recollect whether the front door was also open? A I do not know anything about the front door.

Q Did you hear any conversation at all between these two persons we call friends of the defendant and the defendant, on the elevated train? A There was a conversation.

Q You did not hear it? A I heard it but it was in Italian.

Q You do not speak Italian? A No, I do not.

Q Now, is it possible that you are mistaken, and that the two friends or persons who were with Gorgoni, that is the defendant, left the train before the defendant? A No, sir.

Q You are positive that the defendant left first? A Yes.

Q Did you see anything done by the ambulance surgeon to the deceased on the station platform? A I did.

Q What did you see? A The ambulance surgeon came up and he fixed the sergeant up; that is, he attended the sergeant and also attended me.

Q Do you know the ambulance surgeon's name? A I think-- I am not sure-- it might be Dr. Cahill, something like that.

Q Cahill? A I'm not sure.

Q Have you seen him since that occasion? A No.

Q Have you been asked by the district attorney or anyone

CASE #1808

on his behalf to find these two girls? A I have.

Q Was it you who got Mrs. Smith who appeared here as a witness? A No, I did not.

Q Now, did the train leave the station before the ambulance surgeon arrived? A No, sir; it did not.

Q How long did the train remain in the station after this occurrence? A Well, I was not paying any attention to the train.

Q Then how do you know that it did not leave before the ambulance surgeon came? A The conductor and the two guards was there.

Q That is what I want to get at-- how long were the conductor and the two guards there; I mean with reference to your being treated. Were they still there when you were treated by the ambulance surgeon? A The guard?

Q That is what I asked for, yes. A I was not paying any attention to the guard on the elevated.

Q I understood you to say a moment ago the reason you knew the train was there was because the conductor and guards were there on the station platform; did you not say so? Perhaps I misunderstood you.

MR. WASSERVOGEL: I understood him to say that.

THE WITNESS: Yes; I think the train was there.

BY MR. FOX:

Q You went into the train with the knife in your hand?

1001

CASE #1808

A I did. I went looking for the two girls.

Q Was that before the ambulance surgeon came there?

A No, it was not.

Q Then it is necessarily true, is it not, that the train had remained in the station long enough for the ambulance surgeon to get there and treat the deceased and to treat you-- that must be the fact, must it not? A As soon as I handed the prisoner-- can I explain?

MR. WASSERVOGEL: The question is argumentative, if your Honor please.

BY MR. FOX:

Q How long a time according to your best estimation was it, after this occurrence until the ambulance surgeon arrived there, how long a time? A Yes.

Q Do not say yes-- how long a time? A Maybe ten minutes.

Q About how long was taken up in dressing the sergeant's wounds and in attending to you; about how long? A A couple of minutes-- he only--

Q You have answered the question. Then immediately after the ambulance surgeon had attended to you, you went through this train to try to find these girls? A I did not. I done that before.

Q Then, did you go through the whole train, A I did.

Q Did you see the girls leave the train? A I did not see the girls. That was what I went through the train for.

1091

CASE #1808

Q You did not find them in the train? A No, I did not.

Q Did you go to the hospital to see McNierney after he was taken there at any time before he died? A I could not go to the hospital. I was confined to my bed in the house.

Q Then your answer is no-- you did not go to the hospital, did you, to see-- A With the ambulance. I was taken there myself in the ambulance.

Q Did you see the sergeant there? A In a bed, yes.

Q Did you see anything done to him in the hospital?
A I was in another room.

Q Then you did not see anything done to him in the hospital? A I saw him in the bed. That was all.

Q Was that the same night? A The same night, yes.

Q How long were you in the hospital? A I had stitches put in to me and then I went home with a friend.

Q You were only there a few minutes? A I was a good half hour there anyhow.

Q Do you know the names of the doctor or doctors who attended either you or the deceased at the hospital? A No, I do not know his name-- either Dr. Cahill-- it is only just through hearsay, listening; but I did not pay any attention to the doctor's name, on the station.

Q This was Bellevue Hospital? A Yes.

RE) DIRECT EXAMINATION BY MR. WASSERVOGEL:

"Q At any time, when you first saw Sergeant McNierney

CASE #1808

with his hand on the right hand or wrist of the defendant, did you at that particular moment observe the defendant's left hand? A I did.

Q Did you see anything in his hand then? A I saw that knife in his hand.

Q Then you saw the knife? A I did.

Q This is the knife which you yourself took from the hand of the defendant? A Yes, sir; he cut me with it.

Q From his left hand and not his right hand? A Left hand.

Q Do you think you could recognize the clothing which McNierney wore-- do you recognize this suit as the suit that was worn by McNierney on that occasion? A Yes, sir; a brand new suit.

Q This suit (indicating)? A Yes.

(The suit is offered in evidence.)

MR. WASSERVOGEL: Is there any objection?

MR. FOX: No.

(The suit is received in evidence and marked People's Exhibit 4.)

THE SECOND JUROR: Where did the knife come from?

Where was he carrying it, in his hand?

BY MR. WASSERVOGEL:

Q The juror wants to know where was it that you first saw this knife? A In his left hand.

CASE #1808

Q You yourself did not see him open the knife? A No, sir; I did not.

THE SECOND JUROR: Did not see him take it out of his pocket?

THE WITNESS: No.

BY THE SECOND JUROR:

Q Did not see anybody hand it to him? A Could not-- nobody could hand it to him.

BY MR. FOX:

Q You were dressed substantially as you are now? A Yes. There are my clothes (indicating).

Q You did not have your shield on as you have now?
A No.

Q Where was your shield? A In my pocket.

Q And so far as you sat there, with the exception of the testimony you gave as to the sergeant showing his shield, there was nothing to distinguish you from ordinary passengers on the elevated railroad? A No.

MR. WASSERVOGEL: I do not want to call Mrs. McN¹erney, but I think it is necessary for the record to have some proof as to the age of Sergeant McNierney, and the date he died.

MR. FOX: I will take your statement.

MR. WASSERVOGEL: Sergeant McN¹erney was 45 years of age and died on October 3rd, 1913.

CASE #1808

MR. FOX: That may be taken as proven.

MR. WASSERVOGEL: We have been trying to find the ambulance surgeon. I understand he is no longer employed at Bellevue Hospital and if your Honor will grant the prosecution an adjournment until to-morrow morning, at this time, we will try to get some more light on the subject.

THE COURT: Have you any other witnesses here this afternoon?

MR. WASSERVOGEL: Not at the present time.

MR. FOX: Will your Honor state to the jury that they must not consider the statement which was stricken out?

THE COURT: Yes. The testimony stricken out on motion of counsel for the defense, namely: "I will have to place this man under arrest, I will have to lock this man up," will be disregarded by you, gentlemen of the jury and given absolutely no weight or consideration whatever, because it is stricken from the record.

Gentlemen of the Jury: You are admonished that it is your duty not to converse among yourselves on any subject connected with the trial or to form or express any opinion thereon until the case is finally submitted to you. We will take an adjournment now until to-morrow morning. Court will stand adjourned until 10:30. You gentlemen need not appear until eleven o'clock.

1091

CASE #1808

New York, January 6th, 1914,

Trial resumed.

MR. WASSERVOGEL: Is there any objection to the other physicians remaining in the room?

MR. FOX: What is the custom?

MR. WASSERVOGEL: It is up to counsel.

MR. FOX: Are they from Bellevue Hospital?

MR. WASSERVOGEL: Yes.

MR. FOX: That is a city hospital?

MR. WASSERVOGEL: Yes.

MR. FOX: Then I will ask to have them remain out of the room.

H O R A C E E. A U R I N G E R, M.D., called as a witness in behalf of the People, being duly sworn and examined, testified as follows:

(Bellevue Hospital).

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q You are connected with Bellevue Hospital? A Yes.

Q And have been for how long? A One year -- I started January 1st, 1913.

Q You are a physician also, regularly admitted and licensed to practice? A I am.

Q How long have you been a physician? A I graduated from the Albany Medical School 1912 and in May received my license to practice medicine.

CASE #1808

BY THE COURT:

Q May 1912? A Yes.

BY MR. WASSERVOGEL:

Q Were you attached to the ambulance service of Bellevue Hospital in September of last year? A I was irregularly.

Q On the 28th of September did you, pursuant to a call, go out with the ambulance? A I took several calls.

Q In particular, one at the 19th street station of the 2nd Avenue Elevated Railway? A Yes.

Q At about what time? A 9 o'clock at night.

Q Are you sure about the hour, was it not a little earlier than that? A I would not swear to the hour.

Q At any rate, you went there? A Yes.

Q And did you see any persons there? A There were several I saw.

Q Any persons who had been injured? A Well, two persons that had been injured.

Q Do you know the persons who were injured? A I got their names; I had never seen them before.

Q You obtained their names -- what names did you obtain?
A James McNierney and I don't remember the other man's name, he was treated at the hospital.

Q There were two men taken by you to the hospital, were there, in the ambulance? A Yes.

Q Confine yourself to James McNierney and tell me, please,

CASE #1808

in what condition you found him? A When I entered the elevated station I found him lying on one of the seats at full length, at the left hand side as I entered the door. He was in a severe state of shock. His clothing was somewhat disarranged and was opened, disclosing a wound at the abdomen, with the protrusion of some of the omentum.

Q Protrusion of what? A Omentum.

Q Tell the jury what that means? A It is the lining of the intestines -- lining of the abdominal cavity, and when it is in some conditions, with a stab wound, it closes -- it is pushed forward as a wad.

MR. FOX: I move to strike out what sometimes happens.

THE COURT: Strike it out.

BY MR. WASSERVOGEL:

Q Tell us about the conditions which were present here?

A There was a small mass of omentum protruding from the abdominal wall. The patient was sweating severely and seemed in great pain. I administered first aid injuries -- or, first aid as best I could, and removed him as soon as possible to the hospital.

Q How long after you arrived at the station would you say it was that you brought him to the hospital, or that he arrived at the hospital? A I should say twenty minutes at the most.

Q Did you give him any treatment at all at the station?

A I applied sterile dressing to his abdominal wounds and

CASE #1808

fastened them by putting three turns of a bandage around his abdomen.

Q Do you know whether or not of your own knowledge, an operation was performed on this man when he arrived at the hospital? A I answered I believe one more ambulance call, and then went up to the operating room and he was on the table being operated on.

Q Who was in charge of the operation? A Dr. Smith.

Q You have seen Dr. Smith in court this morning? A Yes.

CROSS EXAMINATION BY MR. FOX:

Q Did you make a report to the hospital of what you observed? A In each case we bring in --

Q Did you or did you not, did you make a report? A I made a record.

Q What? A Made a record of the case.

Q And where is that? A In the ambulance book at the hospital. It gives the hour I returned and the hour I went out.

Q Is there a record kept in the hospital of the progress of the case from the time the patient was received in the hospital until his death?

MR. WASSERVOGEL: I have that here.

MR. FOX: We have tried to get it, and they would not let us have it.

MR. WASSERVOGEL: I have obtained it.

BY MR. FOX:

Q You say that you applied a sterilized bandage. Is that

CASE #1808

right? A Sterile dressing.

Q Had you sterilized the dressing personally? A No, sir, we have them all ready --

Q You had not done it personally? A No.

Q Where did you get the bandage from? A They are supplied in the ambulance bag.

Q Did you replace that part which you referred to, which was protruding from the wound? A I did not touch it except with sterile gauze, no.

Q You did not touch it except with the gauze which you had? A I just placed gauze over it.

Q When you say sterile gauze, you mean to say as matter of fact, only the gauze which was given to you or which you received from the ambulance, is that right? A Yes.

Q You had not yourself taken part in sterilizing anything? A No, sir.

BY THE COURT:

Q In what condition was the sterilized dressing before you applied it to the body of the officer? A They were wrapped in cloths and pinned together, to be kept from the air.

BY MR. FOX:

Q Had you wrapped them in the cloths yourself? A I had not.

Q They were supplied to you wrapped in certain cloths?

A Yes, sir.

Q You of course have no knowledge where those cloths came

CASE #1808

from, what their condition was, or how long they had surrounded this gauze? A Not definitely.

Q What? A I could not say definitely.

RE-DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q As a physician, you know the kind of cloth which is used by physicians for this purpose, do you not? A Yes, sir.

Q And was this article the usual article which is ordinarily used by physicians? A Yes, sir.

Q And was it wrapped up as it is usually wrapped up? A Yes.

Q And as it is usually turned over to the physician who uses it? A It was.

Q In the same way? A Yes.

THOMAS ALLISON SMITH, M.D., called as a witness in behalf of the People, being duly sworn and examined, testified as follows:

(Residence 57 West 75th street).

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q You are a physician and surgeon, Dr. Smith? A Yes, sir.

Q And have been for how long? A Since 1895, eighteen years.

Q A graduate of what college or institutions? A College of Physicians & Surgeons, New York City.

Q You have been practicing as a physician, and are regularly licensed to do so, since 1895? A Yes, sir.

CASE #1808

Q Give us an idea of what your general experience has been since 1895? A I have been practicing medicine and surgery here in the city of New York.

BY MR. FOX:

Q Give your hospital experience and probably it will be sufficient, so far as I am concerned.

BY MR. WASSERVOGEL: Q Yes? A From 1899 until 1906 I was assistant visiting surgeon at Bellevue Hospital, and from 1906 to the present time I have been a visiting surgeon at Bellevue Hospital, and for the past five years, I think, I have also been attending surgeon to the Willard Parker and Riverside Hospital, Board of Health Hospital.

BY MR. WASSERVOGEL:

Q In your experience, have you had occasions to perform operations? A A number of times.

Q Frequently? A Yes.

Q Were you in attendance at Bellevue Hospital on the night of the 28th of September last year? A I was.

Q Did you see a man named Joseph McNierney, a police sergeant? A I did.

Q Did you perform an operation upon him? A I did.

Q Tell us please what condition you found him in, and just exactly what you did in performing this operation, and give it to us in as much detail as you possibly can? A I found him in a condition of shock, and on examination I found that he had a stab

CASE #1808

wound of the abdominal wall, about an inch to the left of the mid line and about the same distance below the navel. From this wound projected a piece of omentum.

Q What is that? A That is a fatty apron which hangs and covers over the front of the intestines -- as far as I know, it does not go by any common name. It is not called by a name in ordinary use. Also from this wound came blood. Because of this wound, because of his condition, I decided to operate upon him as soon as possible, which was within, I should say, thirty minutes of the time that I first saw him. On operation I found by making a wound of my own about five or six inches in length, and near the mid line, I found first an incised wound of the skin and fat of the abdominal wall, as I have already said, an inch or an inch and a half in length. I found practically a complete division of the left rectus muscle, which is a flat muscle in front of the abdomen -- a complete division of the belly of that muscle on the left side, and almost the same condition of affairs on the right side, together with some bleeding from either the main trunk or branch of the deep epigastric artery on the left side. The abdominal cavity contained a large amount of fluid blood and blood clot. Also some fecal matter, intestinal contents. There was a wound of the small intestines at -- this wound was a penetrating wound into the intestinal cavity itself. It was about half an inch long. Also then, or shortly after, in describing what I found, examining

CASE #1808

him well under ether, I discovered a wound over the right hip, I should say an inch or an inch and a half, as I recall, below the most prominent point of the hip here (indicating) -- the bone of the pelvis, and this wound went directly in until you encountered bone, and then shelved down a short distance. Also he had a slight wound of his hand -- I have forgotten whether it was the right or left side, but that required practically no attention.

Q What was the nature of the operation that you performed?

A First the operation was to find, look for and find the incised wound in the intestine itself and to close that. Next to repair the cut muscles of the abdominal wall, left and right rectal muscles. Third to clean out the accumulation of blood, blood clot and fecal matter that was in the abdominal cavity, and to provide drainage, and fourth to explore and repair the wound over the hip. Fifth a dressing on the hand.

Q Did you see your patient again after the 28th of September? A I saw him every day until his death.

Q When did he die, do you recall? A I do not recall the date.

MR. FOX: Have you the date?

MR. WASSERVOGEL: It was October 3rd.

THE WITNESS: He died October 3rd.

BY MR. WASSERVOGEL:

Q Have you your record with you as to how this man pro-

CASE #1808

gressed, what his condition was from day to day? A The hospital record?

Q Yes? A The hospital records are right back there.

Q Can you, by referring to those records, tell us what his condition was from day to day -- is there any objection to his referring to the official record?

MR. FOX: I would like to have a preliminary cross-examination first.

BY MR. FOX:

Q The record to which you are asked to refer, is a record kept by yourself? A No, sir.

Q By whom was it kept? A It is kept by --

Q Who was the individual who kept it in this particular case? A It is not kept by any one individual.

Q Who are the individuals who kept it? A Members of the house staff.

Q Give me their names? A Dr. Hagmeier -- they have signed the various reports -- here is Dr. Hagmeier (indicating) -- Dr. Cahill, Falkner and the urinary examinations are signed by Dr. Howard and Dr. Hagmeier. The blood examination by Dr. Howard. The temperature chart is plotted by the nurses or one of the nurses in the ward, and the nurse's notes are made by whichever nurse happened to be on duty. So, a number of people took part in this.

Q There is no part of that record which you have in your

CASE #1808

hand, actually kept by yourself? A None of it kept by myself, but some of it is at my dictation.

MR. FOX: I think then it would be wiser that the witness should testify as to what he saw, and then we may cross-examine the witnesses who kept it, when they are produced.

BY MR. WASSERVOGEL:

Q Can you tell us what the condition of this man was the day before he died? A The day before he died?

Q Yes, do you recall? A The day before he died his condition was not satisfactory to me.

MR. FOX: I object, and move to strike that out.

THE COURT: Strike it out.

MR. FOX: I suppose what counsel means is to ask you what you observed.

BY MR. WASSERVOGEL:

Q Tell us please what this man's condition was the day before he died, as near as you can recall? A First of all, the quality of his pulse was failing over what it had been. His respirations were more labored. The color of his face and of his hands was slightly cyanotic, slightly bluish. He was restless and very apprehensive about himself.

MR. FOX: That hardly I suppose is proper.

THE COURT: The last part of the answer will be stricken out -- apprehensive about himself will be stricken from the record.

CASE #1808

BY MR. WASSERVOGEL:

Q Confine yourself to the physical condition of the patient?

A Not the mental?

THE COURT: The objective symptoms.

MR. WASSERVOGEL: Yes, what you saw yourself.

THE WITNESS (continuing) And last would be the fact some harshness in the breathing, over both lungs behind and towards the base, and as I recall, this was more pronounced on the right side than upon the left.

Q Harshness in breathing where? A The base of the lungs, behind.

Q Did that indicate anything to you as to the presence of another disease that had developed, or anything else? A It indicated this -- not that another disease had developed, but that I was afraid that he was getting up a hypostatic congestion of his lung.

Q What do you mean by hypostatic congestion of the lungs?

A Congestion of the lung which is due to failing circulation, plus general weakness, plus lying on one's back or lying in one position.

Q That congestion of the lungs is produced by lying on one's back or by the weakened condition of the individual?

A You mean generally?

Q No, in this particular case? A In this particular case, from the man's general weakness, from a failing pulse, plus the position in bed.

CASE #1808

Q Will you state whether that general weakness was super-induced by the stab wounds received by him? A I do not think there is any question as to that.

Q No doubt about that at all? A No, I do not think so.

CROSS EXAMINATION BY MR. FOX:

Q Did you discover any infection in the wound which you described as being to the left of the median line and a little below the navel, will you answer that yes or no? A No.

Q Infection, when it exists, expresses itself by indubitable signs, does it not, to the surgeon? A Not at first.

Q I mean at some time in the development? A At some time.

Q You cannot have infection of a wound, without a surgeon being able to observe it very well, can you, at some time during the course of the infection? A Yes, at some time. I understood you to mean at that time.

Q No, that was a general question -- that infection discloses itself necessarily to the eye of the surgeon at some time during its progress? A Usually.

Q But what are the ordinary signs that ^{accompany} the first appearance of infection, when it does occur in such a wound as the deceased suffered from? A Local or general?

Q We will take local first? A Redness, swelling, pain, local heat, and if in a limb or anything of that sort, impaired motion. Those are the five cardinal symptoms of infection.

Q Those are what might be called the local symptoms?

CASE #1808

A Yes, sir, local.

Q You spoke of general symptoms, do you mean by that constitutional? A Constitutional.

Q Will you tell me by what constitutional symptoms the septic condition manifests itself usually? A Usually the most constant and most reliable is the temperature, a rise in temperature.

Q Anything else? A Occasionally a chill.

Q Quite usually a chill? A Not always. I would not say quite usually.

Q I do not say always, I said quite usually a chill -- at any rate not infrequently? A Not infrequently a chill.

Q Did you observe yourself any such chill in the deceased? A I did not.

Q Did you observe any of the local conditions in the deceased which you have said usually accompany the development of a septic condition? A None.

Q Another witness who testified yesterday, a medical witness, spoke of lobar pneumonia, and I then asked him if lobar pneumonia was not ordinary pneumonia, and he said yes -- is your opinion the same as to the use of the term? A That is the ordinary understanding.

Q When you say lobar pneumonia, speaking surgically, you mean what a layman means when he says a person has pneumonia, is that right? A Ordinarily, yes.

CASE #1808

Q So lobar pneumonia and pneumonia are practically convertible terms? A To the layman, yes.

Q Is there any difference to the scientific mind between lobar pneumonia and pneumonia? A If I were told a man had pneumonia --

Q Answer my question first? (The question is repeated)

A I think there is.

Q Tell the jury what the difference is? A A lobar pneumonia is the ordinary pneumonia as it occurs in young and middle aged adults. It is an inflammation of a lung which runs a very definite course, in which, if the inflammation begins in any part of the lung, that inflammation almost, without exception, extends and involves the entire lobe of that lung. Hence the term lobar pneumonia. In people who are very much debilitated by privation, by disease, by lack of nourishment and things of that sort, and very frequently in elderly people, there does occur an area of inflammation, plus consolidation, which is the result of inflammation, in small areas around the smaller bronchia the air tubes, the smaller air tubes in the lungs, and this inflammation is spoken of as a bronchial pneumonia, and the entire lobe in this sort of pneumonia, does not necessarily become consolidated at all. You may have a number of small spots of consolidation, scattered over both lungs in all five lobes, for that matter, and not one single lobe entirely consolidated. The two diseases are quite distinct, and at the same time they are both pneumonia.

CASE #1808

Q Do you know Dr. Lehane -- are you finished? A I was going to say those were the two main divisions of pneumonia that one thinks of. There are finer sub-divisions.

Q Do you know Dr. Lehane? A Slightly.

Q Has he conversed with you about this case and the cause of death? A Only to a very slight extent -- possibly in less than a minute's time as I came in the court room.

Q I am not intimating anything improper? A I understand. I have not seen Dr. Lehane for a number of years until this morning.

Q Dr. Lehane has not conferred with you upon the medical or surgical point of view as to the cause of the death of the deceased? A No, he has not.

Q Do you know of your own knowledge whether he has seen or read the record to which you have referred, and which you hold in your hand? A I do not know whether he has or not, no, sir -- might I go a little further?

Q Certainly? A I think he must have seen some of this, because the first part of this history, as a matter of routine, would go down to the postmortem room.

BY MR. WASSERVOGEL:

Q You do not know that of your own knowledge? A No.

MR. FOX: The reason I asked that was that he spoke of a history of the case.

BY MR. FOX:

Q From the moment that a wound is infected, whether the

CASE #1808

wound be caused benevolently, if you please, by a surgeon, or malevolently by some one else, the period of danger of infection begins? A From the very moment that it is inflicted, yes.

Q In this particular case which we are investigating here, the importance of the ambulance surgeon having everything which he used thoroughly sterilized, is recognized by all, is it not?

A It is.

Q And in well regulated establishments the surgeons do not operate except where their hands are even protected by sterilized gloves, do they not? A That is almost the universal custom.

Q That is important -- in fact that is essential in order to prevent the possibility of infection being received by the patient from the unguarded hand of the operator? A It is.

Q And it is recognized that the contact of a hand with an open wound is itself a sort of danger? A It is, yes.

Q And ought always to be avoided? A Yes.

Q Do you know who signed the certificate as to the cause of death in this case? A I presume the --

Q Whose duty would it be at Bellevue? A This was a Coroner's case and I think the Coroner signs it.

Q You do not think that as matter of routine any attending physician who attended the deceased, would, in the ordinary course of routine, sign any statement as to the cause of death, other than what might appear in the records of the hospital? A There is a blank, a Coroner's blank, that has to be signed.

CASE #1808

Q Is that signed only by the coroner? A No, that is signed by one of the house staff but that is not the certificate.

Q You are quite right-- there is some paper signed by someone in the ordinary and regular course? A Yes.

Q Stating the opinion of the signer as to the cause of death, is there not? A Yes.

Q In this particular instance, do you know whose duty it would be to sign that; perhaps you do know.

MR. WASSERVOGEL: Here is the certificate.

(Paper is handed to Mr. Fox.)

MR. WASSERVOGEL: At the end you will find it-- the cause of death.

MR. FOX: I wanted to see the individual.

BY MR. FOX:

Q Do you know Dr. Waterman? A Dr. Waterman has just gone off duty as my house surgeon in Bellevue Hospital.

Q Has he left the city? A I think he is in Syracuse at the present time.

MR. WASSERVOGEL: In Rochester.

BY MR. FOX:

Q He is within the State? A In Rochester.

Q You mean Rochester in the State of New York? A Yes, sir; I believe so.

Q Pneumonia is recognized now as the result of the pres-

CASE #1808

ence of a germ in the body? A It is.

Q And it is recognized, is it not, that every man carries in his mouth a more or less liberal supply of what are known as the word "coccus"? A Pneumococcus.

Q Yes. A generous supply of pneumococcus. A I think that is generally accepted, except in tobacco chewers. I believe tobacco chewers are exempt.

Q With the exception of that very diminishing class, the statement would be taking as substantially true? A Yes, sir; I think so.

Q That germ or that class of germ develops in to fatal activity very frequently in the case of persons who have never received any injury at all? A Very frequently, yes.

Q Pneumonia is not considered now as the result of a cold, but as the result of the activity of such a germ, and then being or getting into the system? A It is recognized as the lack of resistance to such a germ, plus its presence.

Q When did you first, so far as you can now recollect, discover anything in the deceased--

MR. FOX: Strike out the question..

Q Did you at any time prior to his death come to the opinion that he was suffering from pneumonia? A As an opinion?

Q Yes. A Yes.

Q How long before his death, as near as you can tell, of course, did you come to that opinion? A Within twenty-four

CASE #1808

hours, as I recall.

Q Up to that time had you seen any forerunner of pneumonia, speaking medically? A I had not.

Q When we speak of a mortal wound, -- I am only putting this question for the purpose of arriving at a definition of terms-- we mean, do we not, a wound which of itself is sufficient to cause and does cause death, or, if that is not the proper definition, will you give me one I can use? A I do not understand the term.

Q What do you understand by the expression "a mortal wound"? A A mortal wound, I understand as one who dies as the result of his injuries.

Q You mean, including in that expression, whether the result be primary or secondary? A That is as I understand it.

Q But there are some wounds which of themselves, anybody can see are necessarily mortal? A Yes, sir.

Q And there be no question but what they would cause death and must cause death from the moment they are received? A Yes, sir.

Q Now, neither of the wounds which you observed on the deceased was necessarily mortal, in that sense? A It was not.

Q You did not anticipate when the deceased arrived at the hospital that he would die of any of the wounds, did you?

A I did not see the deceased when he arrived at the hospital.

Q I should say, when you saw him-- you were the man who

CASE #1808

performed the operation? A Yes, I was.

Q When you had finished your operation, did you anticipate with any degree of reasonable certainty, that the deceased was likely to die from the wound which he received-- will you answer that yes or no. A May I have that question again?

Q I will put it to you in a different form-- had you in your experience treated wounds substantially similar to those which the deceased had received? A I have.

Q And in many cases, I suppose-- I do not mean identical, of course-- but I mean in that part of the body, of similar severity? A In that part of the body and similar severity, yes.

Q Is it your experience, from such wounds, the persons who received them had in large measure recovered? A No.

Q Had some recovered and some not? A Yes.

Q Then, we are getting at it. It was a wound which might result in death and might not, is that it? A Yes.

Q Now, you have said, have you not, that at no time did you discover any sign of infection in any of the wounds.

A No, sir; I said at the time I operated I did not.

Q Did you thereafter discover any? A No, I did not.

Q Then you could answer my question? A Yes, I could but I--

Q So far as you are concerned it is not your opinion that poisonous infection was the immediate cause or the producing

CASE #1808

cause of the death of the deceased, is that right? A You mean in the wounds?

Q In the wounds-- is that right? A That is right. I did not think it was

Q You spoke of making a wound yourself. Will you describe again the size of the wound which you made and its proximity to the wound which the deceased had received before you began your operation? A As nearly as I can recall--

BY MR. FOX:

Q Give it in inches and not a description, if you can.

MR. WASSERVOGEL: Suppose he gives both.

MR. FOX: I have no objection to his giving both.

Q Describe the wound you made and its relative position to the wound which the deceased had received by someone other than yourself. A The incised wound in the abdominal wall that he had received was about an inch to the left of the medium line and about an inch below the navel. I enlarged this wound by making a longitudinal incision slightly above the level of the navel, down through the wound that he already had received, extending we will say three inches above that wound or two inches above that wound and two inches below. I should say my wound would have been five to six inches in length.

BY THE COURT:

Q In length? A In length.

CASE #1808

THE COURT: What about its depth.

BY MR. FOX:

Q How deep was the wound? A The depth of the abdominal wall-- that went through skin, fat, muscle, peritonium.

BY THE COURT:

Q In this instance, how deep was it in your judgment?

A Approximately I should say an inch and a half or two inches. I think he was-- had a rather stout abdominal wall.

Q That would depend upon the abdominal wall? A Yes, sir. Entirely upon the fat, the amount of fat the man had;; other things being equal, the depth through a muscle is usually always about the same.

BY MR. FOX:

Q This man was an unusually large man? A I would say he was a large man.

Q It has been testified that he was over six feet and weighed more than the witness who said he, the witness, weighed 185 pounds. Would that agree with you? A I would have said that he was a man who weighed about 185 or 190 pounds.

Q Stripped? A Stripped, yes.

Q Now, doctor, assuming-- contrary to your view-- but assuming that the pneumonia from which the deceased suffered was caused by infection of some kind, the causes of such infection, in such a case, are numerous, are they not? A Yes, sir; quite numerous.

Q That is to say, infection might result or might be

CASE #1808

caused in different ways, or different causes coming into operation between the time when the stab wound was received and the coming on of the actual sepsis or poisonous condition?

A Yes, sir.

RE-DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q How often did you see the wound of this man? A After the operation?

Q Yes. A I think once. I dressed him once afterwards.

Q You were not present at the time of the autopsy?

A No, sir.

Q Of course you do not know what conditions were present at that time? A No, sir.

Q Can you tell us your opinion as to the cause of death in this case?

MR. FOX: Will you answer that yes or no?

THE WITNESS: My opinion, yes.

BY MR. WASSERVOGEL:

Q That is all we want to know; tell us that please.

MR. FOX: I object to it as a conclusion, and from facts not stated, and in view of the discussion we had yesterday, the admissibility of the answer will depend upon what the answer will be. I appreciate the difficulty your Honor is in. There are certain classes of answers that may be admissible. I am content now, having entire

CASE #1808

confidence in this jury, to take the answer without waiving the right to move to strike it out, if I may do so, without incurring any risk legally, in your Honor's opinion. I had supposed you could prove there were various causes from which death might result, and you can prove the fates in this case and then let the jury draw inferences as to what was the cause of death. Of course, we have already proceeded far enough in this case to see that the learned are not agreed. I think I may go as far as that-- there seems to be a difference but, that points also to the necessity of keeping this testimony well within the rules.

THE COURT: Is it your theory that an expert cannot express his professional opinion as to the cause of death after an examination made by him?

MR. FOX: I think he can. I think there are certain limits in which he clearly can. I am not here to contend to the contrary, but, in the case of Dr. Lehane yesterday, I contended and shall still contend that in that particular case he overstepped the limits, because he did not testify medically. He testified to something which I shall contend involved a statement of fact, that a particular knife at a particular time was infected. That I shall contend was not a matter for an expert.

THE COURT: I will overrule the objection and give

CASE #1808

and give you the benefit of an exception.

BY MR. WASSERVOGEL:

Q Now, doctor, kindly tell us your opinion as to the cause of death in this case? A My opinion is the man died from lobar pneumonia.

Q Superinduced by what? A Superinduced by shock-- shock-- hemorrhage and concomitant weakness with such shock and hemorrhage; his position in bed.

Q And shock caused by what? A By injury, and the operative procedure necessary to repair that injury.

Q You mean the stab wounds? A The wounds he had received and the operative procedure necessary to repair it.

BY THE COURT:

Q Will you describe in detail what you did before you performed the operation upon the sergeant of police, with reference to the sterilizing of your necessary instruments-- I am putting a leading question so as to save time.

MR. FOX: There is no possible objection.

THE WITNESS: The instruments went through the usual formula-- the routine formula-- they are put in a sterilizer.

MR. FOX: May I interrupt the witness and ask him if he testifies to his own knowledge as to what he did or what he believes somebody else did?

THE WITNESS: I happened to see this being done.

CASE #1808

I do not sterilize the instruments myself.

BY THE COURT:

Q You saw the instruments sterilized? A Yes, sir; I saw the instruments sterilized. They are allowed to remain in this sterilizer from twenty minutes to half an hour-- and just what time that evening I do not know. That was as to the instruments. Now, do you ask me how I sterilized myself?

Q Yes. A I scrubbed my hands with soap and water for something over five minutes. I then took a preparation of lime and soda and a solution of soda and mixed up with my hands so as to liberate chlorine gas. My hands and arms were washed off with water that had been sterilized in a water sterilizer. Then they were immersed for about a minute in a solution of one in two thousandths corrosive sublimate. After that I washed off with alcohol and then dried with a sterilized towel, after which I put on a pair of sterilized rubber gloves.

Q After the operation was performed did you bandage the body? A I applied dressings and those dressings were held in place by strips of adhesive plaster, so-called zinc oxide, Z. O. adhesive plaster and over all was applied a binder, held in place by dressing pins.

Q Were the dressings sterilized? A All of them with the exception I think of the binder.

Q You stated that you made a longitudinal incision, which was about five or six inches? A As I recall.

CASE #1808

Q How deep was that incision made? A I do not recall, as I say he was quite a stout man, I should say it was as deep as that in the upper and lower part-- the wound-- the depth sagged in the middle part, on account of the cut transversely through the rectal muscle.

Q Is lobar pneumonia superinduced by stab wounds following sepsis? A Is it superinduced following sepsis?

Q Yes. A Sepsis lowers vitality, yes.

Q Does lobar pneumonia follow any injury due to violence?

A Very frequently.

BY MR. FOX:

Q That is called traumatic pneumonia? A Traumatic--

Q Simply describes the origin. A That described the origin but not the pathology.

Q That is known as traumatic pneumonia? A Yes.

BY MR. WASSERVOGEL:

Q The word "traumatic" simply means injury? A As I understand it.

Q A blow. A Yes.

Q Or a stab wound? A Any injury.

Q Any injury at all, that is what traumatic means?

A Yes.

Q And traumatic pneumonia may also be lobar pneumonia?

A Yes, sir.

Q Covering all the entire lobe of the lungs? A Yes.

CASE #1808

JOHN EDWIN HAGMEIER, M. D., called as a witness on behalf of the people being duly sworn and examined, testified as follows:

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q You are attached to Bellevue Hospital? A Yes.

Q How long have you been a physician and surgeon in this State? A In this State-- I am a graduate of Toronto University and I have had an internship at Bellevue since July 1st, 1912.

Q How long have you been practicing medicine? A Since May of 1911.

Q And were you attached to Bellevue Hospital September 28th of last year? A Yes.

Q Were you present when an operation was performed on a man named Joseph McNierney, a police sergeant, by Dr. Smith? A Not during the whole time.

Q Part of the time? A Yes.

Q Did you observe the condition of the man upon whom the operation was being performed? A When I entered the operating room--

MR. FOX: Unless counsel wishes to duplicate the testimony, I shall assume the testimony of the last witness was correct as to matters of fact, as to what he did at the time of the operation.

CASE #1808

MR. WASSERVOGEL: Then I will stop. I thought Mr. Fox might want Dr. Hadmeier.

MR. FOX: Now I will ask one or two questions.

BY MR. FOX:

Q Did Dr. Lehane talk with you about the medical and surgical history of the case? A No.

Q Did you observe the patient after the operation and before his death? A Yes.

Q How frequently did you observe the deceased? A I was on the ward and observed him possibly the greater part of the day.

Q Every day? A Yes.

Q Did you at any time form the opinion that the deceased was suffering from pneumonia? A I suspected pneumonia although I was not positive.

Q Did you at any time before his death come to the conclusion, as an opinion as distinguished from suspicion, that as a matter of fact he was suffering from pneumonia? A I was of the opinion-- you could not be positively certain, on account of his other condition.

Q Did you at any time, prior to his death, come to the opinion with anything like reasonable certainty that he was suffering from pneumonia? A Yes, sir; I did.

Q How long before his death did you first come to that opinion? A Oh, about 24 hours, within the last 24 hours.

CASE #1808

Q Up to that time, there had not been any indications which to your mind justified you in coming to that conclusion?

A There were indications but there were also contrary indications.

Q Taking all the situation together, there was nothing in your mind that justified you in coming to that conclusion until some period within twenty-four hours of his death, is that right? A Approximately that, yes.

BY MR. WASSERVOGEL:

Q Can you tell us the cause of death in this case, in your opinion? A In my opinion he died of his stab wound-- the stab wounds opened up a source of infection and gave him a septicemia. He had an abdominal wound which inhibited free respiration particularly in his lower lobes, which increased his susceptibility to pneumonia in those parts. The cause of death in my opinion is that he died of his stab wounds.

MR. FOX: I am not repeating my objection, if your Honor please, as to this line of testimony, because you have already given it to me.

CROSS EXAMINATION BY MR. FOX:

Q Doctor, septicemia is only another word or scientific word for a poisonous condition? A Yes, sir.

Q Were you in court when Dr. Smith testified? A I just came in when you asked him his last question.

CASE #1808

Q That was all you heard, A Yes.

Q You did not hear any of my questions put to him or his answers thereto in regard to whether he discovered any signs of infection or poisonous condition? A No, sir.

Q Now, what are the usual manifestations, local manifestations of septicemia or poisonous condition, following a stab wound? A The patient has possibly a chill. He has a rise in temperature. His pulse rate will increase. He may have more than one chill. He has an inflammatory condition about his injury-- stab wound in the abdomen-- he would have pain and evidences of peritonitis. His temperature and his pulse and general appearance of the patient would lead you to believe he had septicemia.

Q You have described some symptoms which would properly be called local, and some which would properly be called constitutional, have you not? A Yes.

Q What would you include within the class known as local symptoms? A Of the septicemia?

Q I do not speak of this deceased, but what are the local symptoms of septicemia following a stab wound? A Septicemia is a general condition--

Q I understand that, but what are the local symptoms of it? A You have symptoms of infection.

Q What are the symptoms? A Redness, swelling and inflammation.

CASE #1808

Q What else? A Pain and possibly have some suppuration if it could escape so you could see it.

Q The constitutional symptoms would include, among other things, a chill? A Yes.

Q And is that constitutional symptom a pretty constant concomitant of septicemia? A It is fairly so.

Q You rather expect to find it? A Yes, sir; although you see many cases in which you do not.

Q But it is more frequently present than absent? A Yes.

Q And is one of the most trustworthy and infallible symptoms of the case, or of septicemia? A I should not say so.

Q What? A No, sir.

Q It is not. A That in itself--

Q I said one-- try to understand me. A There are no infallible symptoms of septicemia except by finding the organism in your blood.

Q The infallible test is the examination of the blood?

A Yes, sir.

Q Was the blood of the deceased examined? A No, sir.

Q Are you sure about that? A Reasonably sure.

Q Did the deceased suffer from chill or rigor? A Yes.

Q He did? A Yes. I will not call it rigor. I will call it a chill.

Q When did he have the chill? A I think the record will

8081-7
CASE #1808

show that definitely. He had it sometime before--

Q Who was present at the time of this chill besides yourself? A I was not present.

MR. FOX: Then I move to strike out the answer.

THE COURT: Strike it out.

BY MR. FOX:

Q Please understand you are here to testify. Probably you did not understand-- not to what you learned from others but what you observed yourself. A I observed from the records at the time--

Q That is another proposition. I will ask you a few other questions of your own observation. Did you observe any local symptoms of septicemia in the deceased? A No, sir.

Q At any time? A No, sir.

Q Did you observe any constitutional symptoms of septicemia in the deceased at any time? A Yes, sir.

Q When first, as near as you can tell, did you observe such symptoms? A Well, within-- oh, twenty-four to forty-eight hours after he had been admitted to the hospital.

Q Did you sign any part of this record I have here?

A I signed the history.

Q And in signing the history, are all the facts therein stated, facts observed by you personally? A No, sir; the history is a statement of what happened to the patient and how he took sick. It is a statement from the patient or his

CASE #1808

friends as to what happened to him and the symptoms as he observed them before he entered the hospital.

Q Will you look at anything signed by you and see if that would enable you to testify as to the date when you observed any symptom of septicemia in the deceased? A There is nothing in the record signed by me.

Q Is it not usual to put in some record kept in Bellevue Hospital, some statement of medical or surgical facts observed in the course of treatment of a surgical case? A Yes, sir.

Q In your opinion, was the showing or^{the} appearance of a local symptom of septicemia important? A No, sir.

Q Are you aware of any treatment which usually is applied on the occasion of the first appearance of septicemia, in a patient who has received a wound? A No, sir.

Q Did you report to Dr. Smith or anyone else the fact that evidence of septicemia had appeared? A It was unnecessary.

MR. FOX: I move to strike that out.

THE COURT: Strike it out.

BY THE COURT:

Q Did you so report? A No.

BY MR. FOX:

Q What was the first local symptom of septicemia that you discovered in the deceased? A I did not discover first a local symptom.

Q Did you discover a local symptom? A No, I did not.

CASE #1808

Q What was the first constitutional symptom which you discovered of septicemia? A There were a number of symptoms I discovered.

Q What was the first that you discovered in order of time? A I do not believe I can tell you which was the first. There were a number of them I observed.

Q What was the first you recall as having discovered? A I discovered a number at the same time. Possibly it was his increased pulse rate with his temperature and possibly just the aspect of the patient, when I first observed him at this particular time, that I began to think that he had a septicemia.

Q Did you regard that as a symptom of any medical or surgical importance at all? A Yes.

Q Who was the person immediately over you? A Dr. Cahill.

Q Is he in town? A Yes.

CASE #1808

Q Who was the person over him? A Dr. Waterman.

Q Is there no rule or regulation requiring surgeons holding the position that you held there, to report to any one above them, the appearance of such constitutional symptoms as you have referred to -- will you answer it yes or no? A Yes.

Q There is a regulation? A Yes.

Q What is that regulation? A That it be reported to your superior officer.

Q Who was your immediate superior officer, Dr. Cahill?

A Dr. Cahill, yes.

Q Did you report it to him? A No, sir.

Q Was he present when you discovered them? A He was present as often practically as I was.

Q You examined him together? A Very often.

Q You and he examined the deceased together? A Very often.

Q As matter of fact, were you together when you discovered these symptoms of septicemia? A I do not recall.

Q Did you do anything at all, either in the way of treatment of the symptoms of septicemia, or in reporting their existence to any one, answer yes or no? A No, sir.

MR. FOX: I think that is all.

BY MR. WASSERVOGEL:

Q What did you do? A I carried out the treatment that fell to me, as outlined by Dr. Smith and Dr. Waterman. I observed the patient in connection with those gentlemen, and I did

CASE #1808

whatever was asked of me in the clinical ward work, which was up to me.

Q Under the direction of Dr. Smith, the operating surgeon?

A Yes, sir.

Q And this patient was under your care each day until he died? A He was under our joint care.

Q You saw him? A Yes.

Q Each day? A Yes.

Q How frequently during the day would you see him? A I spent the greater part of the day in the ward. We have twenty-five to thirty patients there.

RE-CROSS EXAMINATION BY MR. FOX:

Q Did I not ask you -- I think I did -- whether you did anything either in the way of treatment of the symptoms, or of reporting their existence to any one, and didn't you say no?

A Yes, I did.

Q Have you not now just answered the District Attorney that you followed a certain treatment -- please answer that yes or no? A May I answer --

Q You may have ample opportunity to explain, but have you not just said to the jury in answer to a question put by the District Attorney, that you followed the treatment, meaning some treatment in regard to the deceased? A Yes.

Q What treatment, as matter of fact, did you follow? As matter of fact I did not do anything to that patient in the line

CASE #1808

of treatment except observe him and give or write any orders that may have been suggested by Dr. Smith or Dr. Waterman.

Q When you answered the District Attorney that you followed a certain treatment, you did not mean the jury to understand that you applied any medical or surgical treatment to the deceased, did you? A May I --

Q One thing at a time -- answer the question yes or no?
A Yes, I did.

Q What did you mean when you answered no to my question "Did you follow any treatment of the symptoms or report their existence to anybody"? A I meant that I personally did not apply any treatment to the patient. That all I did to the patient was observe him and write -- possibly I wrote some orders given by Dr. Smith or Dr. Waterman, but as for doing anything directly myself to the patient, I did not.

RE-DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q Did you observe any other physician do anything? A Yes, I observed Dr. Waterman and Dr. Smith.

Q What did Dr. Waterman do? A Dr. Waterman went over the patient frequently, examined his general condition and observed his lungs and heart and prescribed for him.

Q And was the wound examined at all by any physician that you know? A If I remember rightly, I believe Dr. Smith looked at the dressing and opened it partially, one day.

MR. WASSERVOGEL: That is all.

CASE #1808

MR. WASSERVOGEL: Do you want Dr. Lehane back?

MR. FOX: No, I would rather wait until you are finished.

MR. WASSERVOGEL: The People then rest.

MR. FOX: One minute, will Dr. Hagmeier take the stand again. I want to ask him another question.

JOHN EDWIN HAGMEIER, resumes the stand:

BY MR. FOX:

Q Do you know Dr. Cahill? A Yes.

Q When did you see him last? A About half a minute before I came in here.

Q Where? A Just outside the door.

Q That is all.

BY MR. WASSERVOGEL:

Q Is Dr. Cahill here? A Yes.

Q Then let him come in -- I did not know he was here.

MR. FOX: You did not know he was here?

MR. WASSERVOGEL: No, I have not seen Dr. Cahill.

MR. FOX: I understood you to say yesterday that he was the witness you were going to introduce to-day.

MR. WASSERVOGEL: I did not mention any particular name.

MR. FOX: You said the ambulance surgeon.

MR. WASSERVOGEL: Dr. Auringer was the ambulance surgeon.

CASE #1808

GEORGE FRANCIS CAHILL, M.D., called as a witness in behalf of the People, being duly sworn and examined, testified as follows:

(House surgeon Bellevue Hospital)

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q You are a physician and surgeon? A Yes.

Q Attached to Bellevue Hospital? A Yes.

Q How long have you been practicing medicine in this state?

A Two years and seven months.

Q You have never spoken to me about this case prior to this minute? A I never saw you before that I can recollect.

Q Or with Mr. Breckenridge -- do you know this gentleman here (indicating)? A No.

Q Did you know a man named Joseph McNierney, a police sergeant? A I knew Joseph McNierney, a police sergeant, yes.

Q Was he under treatment by you at any time at Bellevue Hospital? A He was.

Q When did you see him for the first time? A The exact date I don't remember.

MR. FOX: I have no objection to your leading the witness.

BY MR. WASSERVOGEL:

Q September 28th was the day he was brought to the hospital? A I saw him the evening of September 28th.

Q The night he was brought in? A Yes.

CASE #1808

Q Tell us the condition you found him in at that time?

A He was in shock. He had a stab wound of his abdomen; stab wound of his right hip and an incised wound of his right hand.

Q And were you present when an operation was performed by Dr. Smith? A I was.

Q Can you tell us what the nature of that operation was?

A The operation was --

MR. FOX: I am perfectly willing to state again that to save time I am content --

MR. WASSERVOGEL: So long as you will examine him I might as well have it on the record.

MR. FOX (continuing) I have a right to state to the Court without interruption that we shall assume that statement of facts made by Dr. Smith as to what he did in performing the operation, is correct.

THE COURT: Why not accept that concession. It saves time.

MR. WASSERVOGEL: I accept it.

BY MR. WASSERVOGEL:

Q Did you see the patient after the operation? A I saw the patient after the operation.

Q How often? A I saw the patient every day until he died.

Q Can you tell us what the cause of death was? A The cause of death, as far as I know, was due to pneumonia.

Q Caused by what?

CASE #1808

Same objection, ruling and exception.

A The absolute cause I could not be certain of.

Q In your opinion? A In my opinion the cause was due to infection following the stab wound of the abdomen into the intestines.

Q Did you attend the patient at all during the time he was in the hospital prior to his death? A Yes.

Q Can you tell us what you did with respect to treatment, if anything? A I saw the patient directly after admission. I covered his wounds with sterile gauze, and notified the attending surgeon of the case. I examined the patient at the time. I saw him later on and attended the patient under the directions of the attending surgeon.

CROSS EXAMINATION:

Q Have you talked with Dr. Smith lately in regard to the presence or absence of infection in the deceased -- will you answer that yes or no? A I saw Dr. Smith in the hall.

Q Pardon me -- I am putting a simple question to you which calls for an answer yes or no? A Yes -- I did not talk to Dr. Smith.

Q Did Dr. Smith talk to you? A No.

Q Have you had any conversation with Dr. Smith at any time relating to the question of fact whether or not there was infection which exhibited itself in the deceased at any time in the hospital? A I cannot recollect that I spoke -- at the time

CASE #1808

the patient was in the hospital I do not remember whether I talked with Dr. Smith or not, as far as infection is concerned, but since that time I have not talked with him.

Q The sources of infection following a stab wound are numerous? A They are.

Q Always to be apprehended and anticipated, as one of the possible dangers to any wound? A Yes, sir.

Q Will you tell us when or what was the first symptom which to your mind indicated the presence of any infection in the wound of the deceased? A All stab wounds --

Q No, no -- A The wound was infected from the start.

MR. FOX: That is not exactly what I asked you, and I move to strike it out.

MR. WASSERVOGEL: I think that is an answer.

MR. FOX: I asked for the symptom, and his answer is that the wound was infected, which is a conclusion from symptoms.

THE COURT: Strike out the answer.

BY MR. FOX:

Q I will put it again.

THE COURT: Are you re-framing the question?

MR. FOX: Yes.

BY MR. FOX:

Q There are local symptoms and constitutional symptoms of infection? A There are.

CASE #1808

Q Will you describe the usual local symptoms of infection in a wound? A Pain, swelling, redness and tenderness.

Q What are the constitutional symptoms? I am not speaking now of this case, but the usual constitutional symptoms?

A Rapid pulse and temperature and increase in blood count.

Q What else? A Symptoms of fever, scanty urine, and all the other concomitants, dry tongue, flushed cheek, &c.

Q Is there not another very important one, and that is a chill? A Not necessarily.

Q Is it not frequent? A It can be frequent.

Q I asked you not about the necessary symptoms, but about such symptoms as are observed in such cases -- is not a chill one of them? A It is impossible to lay down an absolute -- a chill can be one of the symptoms.

Q It is not an unusual symptom of septicemia? A It is.

Q It is unusual? A No. I say it can be one of the usual symptoms of septicemia.

Q Will you describe to the jury what was the first local symptom which you observed, which to your mind indicated the presence of septicemia or infection in the wound of the deceased? A The patient had a wound which was cut by an instrument which I knew was not clean. The wound was dirty.

THE COURT: Strike out the answer.

BY MR. FOX:

Q A knife is not a local symptom.

CASE #1808

THE COURT: The objective symptoms.

THE WITNESS: The patient had a temperature.

BY MR. FOX:

Q When did the temperature manifest itself for the first time? A That I cannot say. It was after the operation.

Q Did you keep any record of what you observed? A No, sir; I wrote nothing down what I observed.

Q So far as you know did anybody write anything down?

A As far as I know--

Q Let me finish my sentence-- perhaps I am somewhat slower than I ought to be-- so far as you know did anybody write anything down that anybody observed medically or surgically in the progress of the case of the deceased; answer yes or no. A May I have the entire question repeated?

Q Certainly.

(The question is repeated.)

MR. FOX: Answer yes or no.

THE WITNESS: Read it over again please.

(The question is repeated.)

THE WITNESS: Observed what?

BY MR. FOX:

Q Observed medically or surgically. A There were-- the nurses notes were written.

Q So far as you know did any surgeon or physician write down anything in any prominent record or any record whatever

CASE #1808

in the hospital, any fact that the surgeon or physician observed medically or surgically of this case? A I do not know.

Q At any rate, you did not? A I did not.

Q You are unable to tell the jury when it was that the deceased first had an abnormal ^{temperature,} is that right? A Offhand, no.

Q That means no, doesn't it? A Yes-- I could--

BY MR. WASSERVOGEL:

Q You could what?

THE WITNESS: By refreshing my recollection myself with the record of the patient.

MR. FOX: I understand-- that is another thing.

BY MR. FOX:

Q What other local symptoms, if any, did you observe at any time, which in your opinion indicated the existence of infection in the wound of the deceased, following the operation?

A The patient had a rapid pulse.

Q That is constitutional? A Local. Complained of pain in his abdomen.

Q That is subjective, is it not? A All symptoms are subjective.

Q All symptoms are subjective? You do not mean that.

THE COURT: You mean objective symptoms.

Q Is not this a fair definition of the words "objective" and "subjective" as applied to a patient: That objective

CASE #1808

symptoms are those which a third person or outsider can observe and a subjective symptom is that for the existence of which the observer has to depend at least in part upon some statement made by the patient? A I think that may be right.

MR. WASSERVOGEL: He said the man complained of pain-- why is not that subjective?

MR. FOX: He said that all symptoms are subjective.

BY MR. FOX:

Q You do not mean to say that all symptoms are subjective?

A I meant to say that a symptom is a complaint of the patient about his condition, or a sign, or something which we observe.

Q You call that a subjective symptom? A I said-- I was under the impression--- a symptom is what a patient complains of.

Q That is what you mean? A You ask a question and they complain-- they answer the question.

Q And that you call? A A symptom.

Q Subjective or objective symptom? A Well, I don't know exactly what you mean.

Q Frankly, is it not true that you yourself recognize no clear line of distinction between a subjective and an objective symptom, as you sit there in that chair? A No, I do not.

Q What did you see, apart from what you were told, that indicated to your own mind the presence of infection in this wound following in point of time the operation? A I did not

CASE #1808

130-1/2

see the wound following the operation.

Q At all? A No, sir. The wound was dressed all the time---

MR. FOX: I do not ask you anything--

CASE #1808

BY MR. WASSERVOGEL:

Q The wound was dressed all the time-- proceed. A While I saw the patient, I did not see the wound following the operation.

Q You did not remove the dressing yourself at any time?

A No.

MR. WASSERVOGEL: Mr. Fox, do you want Dr. Lehane now? Otherwise, the people rest.

MR. FOX: I think the cross examination of Dr. Lehane has been made unnecessary/

MR. WASSERVOGEL: I object to that remark and ask the jury be directed to disregard it. It was improper.

MR. FOX: What I mean is that I have extracted from these witnesses such facts as I thought I should have to extract by the cross examination of Dr. Lehane.

THE COURT: The remarks of counsel on either side will be disregarded by the jury.

MR. FOX: It only explains my not calling him and has nothing to do with the merits of the case.

MR. WASSERVOGEL: The people rest.

THE COURT: Recall Dr. Cahill.

GEORGE FRANCIS CAHILL, re-called:

BY THE COURT:

Q Will you state with more detail the condition of the

CASE #1808

wound in which you originally saw it. A He was stabbed in the right lower part of the abdomen over the right rectal muscle. The wound externally was about an inch to an inch and a half in length. It was bleeding. At the time I first saw it it was covered with a dressing of gauze. The wound in his right hip was on the outer surface below the crest of the illium, about an inch in length. He was wounded on the right hand over the dorsal surface of the right thumb, and right first finger.

Q Where did you see the patient for the first time?

A Ward 40, Bellevue Hospital, left hand side of the ward.

Q Was he dressed or undressed at that time? A If I remember he was partially dressed. I am not exactly certain.

Q What, if anything, did you do towards treating the wound before Dr. Smith arrived? A I just covered it with sterilized gauze so nothing else could touch the wound except its sterile surface.

THE COURT: Is the clothing of the deceased here?

MR. WASSERVOGEL: Yes. I have the outside clothing.

The undergarments are upstairs, if you want them.

BY THE COURT:

Q Doctor, at any time did you see People's Exhibit No. 3, the knife? A I have never seen the knife.

Q On cross examination by Mr. Fox, you were asked to state some of the symptoms which manifested themselves after the

CASE #1808

patient was taken to the hospital, and you referred to the condition of the wound and knife, and on motion of Mr. Fox, because the answer was not responsive, I ordered the stenographer to strike it from the record. Do you recall at that time you stated something about the condition of the wound, and I specifically desire to call your attention to your testimony which was stricken out, with a view to refresh your recollection as to what was the condition of the wound when you first examined the patient. A The wound was-- it was partially gaping.

Q State what you observed. A The wound, as I first observed it in the abdomen, was partially open, that is, gaping and was bleeding.

Q Was that all you saw? A That is all the wounds were in that condition, as I remember it.

BY MR. WASSERVOGEL:

Q When was it you observed this infection you spoke of?

MR. FOX: I do not object to his giving any symptoms or any statement of facts that he observed, but whether it is an infection or not, merely answered of itself, I shall contend was a conclusion.

THE COURT: Of course, he is giving his professional opinion. As the result of an examination of a wound, a medical witness can express his opinion whether or not it was due to infection, and then he can give his grounds

CASE #1808

for basing his judgment upon that conclusion.

BY MR. WASSERVOGEL:

Q Upon examination of the wounds of the deceased, were there any indications of infection at all that you observed?

A All such wounds--

THE COURT: No, not all such.

THE WITNESS: I considered the wound infected.

MR. FOX: I move to strike out the answer as a conclusion from facts not stated.

Motion denied. Exception.

THE PEOPLE REST.

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

(After recess, trial resumed.)

MR. RYAN: If your Honor please, we move to dismiss the complaint and the indictment upon the ground that the people have failed to prove the crime charged in the indictment or any other crime and also they ^{have} failed to sustain the burden of proof, that the death of the deceased was caused by the defendant.

Motion denied. Exception.

CASE #1808

Mr. Ryan's opening address to the jury in behalf of the defense:

If the Court please, and Gentlemen of the Jury:

The defendant at the bar is charged with the crime of murder in the first degree. The court will explain the different degrees of murder. The defense will show that on the 28th of September last year the defendant and two other companions were coming downtown on a Second Avenue elevated train. The Second Avenue elevated running across 23rd Street and from there running down First Avenue; that between 23rd and 19th Streets there was some talk between the deceased and one of the witnesses for the people, but that no arrests were made either on the train or upon the station platform, until after the occurrence that is charged in the indictment against the defendant. We will show that the defendant was not placed under arrest on the train as testified to by the people, and that instead of the defendant resisting arrest he was trying to avoid any trouble whatsoever and made efforts to get away. That he did not know that the two officers were officers, but thought they were ordinary citizens and that he was, instead of intending trouble, endeavoring to get away from the trouble and we will also show you that the police officers first assaulted the defendant and dealt him several blows, and in order to protect

CASE #1808

himself he used the means at his disposal, in order to protect his own life, thinking he was in danger of being killed himself.

THE DEFENSE:

FRANCESCO GORGONI, the defendant, called as a witness in his own behalf, being duly sworn and examined, testified as follows through the official interpreter, Mr.

(Residence: 25th Street between 7th and 8th Avenues.)

DIRECT EXAMINATION BY MR. RYAN:

Q Where did you live immediately before that? A In Brooklyn I lived before, at Carroll Street. I don't remember the number. I was a shoemaker there.

THE COURT: Explain to him, Mr. Villemena that it is important for him to calm himself and to tell the gentlemen of the jury what occurred on the night of September 28th and that he should stop crying.

BY MR. RYAN:

Q Do you remember the 28th of September, 1913? A I do not know if it was the 28th.

Q It was on a Sunday, was it not? A Yes.

Q And where did you go that afternoon? A I went with a friend of mine named Arturo, uptown to some friend of his.

CASE #1808

I don't remember if it was 115th or 116th Street. I am not well acquainted with the streets of New York.

MR. FOX: Did he not say to see some friend of mine?

THE INTERPRETER: Of his.

MR. FOX: Meaning Arturo?

THE INTERPRETER: Yes.

BY MR. RYAN:

Q This was First Avenue near 115th Street? A I don't know. Arturo knows it.

MR. RYAN: If your Honor please, the witnesses called by the people are present, will you request them to leave the court room?

MR. WASSERVOGEL: Not those who have testified.

THE COURT: Do you contemplate calling them in rebuttal?

MR. WASSERVOGEL: I do not know. I think it is necessary they should be here and listen to this evidence. I think that is a proper practice and you have permitted it in every case I have ever tried before you.

THE COURT: It is purely within the discretion of the court to allow witnesses to remain here, but if it should become important on some contested question of fact, you might request to have the witnesses retire.

MR. FOX: I should imagine there will be rebuttal, but of course we cannot be sure.

CASE #1808

THE COURT: Let the witnesses retire from both sides.

BY MR. RYAN:

Q What time in the afternoon did you reach this house with your friend? A About two o'clock.

Q And how long did you remain there? A Well, we remained there until it commenced to get dark, in the evening.

Q What did you do while you were there? A We eat and drank.

Q And where did you go when you left there? A We went on the elevator.

Q And do you remember what car you sat in when you got on the elevated train? A No, sir; I do not know.

Q Now, did two friends of yours get on the train with you? A Yes, sir.

Q What was the other one's name beside Arturo Ortasio? A I don't know the other man's name-- Arturo knows it.

Q State what occurred in the elevated train after the train passed 23rd Street? A When we got at 19th Street, I don't know-- I heard someone holler and we got off the train and somebody said son of a bith to me and I said to him you are one, and I don't know-- I was struck-- I heard lots of hollering around and after a while they brought me a knife and said to me this is the knife, you killed a man. That is all I know.

CASE #1808

Q What part of the car did you get off of, the front or back part of the car? A From the rear door.

Q And who got off the train first, you or the two fellows that were with you? A I went out first.

Q Then who followed next? A I did not see who came after me.

Q Did you see Ortensio after you got off on the station platform?

THE INTERPRETER: Do you mean Arturo?

MR. RYAN: Yes.

THE COURT: For the purposes of having the record read intelligently, refer to the first name of the man, Arturo.

THE WITNESS: I saw Arturo and the other man come out, the two, but after I did not see them any more.

BY MR. RYAN:

Q Did any of the two officers have you by the hand before you got off from the train? A No, sir.

Q Did these two men, either of them, either of these two men, state to you that they were policemen or officers before you got off of the train? A No, sir; nobody said anything. They only started to holler and beat me. That was all. They jumped at me and they beat me, dong-dong-- that is all. (That is merely a sound.)

MR. FOX: It is not a word. It is only a sound.

CASE #1808

THE INTERPRETER: Yes.

BY MR. RYAN:

Q Did either of those two men show you any badge or shield like the interpreter has on his coat there, before you got off the train? A No, sir. No, nothing.

THE COURT: Not of that color-- I believe they have another kind. Any metal badge.

Q Any badge similar to that of any color? A No, sir; I did not see nothing, no. Without seeing anything they beat me, that was all.

Q After you got out on the platform, after the train stopped, where did you go to first? A When I got off the train they started to beat me and beat me. I placed my hands over my head this way (the witness indicated by placing both hands on top of his head). Then they pushed me in some place, in a little room there, and they kept me there for a little while and still they were beating me and they took me to the station house and there they told me that they were policemen.

Q You did not see Arturo, after you got out on the station platform? A No, sir; I did not see Arturo. I did not see nobody up there. When I got up there, they started to beat me, and I saw all dark, that was all, and after I saw where I was.

Q You did not pull either of these two off of the train platform, did you? A No, sir.

Q After you got out on to the station platform, you did

CASE #1808

not pull one of these two officers up towards the north end of the station platform, did you? A No, sir; when I got off of my train, and I went on the platform of the station, those two men were hollering at me. I said to them in Italian: "What are you hollering at? I did not understand what you say," and then two men that were there started to talk to them but they jumped at me and started to beat me and they started to beat me.

BY THE COURT:

Q Where did they strike you? A Right here (indicating his left temple.) Right over (indicating the top of his head.) Right here (indicating the right side of the body.) And all over, all over.

BY MR. RYAN:

Q How much do you weigh, what is your weight? A I do not know.

Q How much did you weigh before you were taken to the city prison? A About 150 pounds.

MR. FOX: 115 or 150?

THE INTERPRETER: 150.

BY MR. RYAN:

Q Are you sure he said that?

THE INTERPRETER: That was what he said.

Q How tall are you? A Five foot five or six I think.

In my discharge from the army is my height. I believe one metre

CASE #1808

and sixty centimeters.

MR. FOX: A meter is about thirty-nine--

THE FOREMAN: Thirty-nine and three eighths--

MR. FOX: We will say about five feet four.

MR. WASSERVOGEL: That is about right.

MR. FOX: Yes, about five feet four.

BY MR. RYAN:

Q When did you come to this country? A About a year and a half or two years.

Q What was your business in Italy before you came here?

A Shoemaker.

Q All the time were you a shoemaker? A Yes.

Q Were you ever in the Italian army? A Yes, but I was discharged.

Q How long were you in the army? A Two or three months.

Q What was the reason for your discharge from the Italian army? A Because I suffered from epileptic fits.

Q Can you speak English? A No, sir.

Q I show you a paper and I ask you if the name referred to in that paper is your name? A Yes, sir.

MR. RYAN: I offer this paper in evidence. It has been identified by the witness-- discharge papers.

MR. WASSERVOGEL: I object. The admission of this paper would be encumbering the record with documents immaterial to the case and having no bearing on the case.

CASE #1808

MR. RYAN: As bearing on the question of character.

THE COURT: Objection sustained.

Exception.

BY MR. RYAN:

Q At the time you got off the train and got on the platform, were you in fear of bodily harm from those two men?

A Sure.

Q Were you in fear of your life? A Why certainly, sure. I defend myself like this (witness raising both hands.)

MR. WASSERVOGEL: It seems to me that this is objectionable. I should have objected to it before and I ask to strike it out. The defense here is not self defense. The defense here is a denial. The defense being a denial how is it material, whether he was in fear of bodily harm or not?

THE COURT: A defendant, under the case of the People vs. Taylor, have a right to interpose as many defenses as he deems fit. There might be consistent and inconsistent defenses interposed. A man has a right to testify as to his state of mind, and as to whether the conduct of a third party produced fear in his mind.

MR. FOX: And as to whether he had any intent to kill, or only acted with intent to defend himself. There is no doubt about that, is there?

THE COURT: No. That is right.

CASE #1808

BY MR. RYAN:

Q I show you this knife, People's Exhibit 3, and I ask you if that was your property? A No, sir; I never had any knife.

MR. FOX: Did not the witness say "I was drunk at one time", in one of his answers?

THE INTERPRETER: He did not say so.

(The direct testimony of the witness is read.)

THE COURT: Was he intoxicated?

BY MR. RYAN:

Q What did you have to drink up at your friend's house in First Avenue? A Beer and wine and some other kind of wine that Arturo brought up.

Q So that at the time you got on the elevated train, on this afternoon, you were in an intoxicated condition, were you not?

MR. WASSERVOGEL: I object as calling for a conclusion and as leading.

Objection sustained.

THE EIGHTH JUROR: Ask him how many drinks he had.

BY MR. RYAN:

Q How many drinks did you have up there that afternoon?

A I don't know. We continued drinking for about a half a day.

Q You drank from the time you arrived there until the time you left there? A Yes, sir.

CASE #1808

Q You had beer and two kinds of wine to drink? A Yes.

BY THE SECOND JUROR:

Q Are you in the habit of drinking right along or only just once a year?

BY MR. RYAN:

Q Are you in the habit of drinking both wine and beer?

A No. Once in a while we drink.

THE COURT: I will allow you to put a leading question to this witness. It will save time.

MR. FOX: Ask him if he was intoxicated.

BY MR. RYAN:

Q Were you intoxicated this afternoon? A I was not falling down. I was a little, feeling good.

Q The two friends that were with you, wanted you to get off the station at 23rd Street, did they not? A I don't know.

Q Didn't they state to you when they reached the 23rd Street station, that that was the station you should get off at and you said that was not the station that you wanted to get off at?

MR. WASSERVOGEL: I object.

THE COURT: It is through an interpreter and I will allow it.

MR. WASSERVOGEL: Conversation he had with other people at a time prior to this. It is hearsay.

MR. FOX: It bears on the question of the man's state

CASE # 1808

of mind. If 23rd Street, as I understand, was the normal station, and he did not know 23rd and they told him to get off there and finally they got him off at 19th Street, I think it tends to show the extent of the intoxication which was existing at the time.

MR. WASSERVOGEL: In view of the charge against the defendant I withdraw the objection.

(The question is repeated.)

THE WITNESS: No, sir; I don't remember nothing.

CROSS EXAMINATION BY MR. WASSERVOGEL:

Q Although you had been drinking that afternoon, you do remember that you boarded a Second Avenue train? A I do not know as it was a Second Avenue. Arturo took me up to take the train. I don't know.

Q You did take a train with Arturo and another friend?

A Yes.

CASE #1808

Q You remember that very well, don't you? A Yes, I was with them.

Q And in which part of the car did you sit down? A I was sitting on this side. (The witness indicates his left).

Q And you saw two girls sitting in that car, did you not? A There was a good many, a good many girls there.

Q Well, there were two girls in particular that you noticed, one quite a young girl? A That is what they say. They were looking at me.

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

Q You remember that they smiled at you, that was what you said? A I don't know who they were. There were some girls sitting right in front of us.

Q There were two young girls sitting right opposite you, were there not? A There was some other girl there.

Q And two girls changed their places in the car and sat elsewhere, you remember that? A Yes.

Q You changed your seat also? A I went outside of the car on the platform.

Q You remember that those two girls changed their places and that you changed your place and took a seat right opposite them, don't you? A No, sir, I did not sit in front of them. I went outside.

Q Before you went outside, did not the two girls take seats in the front part of the car, the motorman's box, or in

CASE #1808

the rear part of the car I should say? A I don't remember that.

Q You do remember seeing a man who spoke to the two girls and asked them to change their seats, don't you? A No, sir, I only know that when I got outside of the train, they started to holler. They started to talk loud, that was all I know.

Q Listen to this will you please -- do you know this gentleman here, Mr. Breckenridge? A No, sir.

Q Do you remember seeing him at the station house on the morning of your arrest, a few hours after you were arrested?

A No, sir, I never saw him.

MR. WASSERVOGEL: Mr. Breckenridge, will you please stand up.

BY MR. WASSERVOGEL:

Q This man? A No, sir, I never saw him before.

Q Do you remember that Mr. Breckenridge was present at the station house and there was also an Italian detective there, a police officer? A No, sir, I did not see that gentleman there (indicating Mr. Breckenridge).

Q Don't you remember you were asked this question by Mr. Breckenridge, which was interpreted to you in the Italian language, "Did she -- (referring to the girl) -- get up from the place where she was sitting and move her seat" and you answered "Yes, she did get up when this American man -- she got up and another little girl and she sat down with this American man". Do you remember that?

CASE # 1808

MR. RYAN: I object. The defendant was under arrest at the time the alleged question and answer were given.

THE COURT: On that ground the objection must be overruled. The mere fact that a defendant is under arrest does not prohibit the District Attorney from questioning the defendant. That inhibition applies only to a Magistrate, a Police Magistrate or to a Coroner. The Court of Appeals has passed upon that question time and time again.

MR. RYAN: Notwithstanding that the defendant has not been warned?

THE COURT: No, they are not obliged to warn him. The leading case on that is The People against Hill, 198 N.Y.

MR. RYAN: I object to it as incompetent, irrelevant and immaterial.

THE COURT: I overrule the objection upon that ground.

MR. RYAN: I take an exception.

THE COURT: The question arises, have you brought yourself within the Randazzio case.

MR. WASSERVOGEL: Yes.

THE COURT: Who were the interpreters?

MR. WASSERVOGEL: An Italian interpreter named Degurio.

THE COURT: Was he of the District Attorney's selection or a public interpreter?

MR. WASSERVOGEL: An interpreter selected by the District Attorney who was present at the time.

CASE # 1808

THE COURT: I will allow the question.

MR. RYAN: We except.

THE COURT: Ask him if, through the interpreter, the following question was put, and if he made the following answer -

THE WITNESS: I don't know him (referring to Mr. Breckenridge.)

THE COURT: Ask him whether or not the question read by the District Attorney was put to him through the medium of an interpreter and whether he, through the interpreter, made the answer as read to him by Mr. Wasservogel.

THE WITNESS: I don't remember that.

BY MR. WASSERVOGEL:

Q Where were you going that night? A I was going to 25th street. I was going with Arturo. I was sleeping in Arturo's house. I was looking for work in New York.

BY THE COURT:

Q Where did Arturo live? A 25th street.

BY MR. WASSERVOGEL:

Q You are sure you did not talk with the girls or smile at the girls or even see these girls?

THE COURT: He said that he saw them.

MR. WASSERVOGEL: I withdraw the last part of the question.

THE COURT: In the early part of his examination he said that he saw two girls, and then he went outside.

CASE #1808

BY MR. WASSERVOGEL:

Q You say that you did not talk to the girls or smile at the girls? A How could I talk to them. I could not speak English.

Q You can smile in English, can't you?

THE COURT: You had better leave that out.

BY MR. WASSERVOGEL:

Q Well, never mind -- you went out on the platform of the car, didn't you? A Yes.

Q You went out alone? A Yes.

Q And until that time you had been minding your own business? A Yes, sir.

Q You had not spoken to any one save your friends all the way downtown until then? A Yes, sir, I remained on the platform only a little while and then I went out of the train.

Q And without having done anything to any one at all, some men struck you, is that what you say? A I only know this, when I was on the platform there, this man, this tall man, started to holler at me, pointing at me and pointing to these girls. I did not understand what he said. When I got off the train I said "What are you hollering for." I said that in Italian to him. He called me a son of a bitch. I told him "You are a son of a bitch", and after that they started to beat me.

Q Up to that time you had done nothing at all? A No.

Q And the next thing you say, one of these men struck you?

CASE # 1808

A I don't know if it was one man or two men or three men that struck me. I know I was struck.

Q At the time you were struck, how far were your two friends from you? A I know nothing more about it. I know that I was struck. What is the use of your now annoying me by putting those questions, those questions, those questions -- if I have to die, let me die now and be done with it.

Q You saw one of the men fall down on the station platform, did you not? A No, I did not see nothing. I only know that they beat me, they beat me up, that is all I know.

Q You are a shoemaker you say? A Yes.

Q You are sure that you never had this knife in your hands?

A I never had any knife. I only use a knife in my trade, and with the knife I was only cutting soles of the shoes.

Q Did you use this knife in your trade (Exhibit 3)?

A No, sir, a shoemaker's knife is a different knife from that.

Q You saw one of the men lying in the station room there, did you not? A No, sir.

BY THE COURT:

Q Did you see anybody cut the sergeant of police or a citizen? A No, sir, I don't see nobody -- after awhile they took me before a man.

Q Did you notice his condition? A No, sir, they carried me like a sheep before this man. I was all beat up. My head was swollen and I did not see nothing.

CASE #1808

Q Were you assaulted before the man was cut or afterwards?

A What do I know. When just I came out of the train he called me a son of a bitch and I answered him and then they started to beat me and that is all I know.

Q You stated on your direct examination that some one said to you you killed a man and you answered "I don't know" -- was that information conveyed to you in English? A They told me that in Italian. You did kill a sergeant.

Q Where were you told that? A They told me that at the police station.

Q Did you wear a hat that night? A Yes, sir.

Q What kind of a hat? A A derby hat.

Q Have you that derby hat with you? A No, sir.

Q What became of your derby? A What do I know, I did not see it any more.

Q Did you have any marks on your face? A I was bleeding in the head.

Q Were you treated by any physician? A Yes, sir, they put a stitch in me. They did not take care of me. When I arrived at the station house -- but I believe it was in the night or next morning the doctor came and put some stitches in me.

BY MR. WASSERVOGEL:

Q Just one question, do you remember having stated to Mr. Breckenridge that you came downtown all alone, nobody was with you at all, that these two other Italian men were not your friends

CASE #1808

8

154

do you remember that? A I never saw that man before (indicating Mr. Breckenridge).

Q Will you answer the question, did you say that? A I don't remember that I said that.

BY THE 8TH JUROR:

Q When the fight began on the platform, did your friend Arturo help you or run away? A I did not see them any more after that, because after that they caught hold of me and kept me there.

BY THE TENTH JUROR:

Q What were you struck with -- did the officers strike you with their fists or use some weapon?

BY MR. WASSERVOGEL: Translate that please -- the juror wants to know if he was struck by the officer with his fist or with a weapon.

THE WITNESS: I don't know. I find my head was broken, that was all.

BY THE 11TH JUROR:

Q Did you take anything else but drink that afternoon, did you take any drug?

MR. WASSERVOGEL: The gentleman wants to know if you took anything else but drinks that afternoon, any drug -- is that the question?

THE 11TH JUROR: Yes, sir.

A No, sir.

CASE #1808

BY THE COURT:

Q Did you ever use any drug? A No, sir.

Q Or any kind of a drug? A No, sir, never, never.

A R T U R O O R T E N S I O, called as a witness in behalf of the defense, being duly sworn and examined, testified as follows:

(Residence 250 West 35th street)

(The witness testifies through the official interpreter Mr. Villamena)

DIRECT EXAMINATION BY MR. RYAN:

Q What business are you in? A Boarding house.

Q Do you know the defendant? A Yes.

Q And was he stopping in your house for some time prior to the 28th of September? A Yes, sir.

Q How long had he been there prior to that time? A Fifteen or twenty days.

Q And do you remember Sunday, September 28th? A Yes.

Q Where did you go that afternoon? A 116th street and First Avenue.

Q Did you go up there alone? A With Gorgoni and Paolo, another young man.

Q What was the man's name where you visited? A Pasquale Gatano.

Q What did you do when you got to Pasquale's house? A We eat our dinner there.

CASE #1808

Q Did you have anything to drink there? A Yes, sir; wine, liquors, beer.

Q What time was it that you arrived there? A About three o'clock.

Q And how long did you remain there? A Until about six o'clock.

Q And what did you have to drink there? A Wine, beer, cognac, and strega.

MR. FOX: What is strega?

THE WITNESS: It is an Italian cordial.

BY MR. RYAN:

Q Did you see the defendant Gorgoni drink anything? A Yes, sir, he drank a good bit.

Q Did he drink more than you did? A Yes.

Q What did he drink there? A All that was there.

Q That is, you mean that he drank wine and beer both? A Yes.

Q The defendant, I mean, drank both wine and beer? A Yes, I am talking about him.

Q And where did you go after you left there? A We went into a saloon and had a drink there also.

Q Then where did you go after that? A We took a 2nd avenue elevated.

Q And was the defendant Gorgoni in such a condition that you and the other friend had to help him to the elevated railroad station that afternoon?

CASE #1808

MR. WASSERVOGEL: What did they do.

THE COURT: The question is too leading -- I will sustain the objection.

MR. WASSERVOGEL: I think this witness understands English and an effort should be made to have him speak English.

BY THE COURT:

Q How long have you been in this country? A (In English) Nine months.

Q Is this your first time in America? A (In English) Yes, I speak English but not well -- sometimes I make a mistake -- if you want, I speak English. I do not understand, sometimes I make mistakes sometimes.

THE COURT: Do not lead the witness.

BY MR. RYAN:

Q About what time was it that you got --

THE COURT: He may state the condition of the defendant.

BY MR. RYAN:

Q What was the condition of the defendant at the time you left pasquale's house? A What condition?

THE COURT: In reference to sobriety.

BY MR. RYAN:

Q In reference to the fact that he had been drinking.

A (In English) He was drunk.

Q Do you remember what station was it that you took the

CASE #1808

elevated train? A Yes, 2nd avenue -- I don't remember well, it is the 2nd or 3rd avenue, I don't remember the street.

Q What happened when the train got to the 23rd street station?

(The question is put through the interpreter)

MR. RYAN: I will withdraw that question.

BY MR. RYAN:

Q What station did you intend to leave the train at?

A (Through the interpreter) 23rd street.

Q And did you endeavor to have the defendant leave the train at that station with you? A Yes.

Q What did the defendant say to you when the train reached the 23rd street station? A Told me that was not the station, that we did not arrive yet at the station, where we should get off.

Q And what did you say to him in regard to getting off between 23rd street and 19th street station? A Then I said all right, we will get off at the next station.

Q When the train reached the 19th street station, who got off of you three, who got off first? A Gorgoni.

Q Who followed Gorgoni? A I did.

Q Who followed you? A The two police.

Q Where was Paulo? A Paulo went away before.

Q Who got off of you three, who got off first at the station? A First Gorgoni and then I.

CASE #1808

Q When did Paolo get off? A Paolo went away from the other gate.

Q The other part of the car? A Yes.

Q Did you see any policeman or officer have hold of Gorgoni before you got off the train? A No. (In English)

THE WITNESS (through the interpreter) No, sir.

BY MR. RYAN:

Q What occurred on the station platform after you got off the train? A When we were in the train, those two men they started to say something.

Q I did not ask you that, the question was what happened on the station platform after you got off from the train?

A (Through the interpreter) The gate of the train was already shut and these two men opened the gate of the train and they pushed us out and when we got out there they started to beat us and I was beaten too, but I went away.

BY MR. RYAN:

Q Did one of these men hit you? A Yes.

Q Did you see those two men hitting the defendant? A Yes.

Q How many times were you hit? A I was hit only once with the fist.

Q And you saw the defendant being hit by both of those men, did you not? A Yes, sir.

Q Now, did you hear any conversation between the defendant and these two officers on the platform of the train before you

CASE #1808

got off? A I heard those two men call the defendant a son of a bitch and I heard the defendant answer back to the man the same words.

Q As you were getting off the car what, if anything, did you say to the two officers? A I said to them "Leave him go, the man is drunk."

Q After you got off the train platform and got on the station platform, where did you see the defendant go? A He went near the rail, near the wall.

Q The wall of the station? A Yes.

Q Which way did Paulo go?

THE COURT: He went to the rear.

MR. RYAN: There are two exits from the elevated station.

THE COURT: He got off at the other end.

MR. FOX: At the other end of the car.

BY MR. RYAN:

Q Did you see Paulo leave the station after you got on the platform? A I met Paulo downstairs.

Q You did not see him leaving the gate of the station?
A No, I saw him downstairs.

Q Which gate of the station did you go out of? A This side (indicating his left)

CROSS EXAMINATION BY MR. WASSERVOGEL:

Q At what station did you say you boarded this train?

A I don't remember the station; I don't remember if we took the

80817 ESCV
CASE #1808

2nd or 3rd avenue train, but we took a station at 116th street.

Q That was about half past six in the evening? A Yes, sir, about quarter after six or half past six.

Q You boarded the train together with the man Paolo and this defendant, is that correct? A Yes.

Q Now when was it for the first time that you saw two girls in the car? A When we went in.

Q And where did you sit down, which part of the car? A We were sitting on the right hand side of the car.

Q Your friend Paolo sat with you? A Yes.

Q But the defendant Gorgoni did not sit with you two men? A He sat near us -- I don't remember well -- I don't remember well, if at the time when we went in the train Gorgoni was sitting next to me, because it was quite crowded. All I know that after a little while Gorgoni sat right alongside of me.

Q You also know there was a time in your trip downtown that Gorgoni did not sit with you and your friend Paolo, is not that correct? A Yes, there was a moment that he was not sitting next to me.

Q Do you know Mr. Breckenridge here? A Yes.

Q You have seen him? A Yes.

Q Do you remember Mr. Breckenridge had a talk with you about this case? A (In English) Yes.

Q Mr. Breckenridge asked you this question "Tell us what happened when you got on the train".

MR. FOX: Won't you give the time and place.

CASE #1808

MR. WASSERVOGEL: This is cross-examination.

MR. FOX: Yes, but I have a right to have the time and place fixed, as to analleged declaration and I ask that it be done.

MR. WASSERVOGEL: October 20th, 1913, in the office of the District Attorney.

MR. FOX: That was what I wanted to know.

BY MR. WASSERVOGEL:

Q Do you remember that? A Yes.

Q Do you remember Mr. Breckenridge asking you this question "Tell us what happened when you got on the train"? A What avenue do you ask me?

Q Mr. Breckenridge asked you this question "Tell us what happened when you got on the train"? A (Through the interpreter) Yes.

Q And you answered "The other fellow sat down with me, Gorgoni was a short distance off, there were two girls opposite, one was about 35 years old and the other 16" -- do you remember that? A Yes, but the girl was on the other side.

Q What I want to get at is this, you told Mr. Breckenridge when you first entered the car, Gorgoni was a little distance away from you? A Yes.

Q He did not sit down with you two men -- you understand me? A Yes, but the girl was on the other side.

Q I talk about the defendant now -- the defendant did not

CASE #1808

sit with you and Paolo at that time - you remember that? A Yes.

Q You also remember that the girls changed their places several times, didn't they? A I saw only one time the girls changed place.

Q At least one time you saw the girls change their places?

A Yes, sir, I saw the girl change place and after a couple of stations they left the train and went away.

Q Do you remember this "Gorgoni did not sit down near me and my friend. There were three or four places between us. He was just opposite the girls" -- you remember that? A Yes.

THE COURT: Put it to him in Italian.

THE WITNESS (through the interpreter) He was, yes, two or three seats away from me, but in the same line or same side I was sitting, and I was also in front of those girls.

BY THE COURT: _____

Q Did Gorgoni take a seat opposite those girls, in the same enclosure? A (Through the interpreter) No, sir, we were sitting in the place that goes right along the train.

BY MR. WASSERVOGEL:

Q You mean the cross seats?

THE COURT: No.

MR. WASSERVOGEL: Ask him the question.

BY MR. WASSERVOGEL:

Q Do you mean you were sitting in the cross seats? A No, we were sitting on the long seats.

CASE #1808

Q Did you see the girls in the cross seats at any time, do you remember that? A Yes, I saw them sitting there.

Q You also saw that the officers were at the front end on the same side that you were, the front end of the car, the same side that you were? A No, sir, they were far away from us.

Q Didn't you tell Mr. Breckenridge that the officers were up at the front and on the same side that you were? A (Through the interpreter) On the other side of the car, yes. It is a great distance, yes.

Q You mean to say you were at one end of the car and the officers were at the other, is that it? A (Through the interpreter) Yes.

Q You did not speak to the girls did you? A No.

Q Your friend Paolo did not speak to the girls, did he?

A No, sir.

Q How many times did the defendant change his seat in the car altogether? A He got up and he went outside on the platform.

Q But before that? A I did not see him.

Q He went out on the platform alone, didn't he? A Yes.

Q You remained in the same seat where you were before? With Paolo? A Yes, sir.

Q Did the officers go out on the platform before you and Paolo did? A No, sir.

Q You went out on the platform with your friend Paolo before the officers did, is that it? A I did not notice those two men before. When we got to the station Gorgoni got up and I let

CASE # 1808

him go a little ahead of me and I was following him, watching him, and these two men were after us, and they started to talk to him.

Q Was not Gorgoni standing on the platform of the car for at least one station before you arrived at 19th street? A Gorgoni went on the other platform, not at the platform where those policemen were.

Q He went out on the platform before you reached 19th street? A Yes, sir, he went outside on the platform long before that. He said to me that he did not feel well, and he wanted to take some fresh air.

Q You remained in the car with Paolo? A Yes.

Q Now tell me, did the officers go out on the platform first or did you and Paolo do so? A First Gorgoni, then I, then those two officers. I said to them "Excuse him, he is drunk." They started to insult me and punch me and the conductor was there to shut the gate of the train when the two officers opened the gate of the train and threw us out.

Q So you were on the platform of the car when you said to the officers "Excuse him he is drunk"? A Yes.

Q But up to this time Gorgoni had done no wrong at all, had he? A He was outside on the platform -- no.

Q But you said "Excuse him, he is drunk"? A Yes.

Q Then the officers struck you? A Yes.

Q You and Paolo and Gorgoni and the two officers went out

CASE #1808

on the platform? A Yes -- Paolo did not come out with me on the platform of the station. I did not see him.

Q But you did go out on the platform with Gorgoni, you are sure about that, are you not? A Yes.

Q As soon as you were out on the platform, you immediately ran downstairs, is that correct? A After they started to strike at me I ran downstairs, yes.

Q When you arrived downstairs you saw your friend Paolo?

A Yes.

Q So that you do not know whether any one was cut or not, do you? A No, sir, I do not know.

Q You did not see anybody cut? A No, sir.

Q Of course you yourself did not cut anybody, did you? A No.

Q You saw that your friend Gorgoni was being struck by two men, didn't you? A Yes.

Q You did not try to help him in any way, but ran downstairs? A Yes.

Q When did you next see Gorgoni? A I did not see him any more.

Q You visited him in the Tombs, did you not? A No, sir.

Q This man had been living with you? A Yes.

Q Have you had any talk with his wife since his arrest? A Yes

Q His wife was not living with you at the time when he was living with you, was she? A No.

Q Yes or no? A Yes -- he sent the wife over to some friend of ~~his~~ hers, because he did not have no money to pay the rent.

Q So you yourself did not take part in this affair at all on the station? A No, sir.

Q The defendant is a shoemaker, is he not? A Yes.

CASE #1808

RE-DIRECT EXAMINATION BY MR. RYAN:

Q How long before you reached the 19th Street station was it that Gorgoni went out on the platform? A Fifteen or twenty stations before.

Q You had a talk with him when the train reached 23rd Street station, didn't you? A Yes, sir; I called him from the platform. I said "We arrive at the station."

Q Where did he go after you spoke to him? A He remained there talking with me.

Q That end of the train, was it at the same end of the car? A Yes.

Q These two officers, did you know they were policemen? A No.

Q They did not have policemen's uniforms on? A No.

Q Did they show you any badge or shield, like the interpreter had on his coat there? A No, sir; did not show nothing.

BY THE COURT:

Q Did you see those men exhibit their shields to the women? A No, sir.

Q Were you intoxicated that night? A No.

Q Was Paolo? A No, sir; well, we felt good but were not drunk.

Q Did you assist the defendant at any time that night, did you help him? A What do you mean by help?

Q Was he able to walk? A No, I helped him.

CASE #1808

Q Did you help him? A Yes.

Q Did he fall at any time? A I believe that he fell one time-- he did not fall exactly, because I held him.

Q How many blows did you receive? A One. It is broke here yet-- I have the mark (indicating).

Q Did the person who struck you have anything in his hand? A Both of these two men placed their hands in their pockets before they struck us. I saw something bright but I could not see if it was a gun or whatever it was.

Q Can you identify the man who struck you? A Yes.

THE COURT: Call in Officer Deneen.

(Officer Deneen is brought into the court room.)

BY THE COURT:

Q Look at officer Deneen, do you recognize this man?

A Yes.

Q Did he strike you? A Yes.

Q Now, did not Officer Deneen strike you after the other officer said, "Bill, I am stabbed"? A No, sir; he struck me right after I left the gate of the train.

Q Did you hear anybody say "Bill, I am stabbed"? A No,

Q Did you see how many times the defendant was struck by the other man who was in the company of Officer Deneen? A I saw that they were striking him but I did not see how many times.

Q Who struck the defendant? A The other man.

CASE #1808

Q Did you see Officer Deensen strike the defendant?

A I saw him go near Gorgoni.

Q Did you see him do anything to Gorgoni? A No, I did not see it.

BY MR. WASSERVOGEL:

Q Gorgoni went out on the station platform alone, didn't he? A He was ahead of me and I was after him.

Q You did not have hold of him when he went out on the platform? A Yes. I caught hold of Gorgoni when we went out on the platform and then I went between Gorgoni and those two men, telling them "excuse him, he is drunk."

Q But at that time Gorgoni had not done anything to the officers, when you used the words, "Excuse him, he is drunk"?

A No, sir.

BY THE COURT:

Q Did you see Gorgoni speak to any women on the train?

A No, sir; Gorgoni was laughing.

BY MR. WASSERVOGEL:

Q Didn't you say before that Gorgoni had gone out on the station platform to get the air and that he had been out on the platform for some little time before you arrived at 19th Street?

MR. FOX: You mean the car platform. You said station platform.

MR. WASSERVOGEL: Yes; the car platform.

THE WITNESS: Yes.

CASE #1808

BY MR. WASSERVOGEL:

Q He walked out on the platform alone that time, did he not, A Yes.

Q You remained in your seat in the car? A Yes.

Q That was what I thought.

BY THE COURT:

Q At what station did you expect to get off that night?

A 23rd Street.

Q Did you approach the platform of the train when the train was about to pull in at 23rd Street? A No; when the train stopped at 23rd, then I called Gorgoni.

Q You called him inside? A Yes.

Q At the time that you called Gorgoni in, did you see Officer Deneen and the other officer? A No, sir.

Q Did you see Officer Deneen prior to the time that he struck you? A No.

Q Did you or Gorgoni say or do anything to Officer Deneen or the officer? A No, sir.

PAOLO NIGRO, called as a witness on behalf of the defense, being duly sworn and examined, testified through the official interpreter, Mr. Villemena, as follows:

DIRECT EXAMINATION BY MR. RYAN:

Q Do you know the defendant? A Yes.

CASE #1808

Q Do you remember Sunday, the 28th day of September last?

A Yes.

Q Where were you that afternoon, on the afternoon of that day? A We went uptown to the house of a friend of Ortensio.

Q What did you do up there? A We ate and drank.

Q What time did you get there? A About three o'clock.

Q How long did you remain there? A About six o'clock.

Q What did you have to drink up there? A Wine and beer.

That is all.

Q Did you see the defendant drink anything? A Yes, he drank.

Q What did he drink? A Wine and beer.

Q What was his condition at the time you left your friend's house uptown in reference to whether or not he was intoxicated that afternoon? A Yes, sir; he was drunk.

Q Do you remember when you reached the 23rd Street station of the elevated railroad? A Yes.

Q What car were you riding in on that train that you were on? A We were in the middle of the train.

Q What part of the car did you get off from, the front or rear of the car? A I went out from the front part of the car.

Q And did the defendant and Arturo get off the car at the same place? A No, I went out from the front part of the

CASE #1808

car and they went out from the rear part of the car.

Q What did you see after you got out on the station platform? A I saw a crowd there, a whole lot of people, all mixed up together. The whistle of the conductor, of the train, was blowing. I saw that. I went downstairs.

Q And you went away? A Yes.

Q Nobody assaulted you or struck you, did they? A No. Nobody assaulted me.

Q When did you meet Arturo after you left the station platform? A I was downstairs and Arturo came downstairs and I asked him: "Arturo, where is Frank," and he said to me: "I don't know, I think he is fighting with two men."

CROSS EXAMINATION BY MR. WASSERVOGEL:

Q When you entered the car did you sit down with your friend Arturo? A Yes, sir.

Q And Gorgoni did not sit with you two, did he? A No.

Q He sat on the other side of the car? A Yes.

THE TENTH JUROR: Can he use the diagram?

MR. WASSERVOGEL: If he understands it.

BY MR. WASSERVOGEL:

Q Can you indicate on this diagram, People's Exhibit 2, which part of the car you and Paolo sat down in; indicate the place where you and Arturo sat, when you entered the car, put a "P" there. A There (indicating, making a letter "P").

CASE #1808

Q Now, Arturo. A There (indicating, making a letter "A").

Q Where did Gorgoni sit? A There (indicating).

Q Put a "G" there. A (Witness indicated by placing the letter "G" at the point indicated).

Q Where did the girls sit when you entered the car?

A Here (indicating).

Q Mark a cross there. A (The witness complies).

Q Were you and Arturo separated by a partition? A Just as you go in the car I was sitting on the first seat and next to me Arturo came.

Q You were not separated by any partition? A No.

Q Don't you mean, then, that you were sitting here at the place where you marked the "A" and Arturo was sitting next to you, is not that correct? A Yes; I was sitting here (indicating the first seat), and he was sitting here (indicating).

Q Was there anything to separate you two? A No, sir.

MR. WASSERVOGEL: They must have been on the other end of the car.

BY MR. WASSERVOGEL:

Q Suppose you indicate on this side here (indicating).

MR. WASSERVOGEL: All the marks made by the witness are now rubbed out and the diagram is reversed.

BY MR. WASSERVOGEL:

Q Now indicate at this end of the car the place where you

CASE #1808

were sitting; put a "P" there. (The witness indicates as desired.)

Q Put "A" where Arturo sat when you entered the car.
(The witness indicates as directed.)

Q Now indicate where Gorgoni sat; put a "G" there.
(The witness indicates as directed.)

Q Where were the girls? Put two crosses there. (The witness indicates as directed.)

Q Can you indicate on this diagram where the police sat when you first observed them and put a letter "O" for officers.
(The witness indicates by placing the letter "O" on the diagram).

MR. WASSERVOGEL: "P" indicates the seat where the witness sat. "A" where Arturo sat. On the other side Gorgoni and the two girls next to him and the two officers on the same side with the witness and Arturo.

BY MR. WASSERVOGEL:

Q Now, how long did Gorgoni remain sitting next to the girls? A A few minutes.

Q And where did he then go? A He went on the back of the train.

Q Did you notice where the girls went to? A They went and sat near those two men.

Q They sat down next to the officers, didn't they?
A Yes.

Q You saw the officers speak to the girls before the girls

801-1808
CASE #

sat down beside them, didn't you? A After they sit there, the girls next to the officers, they talked, yes, a few words, and they did not say nothing more.

Q I mean before. A It was the man that called the girls and they went and sat next to the man.

Q Did you see Gorgoni speak to the girls? A He was laughing only, that was all.

Q Did you see Gorgoni sit in the cross seats at any time? A No, sir.

Q You did not get off at 23rd Street, did you? A No.

Q Who went out on the platform first, on the platform of the train? A Gorgoni.

Q And who followed him? A Ortensio.

Q And then did you follow them? A No sir; I went through the other door.

Q Up to that time did you hear the defendant have any conversation with the two officers? A No, sir.

Q Did you see anybody strike the defendant? A No, sir; I did not see nothing of that.

Q Did you see either of the officers take hold of the defendant? A No, sir; I did not see that.

Q All that you know is that you were on the train with Gorgoni? A That is all. That is right.

Q You did not see anybody stabbed, did you? A No, sir; I did not see nobody stabbed.

CASE #1808

Q Of course, you never used this knife yourself, did you?

A No, sir; I never used any knife.

Q Why did you run downstairs, what were you afraid of?

A I saw there a big crowd collecting and I saw a good many people and I went away. Why should I remain there to look, I went downstairs for my business.

Q Were you not interested in your friend Frank Gorgoni?

A Yes, I went downstairs until Ortensio got there and when Ortensio came down there I went away with Ortensio. He said: "Maybe Frank have a fight upstairs, let us go."

Q At that time you did not know anything about this fight at all, when you were downstairs, did you? A I heard the train whistling and I heard noises and I know there was a fight but I did not know who was fighting.

Q You did not know whether your friend Gorgoni had done any wrong up to that moment or not, did you? A I did not know anything about it.

Q Do you remember having a talk with Mr. Breckenridge upstairs in the District Attorney's office about this case?

A Yes.

Q Do you remember telling Mr. Breckenridge "I think Frank Gorgoni was a little drunk at the time." Do you remember that? A Yes, I said that but when men are drinking a bottle of wine and beer, I don't know how much he could stand and I said a little drunk, yes.

CASE #1808

Q Did Arturo tell you that he was mixed up in the fight upstairs?

MR. FOX: I object. Is the declaration of the witness Arturo admissible, his attention not having been called to any such matter on cross examination? How can a declaration of Arturo be relevant?

THE COURT: Is it your theory, Mr. Wasservogel, to impeach Arturo?

MR. WASSERVOGEL: I simply want to know the conversation he had with Arturo downstairs-- I am testing the credibility of the witness on cross examination.

MR. FOX: I submit that alleged declarations of the witness Arturo are irrelevant and inadmissible to bind the defendant and are collateral, and I wish to say to the court that Arturo's attention was not directed on cross examination to any such alleged conversation.

MR. WASSERVOGEL: The witness has already on direct examination stated a conversation that he had with Arturo when he came downstairs and I am questioning him regarding that conversation.

THE COURT: It was elicited upon direct examination.

MR. WASSERVOGEL: Yes.

THE COURT: A declaration made by Arturo is not binding upon the defendant.

MR. FOX: Is it admissible for any purpose?

CASE # 1808

THE COURT: It might be on question of testing credibility.

MR. FOX: I maintain that it is not.

THE COURT: I will have the question read.

(The question is repeated by the stenographer.)

THE COURT: I will allow the question.

MR. FOX: I except.

THE COURT: Of course, Gentlemen of the Jury, the answer must not bind or affect the sentence. It is simply as bearing on the credibility of this witness.

MR. FOX: I take an exception.

THE WITNESS: Arturo told me when I was downstairs: "I wanted to take Frank with me when two men struck me and I came downstairs."

BY MR. WASSERVOGEL:

Q Did you go back to the station platform at all, yes or no? A No, sir.

THE DEFENSE RESTS.

WILLIAM J. DENEEN, re-called in rebuttal:

BY MR. WASSERVOGEL:

Q Officer Deneen, you saw the witness Arturo Ortensio on the stand when you were brought into the court room? A Yes.

CASE # 1808

Q Is that the person that you testified on your direct examination that you struck that night? A Yes.

Q Where was he when you struck him and where were you?

A It was on the Second Avenue elevated, on 19th Street--

Q Were you on the train or on the station at that time?

A On the platform station.

Q Did you strike the defendant or either of his companions on the train? A No, sir.

Q Did Sergeant McNierney strike the defendant or either of his companions on the train? A No, sir; on the platform.

Q On the platform? A Yes.

Q And the defendant was struck at a time when he was trying to run away, as you testified, on your direct examination?

MR. FOX: That is a conclusion I think, your Honor.

THE COURT: It is a conclusion.

MR. WASSERVOGEL: I am simply making a resume of the testimony given by the witness before. We do not want to go over it again.

BY THE COURT:

Q When was the defendant struck and what was he doing at the time? A The deceased?

Q No, the defendant.

MR. WASSERVOGEL: The man on trial.

Q What was he doing when he was struck? A Will you

CASE #1808

please give me that over again?

BY MR. WASSERVOGEL:

Q There was a time when the defendant was struck by someone? A Yes.

Q Who was the person who struck him, you or Sergeant McNierney? A The defendant?

Q Yes. A I struck the defendant.

Q Did McNierney strike him? A He had nothing to strike with only his hand.

Q Did he strike him with his hand? A No, sir.

Q Did you strike him with anything? A Yes.

Q With what? A I struck him with my billy to protect myself.

Q When was that? A When the sergeant cried: "Bill, he stabbed me"--- naturally enough I had to go to the defense of the sergeant.

Q Did you strike the defendant with your billy or with your hand, before you heard the sergeant cry out: "Bill I am stabbed"? A How could I?

Q I ask you-- I was not there. A No, I did not.

Q Did you notice the defendant's condition at any time that evening, as to whether he appeared sober or drunk? A He was as sober as I was, gentlemen, and I was not drunk.

Q Was you sober? A I certainly was.

BY THE COURT:

Q Did you smell his breath? A No, I did not.

CASE #1808

MR. FOX: Perhaps you did not try.

BY THE COURT:

Q Did you try to do so? A I did not try; no, sir; I did not.

MR. WASSERVOGEL: In view, if your Honor please, of the fact that this witness Paolo indicated on this diagram the positions in which he sat and where the girls sat, would it not be proper for the guidance of the jury, to have Deneen indicate on the diagram where the girls sat?

THE COURT: Yes, because by consent the diagram will be given to the jury.

MR. WASSERVOGEL: I think that ought to be done. It will only take a minute longer.

MR. FOX: Is this at the time when they entered the car?

MR. WASSERVOGEL: Yes.

BY MR. WASSERVOGEL:

Q Will you please indicate on this diagram the place where you first observed the defendant Gorgoni-- do you understand the diagram? A These are cross seats and this the motorman's box. If you don't mind, I could explain it to you.

Q No, indicate on the diagram. A This is the last car.

Q I do not care anything about the car. A This is the car ahead (indicating).

CASE #1808

Q The whole thing is the car, this is one car (referring to the diagram).

THE COURT: That is the interior of a railroad car.

THE WITNESS: Here is where the motorman's box is and this is where we were sitting.

THE COURT: Indicate that.

BY MR. WASSERVOGEL:

Q Where you were sitting? A Yes, and here is the door.

Q Mark your own initials. A This is where I was sitting, right here.

Q Put the letter "D" there. Now, where was McNierney?

A Here (indicating).

Q Put an "Mc" there. (The witness indicates).

Q Where was Gorgoni sitting? A When first I saw him he was right there (indicating).

Q Near the window? A Yes.

Q Suppose we put a letter "G" there. Where were the girls sitting at that time? A Right here (indicating).

Q This is one seat here (indicating). A This is where he was sitting right here (indicating).

Q He was sitting here (indicating). A The two girls here and he was facing this way.

Q The girls were sitting here? (Indicating.) A Yes.

Q And the defendant was sitting there (indicating)?

A Yes.

1200

CASE # 1808

Q Where were his two friends at that time, do you recollect that? A They were back.

Q Do you happen to know where they were? A Yes, they were back that way (indicating).

Q Whereabouts? A I did not pay particular attention.

Q You cannot tell us? A No, not about his two friends.

A JUROR: Would it not be well to have the officer indicate which is the front and which is the back of the car?

THE WITNESS: The train was going south.

A JUROR: Were the officers at the front end of the car or rear end?

THE WITNESS: We were at the rear end of the car. These are the two seats we were in. This is the car going south.

BY MR. WASSERVOGEL:

Q This shows the motor end of the car and the trailer end-- the diagram.

THE COURT: Does the officer indicate where the young girls sat?

MR. WASSERVOGEL: Yes, when he first saw them.

MR. FOX: It seems to me it would be well to indicate the end of the diagram which represents the forward end of the car by an arrow, which would indicate in which direction the car was going.

CASE #1808

MR. WASSERVOGEL: It is marked, the motor end and the trailer end of the car.

BY MR. WASSERVOGEL:

Q Will you say if this is the front of the car, this end? A This is where we were sitting.

Q Is the South Ferry end of the car? A That is south.

MR. FOX: Put the arrow there.

(Mr. Wasservogel places an arrow at the front of the car.)

BY MR. RYAN:

Q Where was this; at what station did you notice the defendant and his two friends? A Between 34th and 23rd going south.

Q Where did you get on? A 86th Street.

Q There is nothing, from your indications on this map, where the defendant and his two companions were seated and where you and Sergeant McNierney were sitting, which would show that at one time the defendant and his two friends were not sitting at the places indicated by the witness, Paolo, is there? A I do not know nothing at all about the other two men.

MR. FOX: He was not in the room when Paolo testified.

MR. WASSERVOGEL: Suppose I ask him this question.

BY MR. WASSERVOGEL:

Q You testified on your direct examination that the girls changed seats. Indicate on this side where they sat down after

CASE #1808

they changed. A After they changed their seats-- this is a cross seat here, (Indicating).

Q Yes. A There is where the two girls sat and this is where the defendant sat right here on this seat.

Q Suppose we indicate this place where they first changed their seats the first time. A From here over there (indicating).

Q We will mark that again-- did the girls again change their seats after that? A Yes.

Q Where did they next go? A They came from there and went into the little motorman's box, where the motorman sits.

Q In this place, (indicating)? A Yes. That is in front of us.

Q You were sitting right opposite? A Right opposite.

Q Where did the defendant then go? A He came from there and then came all the way back.

Q Did he stand near the girls? How far away was he from them at that time? A Right in front of them.

Q Here we have the girls at the end, in the motorman's box and the defendant standing in front of them? A Yes.

-BY MR. RYAN:

Q You do not know whether or not the two friends of the defendant-- there is nothing on this diagram or nothing in your mind which would indicate that the two friends of the defendant did not sit in these two places here indicated by lead pencil

CASE #1808

crosses? A They did not sit there.

Q You did not know where they sat before you got on the train, after 57th Street? A I know they were not sitting in front of me.

Q You do not know where these two friends sat before you got on the train, do you? A I know they were not sitting in front of me.

Q Answer my question, do you know where they were sitting on this car?

THE COURT: Is not that immaterial?

MR. WASSERVOGEL: Of course he could not tell where they were before he got on.

THE COURT: He said he boarded the train at 86th Street.

A JUROR: I think the trouble is that your witness marked the train at one end and this witness has marked it from the other. That is why I wanted the direction in which the car was going indicated on the diagram.

MR. RYAN: I was only trying to show that he does not know where these people sat before he got on the train.

THE COURT: He could not know that.

MR. RYAN: That is all.

T e s t i m o n y C l o s e d .

THE COURT: Gentlemen of the Jury: Do not discuss this case among yourselves or permit any person to talk with you about it, or form or express any opinion as to the guilt or innocence of the defendant until the case is finally submitted to you. We will adjourn until to-morrow morning at 10:30.

1201

CASE # 1808

THE COURT'S CHARGE.

ROSALSKY, J.:

Gentlemen of the Jury, our citizens should appreciate the necessity of freely and willingly giving up their time and attention to the performance of their public duties, even though it entail no small hardship and business inconvenience. You are called upon to perform one of the most important duties the State can exact from a citizen. Perhaps no higher duty can devolve upon you than that of being called upon to serve as jurors on an issue involving the life or the liberty of a person accused of crime. You have afforded a fine illustration of the sacrifices which citizens are often called upon to make in behalf of the commonwealth. With unwearied attention you have followed the details of this case, with never a suggestion of the irksomeness of the duties which the State is exacting from you. I would therefore convey to you my thanks for the close interest which you have given to the consideration of this case, and, I also wish to express my thanks to the learned and distinguished counsel representing the defendant, and to the learned Assistant District Attorney, for their gentlemanly and courteous conduct during the trial, each representing his cause with great fidelity and learning.

You should consider the statements, comments and arguments made by counsel on either side based upon the evidence,

CASE #1808

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but, you should disregard statements, comments and arguments of counsel on either side which are not supported by the evidence, or, remarks which are of a personal nature. In the introduction of evidence the defendant, through counsel, has a right to contest the case of the prosecution, step by step, to dispute every theory and fact advanced against him, and to introduce evidence to disprove the charge.

All offers of counsel to prove things which were not proved, or which were not permitted to be proved by the Court, and all arguments of counsel addressed to the Court upon questions of law or upon motions for the admission or exclusion of evidence, should be disregarded by you. The answers of witnesses stricken out, or matters in evidence which were stricken out, or matters not admitted in evidence which you were instructed to disregard, should be disregarded by you, and given no weight or consideration in the determination of the guilt or the innocence of the defendant.

If, by any excluded answer of a witness, or by any offer of testimony which was excluded, or by any question which was not allowed, any suggestions were conveyed to your mind of things not in evidence, you should resolutely refuse to be moved by such suggestions. You are only to consider matters which were legally admitted in evidence.

It is the duty of the Court to present for your consideration the rules of law which shall govern you in determining

CASE #1808

the guilt or the innocence of the defendant, and, likewise it is the duty of the jury to accept the law as declared by the Court. It is essential to the due administration of justice that you shall not question the correctness of any rule of law laid down by the Court for your guidance.

The jury are just as sovereign with respect to all questions of fact as is the Judge with reference to all questions of law. It is your duty upon your oaths, to apply the law to the facts, and to determine whether or not the evidence establishes, beyond a reasonable doubt, the allegations set forth in the indictment.

It is the duty of the Court to safeguard the defendant's rights to a fair and impartial trial.

An indictment is an accusation in writing charging a person with a crime, and the mere finding thereof is absolutely no evidence of the guilt of such person. The People are required to establish the allegations of the indictment beyond a reasonable doubt, before you will be justified in rendering a verdict of guilty.

The defendant in a criminal action is not called upon to establish his innocence; the burden of establishing the guilt of the defendant rests upon the People throughout the entire case.

The defendant is indicted for one of the highest crimes known to the law: Murder in the first degree.

CASE #1808

1202

It is charged in the indictment that on the 28th day of September, 1913, in the Borough of Manhattan, County of New York, the defendant wilfully, feloniously, and with malice aforethought, did make an assault upon one Joseph McNierney with a knife, and that due to the wilful and malicious assault, induced by the malice aforethought of the defendant, the deceased, Joseph McNierney, came to his death.

MR. FOX: If your Honorplease, would it be out of order to ask your Honor to read the rest of the sentence. It says with a certain knife, which, in my copy reads "he, the said Gorgoni, in his right hand then and there held", and I notice it now for the first time. It is not a fatal variance at all, but your Honor is reading from the indictment, and I wish you would read the whole sentence.

THE COURT (continuing) Right hand is printed -- with his right hand -- if you find the defendant inflicted the fatal wound, it matters not whether he inflicted it with his right or left hand.

THE COURT (continuing) There are four kinds of homicides, murder, manslaughter, excusable and justifiable homicide.

The law provides "No person can be convicted of murder or manslaughter, unless the death of the person alleged to have been killed, and the fact of killing by the defendant as alleged, are each established as independent facts; the

1201

CASE # 1808

former by direct proof, and the latter beyond a reasonable doubt.

The corpus delicti, that is, the body of the offense, is made up of two things; first, that a human being was killed, and that must be established by direct proof. Secondly, the existence of criminal and human agency as the cause of death, and that must be established beyond a reasonable doubt.

The term "direct proof" means direct proof of the fact of killing; that is, that the death of a human being, and in this case the death of Joseph McNierney, was due to violence of a criminal character, and was produced by human agency, and that it was not due to accident or mistake, or to a self inflicted wound.

The proof of the identity of the body, and that the defendant committed the crime, may be established by circumstantial evidence and beyond a reasonable doubt.

Homicide is the killing of one human being by the act, procurement or omission of another.

The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed from a deliberate and premeditated design to effect the death of the person killed, or of another.

Murder in the second degree is the killing of a human being when committed with a design to effect the death of

1209

CASE # 1808

the person killed or of another, but without deliberation and premeditation.

Manslaughter in the first degree is the killing of a human being when committed without a design to effect death, in the heat of passion, but in a cruel and unusual manner or by means of a dangerous weapon.

You will observe the distinction relative to the various degrees of homicide. In murder in the first degree it is necessary to prove that a human being was killed from a deliberate and premeditated design to effect his death. That is, the killing, the design to kill and premeditation and deliberation upon that design.

In murder in the second degree, deliberation and premeditation form no elements of the crime. It is necessary to prove the killing and a design to kill.

In manslaughter in the first degree, it is necessary to prove that the killing was done without a design to effect the death of the person killed, in the heat of passion, and in a cruel and unusual manner, or by means of a dangerous weapon.

Premeditation and deliberation are matters which the jury must find from the evidence in the case. They are frequently mental operations known only to the defendant himself, and the only possible way for human judgment to ascertain these mental operations is by the acts of the defendant

1219

CASE #1808

and the reasonable, rational and fair inferences from the acts established.

You are to consider the nature of the weapon, the manner of its use, the character of the wound inflicted on the deceased, and the number of wounds, and all of the surrounding circumstances under which the injury was inflicted. Was the knife closed? Was there deliberation in the mind of the defendant to open it, and if so, what was his purpose? Did he premeditate upon the design and intent to use the weapon, and then, from all the circumstances surrounding the transaction, you will determine whether or not the defendant, if he killed the deceased, did so from a deliberate and premeditated design to take his life.

While the law requires, to constitute murder in the first degree, that the killing shall be deliberate and premeditated, nevertheless it does not require that the deliberation and premeditation shall exist for any great length of time before the crime is committed. The courts of this state have so frequently defined premeditation and deliberation, that it would be hardly wise on my part to attempt to give you any new definition. I shall therefore read to you certain extracts from the decisions of the Court of Appeals of this State, because they embody the law of the State which binds our courts and juries.

In Leighton vs. People, the Court said: "If, therefore,

CASE # 1808

the killing is not the instant effect of impulse, if there is hesitation or doubt to be overcome, a choice made as the result of thought, however short the struggle between the intention and the act, it is sufficient to characterize the crime as deliberate and premeditated murder."

In People vs. Majone, the Court said: "Under the statute there must be not only an intention to kill, but there must also be a deliberate and premeditated design to kill. Such design must precede the killing by some appreciable space of time; but, the time need not be long. It must be sufficient for some reflection and consideration upon the matter, for choice to kill or not to kill, and for the formation of a definite purpose to kill. And, when the time is sufficient for this, it matters not how brief it is. The human mind acts with celerity which it is sometimes impossible to measure, and whether a deliberate and premeditated design to kill was formed, must be determined from all the circumstances of the case.

In People vs. Conroy, the Court said: "The intention to commit a homicide which is not formed under the impulse of immediate provocation, or a sudden and instinctive apprehension of danger from some apparent cause, would seem to involve, to a certain extent, both deliberation and premeditation. These terms are not the creation of our statute, but were considered essential elements of the crime

CASE # 1808

at common law."

Under our law it is the duty of the Court to submit to the jury every degree and grade of the crime embraced by the evidence, so that the jury may determine from the proof presented, whether the defendant is guilty of the highest or the lowest degree of crime, or of an attempt to commit the highest or lowest degree of crime.

Section 444 of the Code of Criminal Procedure provides as follows: "Upon an indictment for a crime consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the crime. Upon a trial for murder or manslaughter, if the act complained of is not proven to be the cause of death, the defendant may be convicted of assault in any degree constituted by said act, and warranted by the evidence."

I am therefore obliged to define unto you assault in the first degree; assault in the second degree; attempt to commit the crime of murder in the first degree, and attempt to commit the crime of murder in the second degree.

Section 240 of the Penal Law provides as follows: "A person who, with an intent to kill a human being, or to commit a felony upon the person or property of the one assaulted or of another, assaults another with a loaded firearm or any other deadly weapon, or by any other means or force like-

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CASE # 1808

ly to produce death, is guilty of assault in the first degree."

To constitute the crime of assault in the first degree, it is necessary to establish that the defendant, with intent to kill a human being, committed an assault by means of a deadly weapon or by any other means or force likely to produce death. It is not necessary for the People to prove that the person assaulted should have died from the effect of the injury sustained.

Section 242 of the Penal Law, so far as it is applicable to this case, reads as follows: "A person who, under circumstances not amounting to the crime specified in Section 240, namely, the crime of assault in the first degree, wilfully and wrongfully wounds or inflicts grievous bodily harm upon another, either with or without a weapon, is guilty of assault in the second degree.

What is an attempt to commit a crime? "An act done with intent to commit a crime and tending but failing to effect its commission, is an attempt to commit that crime."

In an attempt to commit the crime of murder in the first degree, all of the elements of that crime must be proved excepting that death did not ensue as a result of the injury inflicted upon the deceased, by the defendant, and in an attempt to commit the crime of murder in the second degree all of the elements of that crime must be proved ex-

CASE #1808

cepting that death did not ensue as a result of the injury inflicted upon the deceased by the defendant.

If you are satisfied from the evidence beyond a reasonable doubt that the defendant committed the crime of killing Sergeant McNierney, and there is reasonable ground for doubt of which degree of homicide he is guilty, or of which degree of assault he is guilty, or whether he is guilty of an attempt to commit the crime of murder in the first degree, or of an attempt to commit the crime of murder in the second degree, it would be your duty to find the defendant guilty of the lowest degree of crime charged. That is to say, if you have a reasonable doubt as to his guilt of murder in the first degree, and no reasonable doubt as to his guilt of murder in the second degree, you must give him the benefit of that doubt, and find him guilty of murder in the second degree. You must apply the same rule to the degree of murder in the second degree, and to the degree of manslaughter in the first degree, and likewise to attempt to commit the crime of murder in the first degree, or to an attempt to commit the crime of murder in the second degree, or assault in the first degree or assault in the second degree. While it is within your power to find a verdict of a lesser degree of crime than the one charged, that power must not be arbitrarily used in disregard of the evidence. The jury is bound to find a verdict in accordance with the evidence as they believe it to have been established. The jury must

CASE # 1808

not capriciously find a verdict of a lesser degree where the evidence satisfies them that a higher degree of crime has been committed. You are only to consider the charges of assault in the first degree, assault in the second degree, and an attempt to commit the crime of murder in the first degree or an attempt to commit the crime of murder in the second degree, if you find that the wounds inflicted by the defendant did not, or if you have a reasonable doubt that they did produce death, or that the wounds were not the actual or proximate cause of death.

To convict the defendant of the crime of murder in the first degree or murder in the second degree, or manslaughter in the first degree, it will be necessary for you to find from the evidence, beyond a reasonable doubt, that the wounds inflicted upon the deceased by the defendant, if he did inflict them, were the actual or proximate cause of death, together with the other essential elements of that grade of crime which you believe the evidence to establish.

The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. That which, in a natural and continuous sequence, unbroken by any new cause, produces an event, and without which the event would not have occurred. The proximate cause is that which is most proximate in the order of responsible causation. Another definition is "The proximate cause of an event must

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9

CASE # 1808

be understood to be that which, in a natural and continuous sequence, unbroken by any new, independent cause, produces that event, and without which that event would not have occurred.

The proximate cause is not limited to the cause immediately preceding the event; for example: -- If a person received a stab wound, and as a result of the wound, gangrene or blood poisoning or lobar pneumonia set in, and he dies as the result of the gangrene, blood poisoning or lobar pneumonia, then the stab wound which caused that condition is the proximate cause of the death, and the person inflicting the stab wound is responsible for the death. The death in such case flowed from the stab wound, and it matters not that some intermediate cause actually produced the death if the stab wound produced that immediate cause. In such a case the person inflicting the stab wound is not relieved from the responsibility for the death simply because medical treatment or other medical treatment than that given, might have saved the person whom he stabbed, so long as death did not ensue from gross negligence in the medical treatment.

Among the requests submitted by the learned counsel representing the defendant, I am requested to charge that if the jury find as a fact that the wounds inflicted by the defendant were such as naturally or of themselves would cause death, but that death resulted from a poisonous or septic

CASE #1808

condition which developed in the deceased from some cause other than any wound inflicted by the defendant, then the jury cannot convict the defendant either of murder or manslaughter in any degree whatsoever. I so charge. If you reach that conclusion upon the evidence, you will determine whether the defendant committed the crime of an attempt to commit the crime of murder in the first degree, or of an attempt to commit the crime of murder in the second degree, or of assault in the first degree or of assault in the second degree.

In this connection it is your duty to weigh, analyze and consider carefully, all the evidence submitted by the People, including the evidence of the physician, with a view to determining what was the cause of death, and whether the wounds inflicted by the defendant upon the deceased, if he did inflict them, were the actual or proximate cause of death, and you are to consider the nature and character of the wounds and the region of the body where the wounds were inflicted. Were they mortal wounds? Did they actually or proximately cause the death of the deceased? This you must answer from the evidence.

You have heard Dr. Lehane, one of the Coroner's physicians who stated that he has had many years' experience in the work as a Coroner's physician. He testified, among other things, as follows: "I found that the deceased had

CASE # 1808

his abdomen considerably distended with blood and serum. I found that he had in the lower lobe of his right lung a well marked condition or stage of lobar pneumonia, and upon said examination, the result of such, I came to the conclusion that the deceased came to his death from lobar pneumonia, following a stab wound of the abdomen. Q Caused by a stab

wound, would you say? A Yes. Q Tell us what the causes were in this particular case which produced lobar pneumonia?

A. It was brought about by the septic condition which the individual had resulting from the stab wound. Q Could it

have been brought about in any other way but by the stab wound? A No, sir, not in my opinion. By Mr. Fox:

Q Then it is a fair statement of your testimony that you draw an inference from the wound, the existence of the wound and the existence of certain infection, that the deceased died of lobar pneumonia, is that it, resulting from the

wound? A Resulting from the wound, yes. Q When you say resulting, that, of course, is necessarily your opinion, is it not? A That is correct. Q You do not intend to

tell the jury in your opinion that was a mortal wound?

A Yes, sir, a certain amount of material could have entered into that wound which would have affected the system.

Q Will you state to the jury that the second wound was, in your opinion, as a matter of fact a mortal wound? A Yes.

Q Is it your opinion that the deceased would have died from

CASE #1808

either one of those wounds necessarily? A It was my opinion. Q On the first part of your examination, did you not tell the jury that it was one particular wound which, in your opinion, caused lobar pneumonia? A No. By Mr. Wasservogel: Q You said something in answer to a question put to you by Mr. Fox about an infection you found, that is the sepsis you speak of? A Yes. Q That was caused by what, in your opinion? A That was undoubtedly in my opinion caused by the entrance of the knife into the individual. Q That was caused by what, in your opinion? A That was caused, in my opinion, by a knife or an instrument perforating the abdominal cavity.

Dr. Horace Auringer testified that he was an ambulance surgeon connected with Bellevue Hospital; that he found the deceased on the elevated station in a state of shock, and that he had a wound of the abdomen; that there was protrusion of the lining of the abdominal cavity which, in his opinion, showed evidence of a stab wound; that he applied a dressing and bandages which were sterilized.

Dr. Smith testified, among other things, that he performed the operation on the deceased within a half hour after his admission to the hospital. He stated to you in detail how he operated upon the deceased; that the deceased died of lobar pneumonia superinduced by shock, hemorrhage, weakness of the patient, and caused by the injury or wounds

1220

CASE #1808

which the patient had sustained, and the operative procedure necessary to treat the injuries, and that lobar pneumonia frequently follows grievous wounds or injury to the person; that before proceeding to operate, he carefully sterilized his hands, and followed the procedure usually adopted by skilled and experienced surgeons, and that the dressing and bandages were also sterilized.

Dr. Hagameier, a physician attached to Bellevue Hospital, expressed his professional opinion that the deceased died of stab wounds.

Dr. Cahill testified that he was present when the deceased was operated upon by Dr. Smith; that the cause of death was due to pneumonia following stab wounds, which wounds were infected. This physician also used sterilized dressing and bandages.

While I have briefly referred to the medical testimony, it is your duty to weigh and consider carefully all of the testimony presented for your consideration.

Now, it is one of the ordinary consequences of a wound, that a surgeon should be called to treat it. In this case the surgeon determined that it was necessary to perform an operation upon the deceased, Sergeant McNierney. It is for you to say whether the surgeon and the other physicians followed the usual course of practice which good and competent surgeons under the circumstances, are accustomed to

CASE # 1808

521

adopt in treating a patient.

The law does not exact from physicians the highest degree of professional skill, but only such skill as men of their profession are, under the circumstances, accustomed to apply. The true test is: Were the physicians attending the deceased guilty of negligence which was the direct cause of death? If not, it is no defense that the deceased under another form of treatment might have recovered.

You must also take into consideration that if the defendant inflicted a grievous or mortal injury upon the deceased, it is for you to determine whether or not an operation was made necessary, due to the defendant's conduct, and if so, did the physician exercise approved methods of medical and surgical treatment for wounds of the character which the deceased sustained.

You have heard the testimony of the medical witnesses. You are to take into consideration their ability, experience and medical skill and whether they are truth telling witnesses.

If you find from the evidence, beyond a reasonable doubt that the defendant inflicted upon the deceased a serious, grievous and mortal wound with a weapon, in such a manner as to put life in jeopardy, so as to require the performance of an operation, if sepsis sets in because of the operation without any gross carelessness or mismanagement on the

CASE #1808

1222

part of the surgeons and physicians, and death follows, it does not alter the nature of or diminish the gravity of the defendant's act.

In a celebrated case, The Commonwealth against Hackett, Chief Justice Bigelow said: "If a man receives a wound, which is not in itself mortal, but either for want of helpful applications or neglect thereof, it turns to a gangrene or a fever, and that gangrene or fever be the immediate cause of his death, yet, this is murder or manslaughter in him that gave the stroke or wound, for that wound, though it were not the immediate cause of death, yet if it were the mediate cause thereof, and the fever or gangrene was the mediate cause of his death, yet the wound was the cause of the gangrene or fever, and so consequently is causa causati.

Though the stroke were not so mortal in itself but that with good care and under favorable circumstances the party might have recovered, yet if it were such from whence danger might ensue, and the party neglected it or applied ineffacious medicines, where, by the wound which at first was not mortal in itself turned to a gangrene, or produced a fever whereof he died, the party striking shall answer for it, being the mediate cause of his death. So, in a more recent case, the jury were instructed that if the defendant wilfully and without justifiable cause, inflicted a wound, which was ultimately the cause of death, it made no differ-

CASE #1808

1223

once whether the wound was in its nature instantly mortal, or whether it became the cause of death by reason of the deceased not having adopted the best mode of treatment. The real question is, was the wound the cause of death. From these and other authorities the well established rule of the common law would seem to be, that if the wound was a dangerous wound, that is, calculated to endanger or destroy life, and death ensued therefrom, it is sufficient proof of the offense of murder or manslaughter, and, that the person who inflicted it is responsible though it may appear that the deceased might have recovered if he had taken proper care of himself, or submitted to a surgical operation, or that unskilful or improper treatment aggravated the wound and contributed to the death, or that death was immediately caused by a surgical operation rendered necessary by the condition of the wound. The principle upon which this rule is founded is one of universal application and lies at the foundation of all our criminal jurisprudence. It is that every person is to be held to contemplate and to be responsible for the natural consequences of his own acts. If a person inflicts a wound with a deadly weapon in such manner as to put life in jeopardy, and death follows as a consequence of this felonious and wicked act, it does not alter its nature or diminish its criminality to prove that other causes co-operated in producing the fatal result.

CASE #1808

Now, the defendant in this case interposes two defenses, intoxication and self defense. The law of this state permits the interposition of what might seem to be inconsistent defenses, and therefore you are to take into consideration the evidence as to the defendant's intoxication, with a view to determining the true condition of the defendant at the time that he inflicted the blows upon the deceased, if he did inflict them. Was he in a state of intoxication? It is the law of this state "No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition, but whenever the actual existence of any particular purpose, motive or intent, is a necessary element to constitute a particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act." It is the duty of the Judge to leave it to the jury to take into consideration the question of intoxication, in determining the motive or intent of the accused, and whether he acted with deliberation and premeditation.

In the case of The People against Leonardi, the Court of Appeals of this state says "We do not think that under this statute the intoxication need be to such an extent as to necessarily and actually preclude the defendant from

208

CASE #71808

forming an intent or from being actuated by a motive, before the jury would have the right to regard it as having any legal effect upon the character of the defendant's act. Any intoxication, the statute says, may be considered by the jury and the decision as to its effect rests with them. That a man may be even grossly intoxicated, and yet be capable of forming an intent to kill, or do any other criminal act is indisputable, and if, while so intoxicated, he forms an intent to kill and carries it out with premeditation and deliberation, he is, without doubt, guilty of murder in the first degree, and the jury should, when such a defense is interposed, be so instructed. It is a most important and far reaching statute in its possible effects, and the jury ought to be warned that where the criminal act is fairly and clearly proved, the fact of intoxication as furnishing evidence of the want of the criminal intent which the proof might otherwise show, should be considered by it with the greatest care, caution and circumspection, and such fact ought not to be allowed to alter the character or grade of the criminal act unless they have a fair and reasonable doubt of the existence of the necessary criminal purpose or intent after a consideration of such evidence of intoxication. The safety of society depends, to a large extent, upon the due administration of our criminal law, and the voluntary intoxication of an accused person should be most

1221

CASE # 1808

cautiously considered before arriving at a conclusion that it has, in any way, altered the character or grade of a criminal act. It ought always to be borne in mind that by the terms of the very statute cited; no act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition. In other words, it should still be remembered that voluntary drunkenness is never an excuse for crime. If the accused be sober enough to form an intent and so deliberate upon and premeditate the crime, then he is responsible the same as if he had been perfectly sober, and that he is guilty, even though intoxicated. By our statute, deliberation and premeditation are necessary constituents of the crime of murder in the first degree, and if by reason of intoxication the jury should be of opinion that the deliberation or premeditation necessary to constitute murder in the first degree did not exist, the crime is reduced to a lower grade of murder, or in the absence of any intent to kill, then to manslaughter in some of its grades. The intoxication need not be to the extent of depriving the accused of all power of volition or of all ability to form an intent. The jury should be instructed that if the intoxication had extended so far in its effects that the necessary intent, deliberation and premeditation were absent, the fact of such intoxication must be considered, and a verdict rendered in

CASE # 1808

1227

accordance therewith."

The next defense which you will consider is the claim of counsel for the defendant that he was justified in inflicting injury upon the deceased, because of the attempt on the part of the deceased and Officer Deneen, to inflict, and who did, in fact, inflict, according to the defense, injury upon the defendant, and that the defendant at that time had reasonable ground to apprehend a design on the part of the deceased and Officer Deneen, to inflict grievous bodily harm upon him, or to do some great personal injury to him, and that the defendant was in imminent danger of such design being accomplished. If under those circumstances the defendant killed the deceased, you cannot convict him of any crime whatsoever. The question arises in this case whether the defendant, upon the circumstances which presented themselves to him, was justified in resorting to force or violence, in order to prevent injury to his person.

Justifiable homicide under our law, is defined as follows: "Homicide is justifiable when committed in the lawful defense of the slayer, when there is reasonable ground to apprehend a design on the part of the person slain, to do some great personal injury to the slayer, and there is imminent danger of such design being accomplished."

Now, what were the true circumstances surrounding the stabbing of the deceased? You must determine that from

CASE #1808

the evidence. Was this a case of self defense? If it was, you cannot convict the defendant.

It is the law when one who is without fault himself is attacked by another in such a manner or under such circumstances as to furnish reasonable ground for apprehending a design to take away his life, or to do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, I think he may safely act upon appearances and kill the assailant, if that be necessary to avoid the apprehended danger, and the killing will be justifiable, although it may afterwards turn out that the appearances were false, and that there was in fact neither design to do him serious injury, nor danger that it would be done. The defendant must decide at his peril upon the force of the circumstances in which he was placed, for that is a matter which will be subject to judicial review -- that is to say, subject to a review by a jury. Before a party can justify the taking of human life in self defense, he must show that there was reasonable ground for believing that he was in great peril; that the killing was necessary for his escape; that no other safe means was open to him. When one believes himself about to be attacked by another, and to receive great bodily injury, it is his duty to avoid the attack if in his power to do so, and the right of attack for the purpose of self defense does not arise until he has

CASE #1808

229

done everything in his power to avoid its necessity. There must be reasonable ground on the part of the defendant to have apprehended a design on the part of the person slain to do some great personal injury to the defendant. There must be imminent danger of such design being accomplished. The question is not merely what did the accused believe, but what did he have a right to believe under the circumstances in which he was placed at the time.

I shall not review the evidence, gentlemen, because you have given careful consideration to the testimony of all the witnesses.

Did Sergeant McNierney and Officer Deneen use force and violence towards the defendant before the defendant inflicted blows with a knife upon McNierney, if he did inflict them, or thereafter. You must determine that from all the circumstances. Was the defendant placed in a position, as the law says, and did he have reasonable ground to apprehend a design on the part of the person slain or the one who was in his company, to do unto him some great personal injury, and was there imminent danger of such design being accomplished? If there was, then the plea of self defense must prevail. If not, it is for you to say from the evidence of what grade and degree of crime he is guilty.

There is some evidence in the case that Officer Deneen received wounds at the hand of the defendant, after Sergeant

1230

CASE # 1808

McNierney was stabbed by him. That evidence was a part of the transaction that occurred at the time. The mere fact that he injured Deneen is no evidence that he is guilty of killing or injuring Sergeant McNierney. The law permits in a case of this character to allow the evidence, because it is competent as part of the same transaction, and as bearing upon the motive and intent of the defendant in committing the crime, and can only be considered by you for such purpose, and no other. Proof of injury to Deneen is no proof that he killed Sergeant McNierney, or that he inflicted grievous bodily harm upon him, but being a part of the same transaction, the evidence was allowed as bearing, as I have said, upon the motive and intent of the defendant.

You must weigh carefully what all of the witnesses have said, the witnesses called by the People and the witnesses called by the defense. Was the defendant under the influence of liquor that he could not form the intent to do any injury, and if he inflicted the injury, did he inflict it from a deliberate and premeditated design to take life, or did he, with justification, inflict the injury? You must decide those questions from the evidence. Give the defendant the benefit of a thorough, careful, patient and neutral investigation of the evidence. It is your duty to

CASE #1808

123

do so.

The burden is upon the People throughout the case to establish beyond reasonable doubt, that the defendant inflicted the injury upon the deceased without justification. It is solely your province to determine the weight and credit to be given to the testimony of all witnesses called by the defendant, and by the People. If you believe that any witness has wilfully testified falsely in any material particular, it is within your power to accept or reject the testimony of that witness in whole or in part, as either credible or incredible, as the case may be. The testimony of each witness must be fairly and impartially considered and tested by a discriminating judgment, with a view to determining whether a witness had a motive or interest other than to speak the truth. It is also within your power to attach to the testimony of any witness whatever value you think it is entitled to, and you may draw upon your own experience and knowledge of human nature in estimating the value of a witness' testimony. In judging the quality of testimony, you may take into consideration the demeanor, manner and bearing of the witness -- his

CASE # 1808

attitude, whether neutral, friendly or hostile towards the prosecution or the defense, and his capacity or opportunity for knowledge or observation of the event or occurrence of which he or she testified. Whenever you can consistently reconcile conflicting testimony, it is your duty to do so, but where you find any conflict of testimony that you cannot reconcile, do not hesitate to cast aside that which you deem **incorrect** exaggerated, colored, partial and biased, or wilfully perverted, and accept and hold fast to that which you believe to be impartial, unbiased, correct and truthful.

You have a right to take into consideration the interest of the defendant in the result of the trial, in considering his testimony, with a view to determining what weight and credit you will attach thereto.

The defendant is presumed to be innocent until he is proved to be guilty by your verdict. That presumption rests with him throughout the case, until the moment when the jury are convinced from the proofs submitted to them, that the defendant is guilty of the crime charged, and then the presumption of innocence is destroyed.

The defendant is entitled to the benefit of every reasonable doubt arising from the evidence in the case. A reasonable doubt is not a mere whim, guess or surmise, nor should it be regarded as a mere subterfuge to which resort may be had, in order to avoid the performance of a disagree-

CASE # 1808

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able duty. A reasonable doubt is not a mere speculative doubt, because everything relative to human affairs that is based upon evidence, may be open to some possible or imaginary doubt. It must be a doubt arising from such fact or facts in the case as lead you, as intelligent men, acting impartially on the evidence, to the conclusion that you are not wholly satisfied in your own minds, that the defendant is guilty of the crime charged against him. It must be a doubt based upon the evidence. It is such a doubt as, after a careful consideration of all the evidence, leaves your mind in such a state that you cannot say that you are convinced to a moral certainty of the truth of the charge against the defendant. If you have a reasonable doubt as to the guilt of the defendant, it is your duty to give him the benefit of such a doubt and to acquit him.

It is the duty of each juror, while the jury are deliberating upon their verdict, to give careful consideration to the views and opinions of his fellow jurors. A juror should not stop his ears and stubbornly stand upon the position he first takes regardless of what might be said by the other jurors. You should discuss the case together and compare views and reasons, but before you make up your verdict each juror, without reference to the other jurors, should be satisfied in his own mind of the guilt or the innocence of the defendant. It is the duty of each juror to

1234

CASE # 1808

reason with his fellow jurors with an honest desire to arrive at the truth, and with a view to arriving at a verdict either for the People or for the defendant. It should be the object of all jurors to arrive at a conclusion, and to that end to deliberate together with calmness. It is your duty to agree upon a verdict, if that be possible without a violation of conscientious convictions. You are not responsible for the law pertaining to the death penalty. You have been accepted by both the learned District Attorney and by the learned counsel for the defense to serve in this case because of your statements that you will obey the law of the land. You have no right, therefore, to take into consideration the question of punishment in reaching a verdict. When you were empanelled in this case, you became a part of the court charged with doing your duty without fear or favor, and without allowing sympathy or prejudice to influence you in your verdict. The law is no respecter of persons. In the eye of the law it matters not whether the deceased was the highest or the lowest member of society. The law is blind to the individual. If a crime has been committed, and evidence beyond a reasonable doubt is presented, establishing the guilt of the defendant, it is the duty of the jury to disregard the individual whose life was taken, but the jurors must act upon the legal and competent evidence, and under their oaths, perform their duty fearlessly, fairly and impartially.

CASE # 77-1808

FBI

The magnitude of this case must not be under-estimated. The rights of the People as well as the rights of the defendant must be conserved by you. The interest on the part of the People is not a desire for vengeance. It is a desire that the law shall be maintained and enforced.

If you believe from the evidence that the People have established the defendant's guilt beyond a reasonable doubt, you should render a verdict of guilty in accordance with the grade of crime that you believe the evidence has established, and if you have a reasonable doubt as to his guilt, you should acquit him.

A case of this character is always unpleasant to all parties concerned. I have a duty to perform under my oath of office. Likewise the public prosecutor has a duty to perform and so have you. It is the duty of the Court to see that the defendant receives a fair and impartial trial; that the rights of the People and the rights of the defendant are carefully guarded and protected. It is your duty, upon your oaths, to weigh the evidence carefully and impartially. You must endeavor to dismiss from your minds every impression which may have a tendency to lead you away from an honest and impartial consideration of the evidence. The rights of the accused and the interests of the People demand that you do this.

In this country where true civilization reigns supreme

CASE # 1808

1236

every person, be he high or low, no matter what his color or condition in life may be or what his race or creed may be, when arraigned before an American jury is entitled to a fair trial free from the slightest taint of prejudice. We are living in a period where we have been emancipated from every form of intolerance and prejudice, and it goes without saying that you gentlemen will give unto the defendant that fair and impartial trial which the law accords to every man brought to the bar of justice. Do your duty fearlessly. Do it conscientiously. Do not permit sympathy or prejudice in the slightest degree to warp your judgment. If you believe the defendant to be guilty, do not hesitate to find a verdict accordingly, and you will find one of the following verdicts: Guilty of murder in the first degree, or an attempt to commit the crime of murder in the first degree; guilty of murder in the second degree, or an attempt to commit the crime of murder in the second degree; guilty of manslaughter in the first degree, or guilty of assault in the first degree, or guilty of assault in the second degree, or not guilty.

MR. FOX: I handed your Honor yesterday certain requests to charge.

THE COURT: I am requested by the learned counsel representing the defendant to charge you as follows: First, that the defendant cannot be convicted of the crime of murder

CASE # 1808

in the first degree. I decline to so charge, and the jury will take into consideration the Court's instructions in the main charge. It is a question of fact for the jury, from the evidence, to determine whether or not the defendant committed the crime of murder in the first degree.

MR. FOX: I except.

MR. FOX: I ask your Honor to charge as follows: That if the jury find as a fact that the defendant received blows from the deceased, blows on the head, and that as a result of the blows received the defendant became so dazed that he did not realize what he was doing, then he is not responsible for his acts, and is entitled to a verdict of not guilty.

THE COURT: Do you not think that request is entirely too broad, Mr. Fox. You see you leave out the elements, the condition in which he was. If the defendant's condition such was that he had no control over himself or did not know what he was doing, and did not know the nature and quality of the act --

MR. FOX: It is my duty to be frank with the Court. I profited from one case in the Court of Appeals.

THE COURT: What case?

MR. FOX: The People against Johnson.

THE COURT: 139 New York?

MR. FOX: Yes. The Judge was requested to charge that if the jury believed that after the defendant was struck by

CASE #1808

McDonald -- I suppose he was the deceased -- it was at page 355.

THE COURT: I have it before me, page 363.

MR. FOX (continuing) That if the jury believe that after the defendant was struck by McDonald upon the head with a club he was dazed or his mind became in such a condition that he did not realize what he did after that, that he is not responsible for his acts, and that they must acquit him -- almost word for word -- if your Honor will charge as they did in that case.

THE COURT: There is something omitted. Here is what the Judge said: "If you reach the conclusion that the blow which McDonald struck affected his mind so that he did not know right from wrong -- what I just said to the jury -- and did not know the nature of the act that he was doing, then he would not be guilty and could not be convicted, but, you must be satisfied, gentlemen, from all the evidence in the case, that that was the condition of his mind, that he did not know the nature of the act which he was doing. With this qualification I so charge.

MR. FOX: Defendant's counsel excepted to the qualification of his request and asked the Court to charge that if he was in such a dazed condition that he did not know what he was doing and did not realize what he was doing, then he is not guilty. To this the Judge, in my copy, is said

CASE # 1808

to have replied "If it affected his mind so he did not know the nature of the act, I charge that proposition."

THE COURT: I so charge.

MR. WASSERVOGEL: May I ask your Honor to charge the jury in connection with the claim of self defense, that the jury are to consider all the evidence in the case, including that of the defendant that he did not do the stabbing, and that the knife was not his.

THE COURT: The jury will consider all of the evidence I have so stated.

MR. FOX: It is suggested that I request you to charge as follows -- it is my request -- that your Honor charge the jury that intoxication can be considered on the question of motive and intent.

THE COURT: On the question of intent, premeditation and deliberation. I have covered that.

MR. FOX: I thought it was omitted. Then I ask your Honor to charge the jury that they may consider intoxication on the question whether deliberation has, as matter of fact, been proven beyond a reasonable doubt.

THE COURT: I so charge. I have covered it.

MR. FOX: Will your Honor charge the jury that gross intoxication may of itself be sufficient to raise a reasonable doubt on the issue of deliberation.

THE COURT: I so charge, that is the law.

CASE # 1808

MR. WASSERVOGEL: Of course the question of intoxication itself is for the jury, because there is a conflict in the testimony upon that.

THE COURT: Of course.

THE 2ND JUROR: Will you kindly intimate to us -- it is not entirely clear to me, just what the defendant's rights or privileges were when the officers in ordinary dress, interfered with his progress, it being unknown to him that they were officers -- what his standing was, and what would be the difference if they had been ordinary citizens?

THE COURT: Is that in the case?

THE 2ND JUROR: Does it have any bearing, that is the question.

THE COURT: I understood Mr. Fox in his summation this morning virtually withdrew that theory from the case.

MR. FOX: No, I said I understood that the question of his being guilty because he was resisting arrest was out of the case, because he did not know what was in the mind of the officer.

THE COURT: That fact should be considered by the jury.

MR. WASSERVOGEL: That is a question for the jury.

THE COURT: Exactly. You gentlemen must find from the evidence in the case what were the true circumstances that took place on that occasion. An officer or a citizen has a right to make an arrest for a crime actually committed in

124

CASE #1808

his presence, and before doing so he must state to the person that he is going to make the arrest, except where the arrest is made in the actual commission of the crime. You are to take into consideration the attire of the police officers; that they were in civilian attire. Did they exhibit a shield to the defendant. Did the defendant know that they were officers. Did they proceed to lawfully apprehend the defendant without attempting to use force or violence towards him. Every person must lawfully submit to arrest. If the defendant in this case did not know, or even if the defendant did know -- first take this example, if he did know that the man was a police officer, and that the officer instead of attempting to place him under arrest, proceeded to assault him, and to use violence, and to place him in a position where he had reasonable grounds for believing that serious bodily harm was to be inflicted upon him, and that he was in imminent danger that that threat or conduct would be carried out, he would have a right to defend himself. Now, the same rule would be applicable to the case of a citizen. If a citizen before proceeding to arrest a man, used violence and force under similar circumstances, a man would have a right to defend himself. You must find from the evidence. You cannot speculate. If this defendant committed an act amounting to disorderly conduct tending to a breach of the peace, and the officer sought to place him in custody and to arrest

CASE # 1808

him, and exhibited to him his authority, and the defendant assaulted the officer, assaulted him first, without being in any position of danger, it will be for you to say from all the circumstances, whether the act was justified. An officer has no right to use force and violence unless it is necessary to prevent an injury to his person or to take one into custody, whether he is in uniform or not. Have I made myself clear to you?

THE 2ND JUROR: Yes.

MR. FOX: I must except to that part of your Honor's answer to the juror in which the Court said substantially that it was for the jury to find from the evidence whether the officer was attempting to arrest the defendant and the defendant assaulted the officer before he was assaulted by the deceased, upon the ground that there is no evidence to warrant it.

THE COURT: That was merely by way of illustration. I said to the jurors you must find what were the true circumstances, from the evidence. You must not indulge in speculation.

MR. FOX : You do not intend to submit it to the jury to find as a fact?

THE COURT: No, the jury must find the fact. I cannot instruct the jury on an abstract proposition of law to be applied to a case where the evidence does not apply. You

CASE #1808

have to determine the case from all the evidence.

MR. FOX: You do not mean to submit it to the jury in this case that any such thing occurred?

THE COURT: No.

MR. WASSERVOGEL: I think your Honor has covered this, but I ask your Honor to charge that even if the defendant did not know that the deceased was an officer, he was not justified in using a knife in the way in which it has been testified here, unless he believed himself in great bodily danger.

THE COURT: I have covered that several times.

Gentlemen, you will retire. If any exhibits are to be taken to the jury room, they can only be given to the jury by consent.

MR. FOX: We consent to the jury having anything there is.

(The jury retire).

LATER: The jury return to court and state that they find the defendant guilty of manslaughter in the first degree.

MR. FOX: I move to set aside the verdict and for a new trial upon the ground that the verdict is contrary to law, contrary to the weight of the evidence and upon all the exceptions taken during the trial and for errors appearing on

CASE #1808

the face of the record.

Motion denied. Exception.

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CASE #1808