

**START**

2851

**CASE**

CASE #2851

1661

INDEX.

	Direct	Cross	Redirect	Recross
William McSherry	51	54		
Malachy O'Beirne	75	85	97	

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CASE #2851

1662

IONS OF THE PEACE.

OF NEW YORK. PART III.

----- x  
T H E P E O P L E

-against-

MALACHY O'BEIRNE.  
----- x

:  
:  
: B e f o r e :

: HON. WILLIAM H. WADHAMS, J.

:  
:  
: and a Jury.

New York, August 4th, etc., 1920.

Indicted for assault in the first degree.

Indictment filed August 23rd, 1919.

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

ASSISTANT DISTRICT ATTORNEY OWEN W. BOHAN:

FOR THE PEOPLE.

FRANK HENDRICK, ESQ., FOR THE DEFENSE.

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TRANSCRIPT OF STENOGRAPHER'S MINUTES.  
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Frank S. Beard

Official Steno.

1663  
CASE #2851

2  
New York, August 4th, 1920.

(A jury was empaneled and sworn)

(The Court admonished the jury in accordance with Section 415 of the Code of Criminal Procedure, and adjourned the further trial of the case to Thursday morning, August 5th, 1920, at 10:15 o'clock.)

- - - -

TRIAL RESUMED.

New York, August 5th, 1920.

C H R I S T O P H E R   R O G E R S, of 86 Lexington Avenue, Brooklyn, a witness called on behalf of the People, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. BOHAN:

Q What is your business? A Grocery clerk.

MR. HENDRICK: Now, if your Honor please, I have some preliminary motions to make, to address to the Court.

THE COURT: I will hear you, Mr. Hendrick.

MR. HENDRICK: I move to dismiss the first count of the indictment, which alleges that the weapon was a dangerous weapon, and also alleges that the weapon was unknown to the Grand Jury, the grounds of the motion being the repugnancy of the two charges in the count, because no ev-

1664  
CASE #2851

dence can be introduced to sustain the deadly quality of the weapon.

I also move to dismiss the second count, on the ground that it is distinguished from the third count, and is based on the allegation that the weapon was likely to produce grievous harm, the allegation in the other count being entirely apart, that the kind of weapon was unknown to the Grand Jury, and it being evident that no evidence could be introduced to sustain the allegation.

I also move to dismiss the third count, on the ground that it is entirely based upon the allegation that there was a weapon held in the hand of the defendant, and yet there is the repugnant allegation that the kind of weapon was unknown.

THE COURT: That is in the third count?

MR. HENDRICK: Yes, sir. Every one of them says that the weapon is unknown, and the learned District Attorney, in his opening, says that it is purely a matter of inference that there was a weapon, and that shows the substance of my motion. Each of those counts of the indictment is repugnant in itself.

THE COURT: Well, it is rather an ingenious point, Mr. Hendrick, and quite worthy of you. But, nonconstat, the weapon might have been some device that was unknown to the Grand Jury, that they had never heard of or seen, and yet might be a dangerous weapon. Motion denied.

CASE #2851

MR. HENDRICK: Exception. Now, I move that the District Attorney be directed to elect on which of the three counts the defendant shall be tried, the ground of the motion being that the three counts are either cumulative or repugnant, the entire difference being the quality or character of the weapon.

THE COURT: I will not require the District Attorney to make an election at this time. Motion denied.

MR. HENDRICK: Exception.

THE COURT: You may proceed.

BY MR. BOHAN:

Q What is your business now, Rogers? A I am now working in a wholesale grocery house.

Q For whom? A Francis S. Legget & Co.

Q And on the 5th of August, 1919, by whom were you employed? A By James Butler.

Q In what capacity? A As manager of the grocery store at 412 Second Avenue.

Q Between what streets is that? A Between 23rd and 24th Streets.

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

Q And how long had you been there prior to the 5th of August, 1919? A About two weeks.

Q Did you have any assistants? A No, sir, I did not.

Q On the 5th of August, 1919, did you see the defendant

CASE #2851

in that store? I saw him down --

Q Just yes or no? A Yes, sir.

Q What time did you first see him, that day? A On or about ten o'clock in the morning.

Q Was he alone or with anybody else? A Yes, sir, he was alone.

Q Did you ever see him or know him before that time?

A Never knew him until I saw him on that morning.

Q Did you see him again during the day of August 5th?

A Yes, sir.

Q What time? A At 3:50 in the afternoon.

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

Q Were you alone or were there any customers in the store?

A There was a customer in just previous to that. He had left before this man and his accomplice came in.

Q (Question repeated) A No, sir. I was all alone.

Q Did he come in alone? A No, sir.

Q Was there anything said to you by this defendant when he came in? A In the afternoon?

Q Yes. A He came in and acted as spokesman, and told me, "We want you to close those doors up," and I said, "What authority have you to come in here, and tell me to close those doors? Why should I close them? Anybody can come in here, and tell me to close the doors. I only take my orders from the superintendent, or from headquarters."

1667  
CASE #2851

And he started in talking to me, meanwhile getting up close to the other man that was with him.

Q pardon me. Where were you standing? A Behind the counter.

Q And where were they? A They were standing in front of the counter.

Q proceed. What was further said by you and by the defendant? A And he said to me, "Are you going to close the doors?" And I said, "No. What authority have you got to tell me to close the doors?"

And, right on the instance, then, he grabbed right directly across the counter, grabbed hold of my vest (illustrating), and him and the other man pulled me across the counter, and pulled all the goods which I had on the counter over with me; and, when they got me out there they hit me, with what I don't know, but I can say that I don't want to be hit any harder with a man's fist, if it was his hand that struck me.

Q On what part of your person were you struck? A On the head.

Q How many blows? Do you recall? A That I can't tell you.

Q How many persons struck you? A Both of them struck me I think, but I'm not sure of that.

BY THE COURT:

Q Did both of them strike you? A Well, I'm not sure that

CASE #2851

the other one did, your Honor.

BY MR. BOHAN:

Q How long did they keep on beating you? A I don't know. I was struck one blow, and I know nothing after that.

BY THE COURT:

Q Was that the first blow? A Yes, sir.

Q So you only remember being struck one blow? A Yes, sir.

Q And you lost consciousness? A Yes, your Honor.

BY MR. BOHAN:

Q Well, who struck that blow? A The defendant there (indicating the defendant).

Q On what part of your body were you struck? A I was hit on my head.

Q Were you stunned then? A Yes, sir.

Q When you became revived, did you see these men in the store? A No, sir, I didn't.

Q They ran out? A Yes, sir.

Q They had disappeared? A Yes, sir, they had disappeared.

Q Now, when you came to, what was the condition of your face? A The condition of my face was that my face was cut on my left side.

Q How large was the cut? A Well, I should judge about two inches, or thereabout.

Q Was it deep? A No; not very deep. It was a slight abrasion.

CASE #2851

Q What other abrasion did you have, if any? A Lumps on both sides of my head.

Q Well, how large were the lumps? A Well, I can't just tell you that, but they were large enough so that I couldn't put my straw hat on, the hat I was wearing.

Q Did you have any lacerations or abrasions on your body? A No, sir, but three teeth were loosened in the front, which I had to get taken out afterwards.

Q Have you told now the condition of your face and body? A Yes, sir.

Q What was the condition of your clothes? A This is my vest (indicating). The shirt I gave to the officer, and the undershirt, I think; and the hat that the man left in the store who was with the defendant.

Q What was the condition of your shirt? A My shirt was torn practically in two, and the sleeves torn, and blood all over on the left side. My pants were torn from the hip here down (illustrating); and, all down the right side of my pants, my pants was full of oil from the floor.

Q Do you remember when you were on the -- question withdrawn Was any other part of your body bruised? A Well, not to my knowledge.

Q Have you told us all the injuries that you had, now? A Yes, sir, all the injuries that I sustained.

Q How long were this defendant and his companion in the

1670  
CASE #2851

store before they struck you, how long had you been talking to them? A I presume about five or seven minutes.

Q And he was directly in front of you, across the counter?

A Yes, right directly in front of me.

Q Did the other man join in the conversation that you had with him? A Well, he was talking to him.

Q But this defendant was talking directly to you? A Yes, sir. He acted as spokesman.

Q During that five or seven minutes? A Yes, sir.

BY THE COURT:

Q What is that which you have in your hand? A My vest, your Honor.

Q Is this in the same condition as it was when you came to? A Yes, sir.

Q On August 5th? A Yes, sir.

MR. BOHAN: I offer it in evidence.

THE COURT: Admitted.

(It is marked People's Exhibit 1.)

MR. BOHAN: You may examine.

CROSS EXAMINATION BY MR. HENDRICK:

Q Mr. Rogers, you have no interest, or prejudice, or desire or vengeance, or any other motive, which would prevent you from telling the truth, the whole truth, and nothing but the truth against the defendant? A Positively not, sir.

Q Your only desire is to inform the jury, so that they

CASE #2851

can make up their mind what happened? A Yes.

Q Is that right? A Yes.

Q And you don't let any motive come in between you and the jury, except that? A No, sir.

Q Now, I understand you to say that you are absolutely positive that this man is the man that struck you? A Without a doubt.

Q There can be absolutely no doubt of any kind, or any shadow of a doubt? A No, sir.

Q You are as sure of that as you are of anything in the world? A Yes, positively.

Q You are also sure that he is the man who came up, and acted as the spokesman? A Positively.

Q Now, did you testify in this case in the Magistrates' Court, at the examination before Judge Tobias, in the Seventh District -- in the Fourth District Magistrates' Court, on the 11th of August, 1919? A Did I testify?

Q Yes. A Yes, I did.

Q You were the complaining witness? A Yes, sir.

Q And made an affidavit, and testified under oath? A yes sir

Q Were you asked this question: "Q Whose grocery concern is it?" And did you answer: "A James Butler, Incorporated, retail store?" A Yes, sir.

Q And were you asked this question: "Q How long have you been employed there?" And did you answer: "A About one

CASE #2851

week?" A probably. I wouldn't say for sure.

Q You wouldn't say you didn't give that answer? A I am not positive. It may have been one week, or two, that I was employed in that store.

Q At this time you can't remember that? A No, sir, I can't remember.

Q And when you gave the answer that it was two weeks, you meant that it was somewhere around two weeks? A Yes; between one and two weeks.

Q Now, did you, at that time, in reply to the question: "Q What did he say then --" question withdrawn. Were you asked this question: "Q Then when did he come back again?" And did you give this answer: "A He came back at ten minutes to four in the afternoon, with another man, a man somewhat shorter than he is?" A Yes, sir.

Q And the shorter man wasn't this defendant? A He was in company with him.

Q The other man was the short man? A Yes, sir.

Q Were you asked this question: "Q What did he say then?" And did you give this answer: "A He was the first one into the store --" that meant the defendant? A Yes, sir.

Q "I happened to be in the front of the store at the time. He walked right directly into the store, and the little man followed him. The little man acted as spokesman. He turned around, and said to me, 'Are you going to shut that door now?' I says, 'No, I'm not going to shut that door. Who am I talking

1673

CASE #2851

to?' And he said, 'Never mind. Are you going to close that door? If you don't, it won't be well for you,' and I said, 'Positively not. What right have you to come in here, and tell me to close this door? Anybody can come in off the street, and tell me to do that.' He says, 'Then you refuse?' And I says, 'Yes.' Whereupon this man, the defendant, was the first one to reach right over the counter. I had by this time gotten back of the Tea-caddy, I felt as though something was going to occur. He reached over the counter, and he grabbed hold of me, As he was grabbing hold of me, the little fellow says, 'Don't hit him with his glasses on,' and he didn't pay any attention to that at all. He grabbed hold of me, and the little fellow grabbed me, too, and the two of them pulled me over the counter, pushed me right completely over the counter, knocked all the coffee I had on the place down, and the jellies on the floor. When I got over the counter, they hit me on the head." Did you so testify? A Yes, sir, I think I did. But I'm not sure whether I said that the other man acted as spokesman. If I did, it was an error. This is the man who acted as spokesman on the two occasions -- of course, in the morning, he was alone-- but in the afternoon he was the first one in the store, and the first one to address me.

Q Now, Mr. Rogers, you were under oath in the Magistrates' court; were you not? A Yes, sir.

Q And that was the 11th of August, six days after the

1674  
CASE #2851

occurrence? A Yes, sir.

Q And this is the 5th of August, one year after the occurrence? A Yes, sir.

Q Are you now able to remember, one year afterwards that what you testified as to the little man acting as spokesman, in the Magistrates' Court, was false? A I am saying that I may have made an error when I said that the little man acted as spokesman. This is the man that acted as spokesman on both occasions when he came there (indicating the defendant).

Q Now, may you not have made an error now, in saying that he acted as spokesman? A No, sir, positively not.

Q Do you know a man named Griffith? A Mr. John Griffith?

Q Yes. A He was my district superintendent.

Q He was your immediate superior? A Yes, sir.

Q Now, Mr. Rogers, is your identification of this defendant -- you know what I mean by identification? A Yes, sir.

Q Based upon anything besides your own ability now to remember his features as the features of the man that you saw, you say, before you were hit upon the head?

MR. BOHAN: I object to that, as calling for a mental operation.

MR. HENDRICK: May I give the point of the question to your Honor, please?

THE COURT: Well, I will allow the question.

Do you mean anything besides the features? Clothing, and so on? Of course, you usually identify a man by his

1987-2851  
CASE #

features, but you may sometimes identify him by his clothing, or something in his possession at the time, such as tatoo marks?

MR. HENDRICK: Anything whatever, besides the look of the man's face, anything in the world, whether anybody told him, or whether he had any experience afterwards, or whether it is a recollection now of a recognition then and there made?

A I recognized the man from the fact that, seeing him in the morning, I took particular notice of him, with the cast in his eye, which stood out foremost before everything; and the very minute I saw him in the afternoon, coming in, I knew him, even though he had a straw hat on in the morning, and a cap on in the afternoon; and, the very minute I saw him, I recognized him as being the man, the same as the Magistrate did, before whom he appeared --

Q Wait a minute.

THE COURT: No, just stop there, where you say that you recognized him as being the man. Strike out the latter part of the answer.

BY MR. HENDRICK:

Q Now, can you answer the question yes or no?

MR. BOHAN: I submit he has answered the question. It calls for a conclusion.

THE COURT: No, I think not. You may answer whether

1676  
CASE #2851

there was anything else besides his face by which you identified him?

A No, sir.

BY MR. HENDRICK:

Q That is, you mean that you didn't need anything but your own recollection to identify him? A Yes, sir.

Q And you didn't need to have anybody else tell you?

A No, sir.

Q Now, did you talk to James Butler about this assault?

A I never spoke to James Butler, in my life. Furthermore, I wouldn't know the man, if he were presented in front of me.

Q How is your eyesight, Mr. Rogers? A Fairly good.

Q Did anybody describe a man to you known as Malachy O'Beirne, between the time of the assault and the time of the arrest? A No, sir.

Q On what day was the defendant arrested? A On the 7th day of August, two days after the assault.

Q Mr. Rogers, did you make an affidavit of the suit in equity of James Butler, Incorporated, plaintiff against William McSherry and others individually? A Did I do what?

Q Did you make an affidavit in that suit, on the 6th day of August, 1919? A To what extent? I don't understand what you mean by an affidavit. Regarding what and whom?

Q Did you make an affidavit in an action in the Supreme Court? A In the Supreme Court?

1677  
CASE #2851

Q Yes. A I don't recollect.

Q Now, let me refresh your recollection. A In the first place, I don't understand what you are referring to.

Q Well, I will try to help you. Do you remember that Butler, Incorporated, tried to get an injunction against <sup>the</sup> retail grocers protective association? A No, sir, I don't.

MR. BOHAN: I object to this, as immaterial, irrelevant and incompetent.

BY THE COURT:

Q But you signed some paper; did you not? A I don't understand, your Honor.

Q You swore to some state of facts, and you signed some paper? A Regarding the assault, or regarding the business?

Q That I don't know. A I don't understand it either, your Honor.

MR. BOHAN: Then say you don't understand it, and that's the end of it.

THE COURT: Well, if you have it there, show it to him, to save time.

MR. HENDRICK: I will sir. Here is the paper.

BY THE COURT:

Q Is that your signature? (Indicating)

MR. BOHAN: That is a copy, sir.

BY THE COURT:

Q It is said to be a copy. Did you sign a paper like

CASE #2851

that. He says it was some paper used in a suit. You may read it and see whether you signed such a paper. A Yes, sir.

BY MR. BOHAN:

Q That is a correct copy of a paper that you signed?

A That I can't say. But, in regard to the --

Q Now just answer the question. A That I'm not positive of. It may be and may not be.

BY MR. HENDRICK:

Q Now, I will ask you, Mr. Rogers, whether you signed the affidavit which reads as follows --

MR. BOHAN: Now wait. I object to this question as immaterial, irrelevant and incompetent.

THE COURT: Sustained. But it is not on that ground, but on the ground that I do not think it is a proper way to get the affidavit before the jury. You have shown him the paper, and he says he does not know whether it is a copy of a paper that he signed or not.

BY THE COURT:

Q You signed a paper, which was, in substance, like this?

A I think so your Honor, but I'm not positive.

THE COURT: Objection sustained.

MR. HENDRICK: Exception. I offer this affidavit in evidence.

MR. BOHAN: I object to it, as incompetent.

THE COURT: Sustained.

CASE #2851

MR. HENDRICK: Exception.

THE COURT: It is not an original paper, as I understand, and does not purport to be.

MR. HENDRICK: For the purposes of this situation, I take it it is an original, because the witness admits that he made that affidavit.

THE COURT: No, he does not.

MR. HENDRICK: Well, in substance.

THE COURT: No, he is not sure of that either.

BY THE COURT:

Q You signed some paper about that time; did you? A I think so, but I'm not altogether positive, your Honor.

MR. HENDRICK: Now, if your Honor please, I don't wish to transgress any ruling of the Court in my endeavor to get this paper in. I will state privately to your Honor the questions that I desire to ask, if your Honor wishes.

THE COURT: You may do so.

(Mr. Hendrick confers with the Court).

BY MR. HENDRICK:

Q Now, it was true, as you wrote in the paper that I showed you, that you made your affidavit on information and belief, and said that the grounds of your belief were something that John Griffith told you? A How do you mean?

MR. BOHAN: I object to the question, as immaterial, irrelevant and incompetent.

CASE #2851

THE COURT: Sustained.

MR. HENDRICK: Exception.

Q Well now, after your reading this paper, and admitting that you swore to something like that, I ask you whether it was not true that, before the 6th day of August, John Griffith did tell you something about the defendant, Malachy O'Beirne?

A No, sir, he didn't tell me anything about Malachy O'Beirne before the 6th, because I didn't see Mr. Griffith before the 6th.

Q Well, on the 6th day of August, did Mr. Griffith tell you anything about Malachy O'Beirne? A Did he tell me anything about Malachy O'Beirne? E

Q Yes. A How could he tell me anything, when Mr. Griffith didn't know the man himself who committed the assault.

Q Where did you get the information upon which you made the affidavit that you read?

MR. BOHAN: I object to it, as immaterial, irrelevant and incompetent.

THE COURT: I cannot allow the question in that form, because it assumes too much. If you will leave out the words, "you read."

MR. HENDRICK: Yes, sir, I will.

Q The affidavit that you made on the 6th of August?

BY THE COURT:

Q Did you make an affidavit on the 6th of August? A On the 6th of August, I went out looking for the man that committed

CASE #2851

the assault.

Q Did you find him? A Not on the 6th, but on the 7th I found him.

Q Now, you are asked whether or not in some proceeding, not in this case that we are trying now, whether you made an affidavit? A To what effect, your Honor?

Q To any effect? A I may have made an affidavit describing the man.

Q You did make an affidavit; did you? A Yes.

Q All right. You made an affidavit? A Yes, sir, describing the man who committed the assault.

Q And on what date did you do that? A On the 6th, and on the 5th both.

Q On both dates? A Yes, sir. I made it to the officer on the 5th, and to the assistant superintendent on fifth and on the sixth also, and I think in the afternoon of the sixth I made the affidavit to the superintendent himself, describing the man who came into the store, and assaulted me, the description of one of the men. The other man I could only give the description that he was shorter, but I couldn't recognize him.

BY MR. HENDRICK:

Q Yes. Now, as the result of that description, did the superintendent tell you who the man was? A No, sir, he did not.

Q Did he tell you who the description would fit? A That

CASE #2851

I can't tell you. I can't recollect that.

Q Did he tell you whether the person the description would fit was a member of the Grocers' Clerks Protective Association? A He didn't tell me no such a thing.

Q Now, I will show you this paper, and ask you if that refreshes your recollection -- and I ask you to read it carefully -- and I ask you whether that refreshes your recollection as to whether Mr. Griffith told you that description fitted the defendant, or fitted a person, whether the defendant or anybody else, who was a member of the Grocery Clerks Protective Association? A Probably. I'm not positive of that. I'm not positive whether Mr. Griffith said that the description given by me was identical with that of the defendant.

MR. BOHAN: That is not answering the question.

BY MR. BOHAN:

Q Won't you read that paper, and say, after reading it, whether you are able to say whether Mr. Griffith suggested that to you or not? A He may have said the description --

Q Are you answering my question now, after reading that paper? A Yes, sir.

BY THE COURT:

Q He may have said what? A I described the man that assaulted me to him.

Q Yes. A To the assistant superintendent.

Q And they were then looking for him, to arrest him?

CASE #2851

A Yes, sir.

Q And you gave a description of the man? A Yes, sir.

Q And who is Mr. Griffith? A He is the superintendent.

Q Of what? A Of Butler's grocery stores.

Q And, when you described the man to Mr. Griffith, did Mr. Griffith say anything? A I think Mr. Griffith said -- I won't say it positively -- but I think he said that the description was that of Malachy O'Beirne; and he told me then -- he assigned me to Mr. McGowan, and Mr. McGowan --

Q Is he a police officer? A I don't know in what capacity he is employed. And we went out in an automobile for two days, looking for Mr. O'Beirn.

And we went to his residence, and he wasn't at home. And, on the 7th of August, we walked up Third Avenue, and we stood on the southeast corner of 42nd Street and Third Avenue, and I walked half way across the street, and I saw Malachy O'Beirne, the defendant, standing right at the elevated pillar.

1587-2851  
CASE #

And I came right back as fast as I could, and I said to Mr. McGowan, "That's the man that assaulted me," and he said, "Go and look at him, and make sure." And I said, "I'm as positive of it as I am that I am standing on this sidewalk."

And then we trailed him up 42nd Street, east, to Second Avenue, and he went up north on the west side of Second Avenue to 45th Street, and west on 45th Street to Third Avenue, and crossed over on the west side of Third Avenue; and we stood in a drug store, so that he would go by and not see us.

And we watched him going to the corner of 45th Street, and Mr. McGowan said, "Now he is going down to Third Avenue," and we went into a drug store until he passed by.

And we walked out, and saw him going into a beer saloon.

Mr. McGowan called up the 51st Precinct station, I believe, and got two detectives -- one of them was detective Cozzens, and the other one I don't know his name -- and they went in, and arrested Malachy O'Beirne, sitting at a table in the beer saloon.

BY MR. HENDRICK:

Q Did Malachy O'Beirne run, when he saw you? A Why, he didn't see me until I went in on top of him in the beer saloon. He was sitting at a table.

Q And he didn't run? A He didn't have a chance to. He couldn't run when he was sitting down at the table.

Q Did he get up from the table when he saw you? A No, sir;

CASE #2851

he sat there while Detective Cozzens spoke to him, and then he stood up. Detective Cozzens told him that he was under arrest.

Q Now, Mr. Rogers, as I understood you, you said that, when you went to McGowan, and told him you saw a man, that you said, "That's Malachy O'Beirne? A No, sir, I didn't. I didn't say Malachy O'Beirne. I said, "That's the man that assaulted me." I didn't know his name then at all.

Q Do you mean to testify that you didn't testify just now, that what you said was, "That's Malachy O'Beirne? A No, sir, I didn't. I didn't know the man's name. How could I say it?

MR. HENDRICK: May we have that testimony of the witness read?

THE COURT: Yes.

(It is read by the stenographer).

MR. HENDRICK: Well, I will leave it to the jury to say whether it was not left out in the hurry of question and answer.

MR. BOHAN: No, I object to that statement. That is not the fact. What the stenographer read, to my recollection, is the exact testimony of the witness.

BY MR. HENDRICK:

Q Mr. Rogers, for whom were you looking? The person who assaulted you, or for Malachy O'Beirne? A I was looking for the man that assaulted me.

CASE #2851

Q Now, were you looking for Malachy O'Beirne? A I didn't know what his name was.

MR. BOHAN: I object to that question if your Honor please.

THE COURT: Well, it turned out that he was.

MR. HENDRICK: I object if your Honor please. The jury hasn't come in yet.

THE COURT: But he says that the man now on trial, Malachy O'Beirne, is the man he was looking for, as the man that assaulted him.

BY MR. HENDRICK:

Q What did McGowan say? A What do you mean? I don't understand you.

Q At the time when you said, "That's the man," at 42nd Street and Third Avenue? A What did he say?

Q Yes. A He said, "Go, and make sure that is the man," and I said, "Well, I'm so sure of it as I am that I'm standing on the street here."

And he said, "Well, we will wait here for awhile," and we stood right up against the elevated pillar, and waited.

And the defendant walked east, as I have told already, on 42nd Street, and we let him get about 50 or 100 feet in front of us; and he was on the south side of the street, and we were on the north side of the street, and we kept in close, so that he wouldn't see us.

CASE #2851

Q How far away were you when you first recognized the defendant? A From the car track to the elevated pillar.

Q Had you gone out there for the purpose of recognizing the person you were looking at? A I saw the defendant turn around -- he was smoking, and I'm not sure whether it was a cigar or a cigarette that he had in his mouth -- but he turned and faced west, and it was then I got a glance of him, and I walked out to convince myself.

And, when I came back, I told Mr. McGowan -- Mr. McGowan didn't know I went over to look at him, because I just got the glance of him myself, and I went over to look at him -- and I said, "That's the man that assaulted me. He stands right over there at the elevated pillar."

And Mr. McGowan said, "Now go out, and make sure; because, if you arrest the wrong man, you are liable to go to jail for it," and I said, "I'm not making a mistake. I'm so sure that I could swear my life away that that is the man."

BY THE FIFTH JUROR:

Q What time of day did you identify him? A Between eleven o'clock and the noon hour.

BY MR. HENDRICK:

Q Did McGowan tell you that he knew Malachy O'Beirne?

A That I can't say. I don't remember. He may have or he may not.

Q He may have known O'Beirne, and told you that? A He may have and he may not. I'm not sure of that.

CASE #2851

Q Is Mr. McGowan the house detective of Butler? A I don't know what capacity he is employed in.

Q Well, as I understand you, Mr. Griffith told you that the man that you described might be Malachy O'Beirne; is that right? A He probably may, yes.

Q And he sent you out with McGowan to look for somebody? A Yes.

Q And the man you brought back was Malachy O'Beirne? A It happened to be the man that committed the assault; happened to be Malachy O'Beirne.

Q Now, did Griffith, in your presence, tell McGowan to look for Malachy O'Beirne? A No, not that I think of.

Q Did Mr. Griffith tell you to have the man arrested, to appear in the Magistrates' Court and to push the case? A No, sir.

Q But he assigned McGowan to you, to find him? A He assigned Mr. McGowan for the simple reason that, in case that this same defendant might come across me again, and give me the same beating as I had already gotten, that I would have protection. He sent him with me to protect me.

Q Well, Mr. Griffith isn't in this case now; is he? A No, sir.

Q And Mr. Butler isn't? A No, sir.

Q Now, have you had any talk with anybody about being compensated for the injury done to you by the defendant? A Have I ever talked?

CASE #2851

Q Yes. A I made an assertion to the District Attorney. I said, "I don't want to show any malice towards the defendant, or I don't want to see him punished, that is, if he wants to make restitution, or reparation for the damage he done to my person, and my clothes, and my body." I didn't go to the defendant, and make any suggestion to him at all. In fact, I didn't do any talking to him, only what I done when the District Attorney brought me before him.

Q What amount of money did you mention? A I don't know of any stipulated amount.

Q Was it a hundred dollars? A Probably.

Q Now, as I understand it, you never saw any weapon in the hands of either of these two men? A No, sir, I didn't get a chance.

Q Well, whether you got a chance or not, you didn't see it? A No, sir, I didn't see it, but there is one thing --

Q Wait a minute: Did you swear in your complaint in the Magistrates' Court -- did you swear in the Magistrates' Court to the complaint to this effect, in part: "And this defendant struck deponent feloniously across the head and face with some weapon?" A I was asked how they struck me, and the answer I gave was that Malachy O'Beirne was standing alongside of the counter, with his arm this way, all the time, leaning over, and waiting his chance (illustrating).

And I said then that I was struck, and I say now I was

1987-2851  
CASE #

struck by something. It may have been with his hand, and it may not; but, if his hand is as hard as I was hit on the head then, I --

Q Then your testimony here and before is merely a surmise that you were hit on the head with a weapon?

MR. BOHAN: I object to that, as immaterial, irrelevant and incompetent.

THE COURT: I will allow it.

A (No answer)

BY THE COURT:

Q Do you know what he means by surmise? A That I think?

Q No, it is different from just thinking. It is a sort of a weak guess, a surmise is. A Well no. I think I was hit with a weapon, although, your Honor, I didn't see no weapon, but my head was struck so hard --

Q Because of the character of the blow, you think he must have had a weapon in his hand? A Yes, your Honor.

BY MR. HENDRICK:

Q Now, can you describe the other man, the short man?

A That accompanied him?

Q Yes. A I can't describe the face, but I know his hair was of a light brown shade, and he was much shorter and more slender than the defendant. That is the only description I recollect of the other man.

Q Did you notice anything about his eyes? A Sir?

CASE #2851

Q Did you notice anything about the other man's eyes?

A No, sir, I didn't.

Q Do you know whether he was cross-eyed? A No, sir.

Q Or had a scar on his eye? A I couldn't tell you.

Q Now, in your description of the defendant to Mr. Griffith, what words did you use in describing him? A I said he was a tall man, heavy set, that walked a little erect, kind of military walk, and I says, "The most peculiar part of it is that I couldn't be mistaken," I says, about the identity of the man, because he has got a cast in his eye." That's the thing that stood out foremost in his makeup, was the idea of his having the cast in his eye; and, seeing him twice on the same day, I couldn't be mistaken.

Q You know what a cast in the eye is; don't you? A Yes.

Q You have a slight one yourself in the left eye; haven't you? A No, sir, I haven't.

Q Take your glasses off. Is there not a difference in the strength of your eyes? A Yes, there is.

Q Now, do you know what a cataract in the eye is? A No, sir, I don't.

Q Have you ever used the word cataract? A It may mean the same thing, as far as I know. If I were speaking of a cast or a cataract in the eye, I would apply the same term to both.

Q Yes. Now, in the Magistrates' Court, were you asked

1692  
CASE #2851

this question, and did you give this answer: "Q What did he say to you, and what did you say? A I told him two men had been in there. I told him it is the same man that had been in, this morning. He says to me, 'What kind of a man is it?' And I said, 'One of the men had a cataract in his eye, his left eye, and the other man was a shorter man.'

"Q You observed this cataract in his eye, while you were being assaulted? A No, I observed the cataract in the morning.

"Q How close was he to you? A Closer than I am to you at present.

"Q Four or five feet. Who is this man you talked to about this? A Mr. Joe Butler." Were you asked those questions and did you make those answers? A Probably Mr. Butler asked me those questions, yes.

Q Now, at the time you were asked those questions, and made the answers, did you know what a cataract is? A No, sir. I said I would apply the same term to a cast as I would to a cataract.

And, furthermore, if I recollect right, I told him I observed the cast, or cataract, in the morning and in the afternoon, because the minute the man came in, in the afternoon, I knew it was the same man I had seen in the morning, and then I knew trouble was brewing.

Q You don't know whether he was smoking a cigar or a cigarette, at 42nd Street? A No, sir, I couldn't tell you.

CASE #2851

Q And you were half way across Third Avenue? A Yes, sir.

Q And it was only when he turned, and you saw the cast or cataract in his eye, that you identified him? A It was his features, in general, that made me certain he was the man. But, when he turned, and I saw the cast in his eye, that made me positively sure.

Q And it was not McGowan who told you that you were looking for Malachy O'Beirne? A No, sir.

Q Now, was there anything to this name, Malachy O'Beirne, that was mentioned to you, that made you sure, if possible, that it was Malachy O'Beirne that hit you? A No, sir.

Q That is, nothing was told to you about Malachy O'Beirne? A No, sir; other than Mr. Butler, or somebody, said that the description that I gave was that of Malachy O'Beirne.

Q Yes, and that might have made you a little surer? A No, sir, it had nothing to do with it. I told you I didn't know who the man was. I knew his features, but I didn't know the name of the man I was looking for.

BY THE COURT:

Q When you went over, and picked this man out on the street, there, as you say, went over towards the pillar where he was, did you know whether that man at the pillar was Malachy O'Beirne or not? A No, sir; he might have been John Jacob Astor, for all that I knew.

BY MR. HENDRICK:

Q Didn't you say that McGowan might have told you that it

1694  
CASE #2851

was Malachy O'Beirne? A No, sir, I didn't say any such thing.

Q Now, didn't you admit that Mr. Griffith might have told you that the man who fitted the description of Malachy O'Beirne was a member of the Grocers' Clerks Protective Association?

MR. BOHAN: I submit that the witness made no such answer, and I object to the form of the question. However, I withdraw the objection.

BY THE COURT:

Q Did you tell that to the lawyer, just now, that Mr. Griffith said that Malachy O'Beirne was a member of that association? A No, sir, I didn't.

BY MR. HENDRICK:

Q You didn't who he was; did you? A No, sir.

Q You didn't know anything about Malachy O'Beirne? A No, sir.

Q When you came into the saloon, did you say anything to the detective? A Yes.

Q What did you say, if you remember? Now, don't tell me, if you don't remember. A I said, "This is the man."

Q You remember that you said that? A Yes, sir.

Q You are positive? A Yes, sir.

Q Did you say anything more? A No, I don't think so.

Q Well, you may have said something more? A I don't know.

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

Q Well, do you know whether what you said was limited to the words, "This is the man"? A Yes, I'm positive those are

1695  
CASE #2851

the words I used. I pointed to him, and I said, "This is the man."

Q Did you say what you meant when you said that? A No, sir.

Q Did you say whether you meant Malachy O'Beirne or the man that assaulted you? A I meant that it was the man that assaulted me. I didn't know his name.

Q Now, I understand that you described this defendant's walk, and a lot of other things, to Griffith, besides his eye?

A A lot of other things?

Q Well, other things. A I said he walked somewhat erect, somewhat of a military walk, and that the walk didn't impress me so much as the cast in the eye, and that I paid particular attention to.

Q You said that to Griffith? A No, I'm telling you that; that what appealed to me most was the cast in his eye.

Q But I am asking what you told Griffith? A I don't remember whether I told him that or not. I'm not altogether positive as to that.

Q Did you work the rest of the afternoon in that store?

A With a policeman in the store with me.

Q Now, Mr. Rogers, I asked you whether you worked? A I was there with a policeman in the store with me.

Q Was he there to help you work? A No, he was there to protect me. The work -- I wasn't able to work, because I wasn't able to stand on my feet.

CASE #2851

Q How soon afterwards did you start to work? A I can't tell you.

Q Did you have any medical treatment? A No, couldn't get medical treatment and run the store at the same time.

Q Where was the first blow struck? Where did it hit you?  
A On the head.

Q What part of the head? A The left side, I think.

Q Put your hand on the place. A There (indicating).

Q That is the back of the left side of the head? A Yes, I think so. I'm not altogether sure. This happened a year ago; but, to the best of my knowledge, presently, I think it was the left side of my head.

Q Well, it might have been on the back of the head, here (indicating), for all that you know? A Yes, as far as I know presently.

Q Now, did you see with which hand the person struck you?  
A No, I didn't get a chance.

Q That is, you couldn't see anything about where the blow came from, before you were hit? A Well, the reason I couldn't see it --

Q Well, whatever the reason is, could you or not? A No, sir, because they had me in between them, and how could I see? How could I see how I was going to be hit? This is the man that struck me (indicating the defendant).

Q And the thing that impressed you was not who hit you,

CASE #2851

but that you were hit; is that right? A Yes.

Q Now, you might have been hit by a brick, from behind, for all that you knew at the time? A A brick from behind where?

Q Behind you? A Well, I should judge, if a man was carrying a brick to hit me, I could have seen it.

Q Yes. That is, if he had anything in his hand you could have seen it? A Yes.

MR. HENDRICK: That's all, that's all.

REDIRECT EXAMINATION BY MR. BOHAN:

Q What you mean is that you do not think he could have hit you as hard with his hand as he did hit you? A Yes, that's it.

BY THE FIFTH JUROR:

Q You say you were between the two men when you were hit? A Yes.

Q When they pulled you over the counter, weren't you in a line with them? A Yes.

Q How do you know -- which side <sup>did</sup> this man stand of you?

A In the back of me; and the other in front of me, just like this (illustrating).

Q You said you stood in a line with them. Then you didn't stand in a line with them when you were pulled over the counter?

A I didn't get a chance to. I stood about this way (illustrating).

Q Now, didn't you stand in a line when you were pulled over the counter? You said you did? A No, sir.

CASE #2851

Q You didn't? A Well, in a line, but not just a regular line (illustrating).

Q And you saw him when this man struck you? A No, I didn't see him actually do it, but I know he struck me.

Q How do you know that? Do I understand you that this man stood behind you, and you were struck on the left side?

A Yes.

Q And he stood directly behind you, and you don't know whether he struck with his right or left arm? A Well, I can show you how it was. This is the counter here (illustrating).

THE COURT: Go down there, and assume that the jury box is the counter, and that you were behind the counter as the jurors are now sitting behind the railing of the jury box.

BY THE COURT:

Q Now, you were over where the jurors are, behind the counter, just where the jurors are now? A Yes, sir. And they pulled me over.

Q Now, you were on this side of the counter, on the outside? A Yes, sir; and Malachy O'Beirne stood over me, with his hand over me like that, and had me by the throat and necktie. It was torn in the struggle, when they pulled me over.

BY THE FIFTH JUROR:

Q Malachy O'Beirne stood where the District Attorney stands now? A Yes.

CASE #2851

Q And you were struck on the left side? A Yes, sir.

Q Then by what inference do you conclude that he struck you? A Because I was looking at this other man here, the other man was in front of me (illustrating) and I saw what he was doing, because he had hold of me this way, with his hands (illustrating), and the other man was in the rear of me, the defendant (illustrating).

BY MR. BOHAN:

Q Were there any other persons in the store, except the defendant and the smaller man and yourself? A No, sir.

Q How many persons had their hands on you at the time you were struck? A Two.

Q That is, the defendant and the shorter man? A Yes, sir.

Q And they were in the positions you have described to the jury, using myself and the crier of the court to illustrate the situation? A Yes, sir.

Q Now, something was said about a Mr. Griffith, and a copy of an affidavit here. Do you know whether there was any trouble in the Butler stores at that time? Just yes or no?

A No, sir.

Q Was there any strike? Yes or no? A Not to my knowledge.

Q Did you ever have any trouble with this defendant or this shorter man? A Never saw them in my life before.

Q Have you got the slightest doubt in your mind now, or have you had at any time before this, who the man was that struck

1700  
CASE #2851

you? A I am positive that that is the man that assaulted me (indicating the defendant).

Q When these men said to you, "Lock the door," was anything else said, about your job? A No, sir.

Q Was something said by either of these men, "Lock the door, and leave your job," or, "give up your job?" A They said, "Lock the door," and I said to them, "What authority have you got --"

Q No, I am not interested in what you said, but what did he say, or what did they say? A Well, all he said was to lock the door.

Q To lock the door? A Yes, sir.

Q Had you ever been struck over the body or head before that time? A No, sir.

Q Have you ever been struck with a stick on your body? A No, sir.

Q Do you know the difference between the blow of a stick and the blow of a hand? A Yes, I do.

Q You know that because you had been struck with a stick? A Well yes. I've been spanked, I suppose, with a stick.

Q Now, when you say that you believe that there was a weapon in the hand of this man --

THE COURT: No, you need not spend any more time on that.

BY MR. BOHAN:

Q After you saw the defendant at 42nd Street and Third

CASE #2851

Avenue, when did you know first that his name was Malachy O'Beirne? A Not until they took me to the 51st Street Prisonet, and the officer told me, "that is the same man that was here, three or four days ago."

THE COURT: No, strike that out. And the jury are directed to disregard it.

BY MR. BOHAN:

Q The first time you learned it was when you got to the 51st Street station? A Yes, sir.

Q And how long was that after you saw him at 42nd Street and Third Avenue? A Well, I should judge about an hour.

BY THE FIFTH JUROR:

Q When they pulled you across the counter, they were facing you, weren't they? A Yes.

Q And did they turn you around, because you said he stood behind you, and I can't understand that, unless they turned you around? A They pulled me across the counter, and this man, being the stronger of the three of us, pulled me sideways, like this (illustrating).

Q Then, when you were pulled across the counter, you reversed your position, and had your back turned to him? A Yes, but I didn't reverse my position. I was pulled that way.

RECROSS EXAMINATION BY MR. HENDRICK:

Q Now, you say that the man that assaulted you was thick-set; didn't you? A Yes.

1702  
CASE #2851

MR. HENDRICK: Now, stand up, Malachy O'Beirne and open your vest.

BY MR. HENDRICK:

Q There was trouble between James Butler and the strikers at that time, wasn't there? A Not to my knowledge.

Q Didn't you get your pay raised as the result of that trouble? A I beg pardon?

(Objected to. Objection sustained. Exception.)

BY MR. HENDRICK:

Q Do you mean to tell me that you don't now know that there was a strike? A Positively.

Q Did you know what the paper was about that you signed on the 6th of August, the paper I showed you? Did you know what it was about? A No, I don't think so.

Q And you don't know now what it was about? A No.

Q Who told you to sign it? A I can't recollect.

Q Now, may not there have been other people in the store, at the time that the persons you described were there with you? A You mean were there any other persons there?

Q Yes. Isn't it possible that there was somebody else in there? A No, there isn't a slightest doubt but that there were only three.

Q But there had been one man in there just previously?

A Yes.

Q Do you know him? A Yes, I know that man. He is a little, short man, thick-set, grey-haired.

CASE #2851

Q Do you know his name? A No, sir, but I know he was a customer.

Q Now, when a man came in, in the morning, to speak to you, what did he say to you? A What man?

Q You say Malachy O'Beirne came in, the defendant, don't you? A Yes. The defendant came in about ten o'clock in the morning, and he walked over near the register, and I came to him and I said, "What's yours, Brother?"

And he turned around and says to me, "Where is the other fellow?" And I said, "What other fellow?" And he said, "The other fellow that was here," and I said, "I couldn't tell you."

And he said, "Do you know where I can find him?" And I said, "No, I haven't the slightest idea where you could find him."

So he said, "You don't know where I could find him at all?"

And I said, "No. But, if you go up through Joe Butler's route, you will find Joe Butler in one of the stores, and he'll be able to tell you." And then he went out.

And I didn't see him again until 3:50 in the afternoon, just about ten minutes to four.

And why I know that it was ten minutes to four, the man that I have just described gave me the time, because, that morning, I had brought down an alarm clock, but didn't have time, or the opportunity of setting it.

Q Now, have you answered my question? A Yes, I think so.

BY THE COURT:

CASE #2851

1704

Q What was it the defendant said when he came in, in the morning? A "Where is the other fellow?"

Q What else? A And I says, "What other fellow?" And he says, "The other fellow that was here."

And I said, "I don't know, Brother."

Then I told him, if he would go up the route, he would find Joe Butler in one of the stores, and I said, "He will probably be able to tell you."

Q Well, had there been another man employed there with you? A No, sir; there was another man employed there as manager before I came there, and I took his place. Probably he had been transferred to another store.

THE COURT: Never mind that. You have answered my question.

BY MR. HENDRICK:

Q And were you asked this question in the Magistrates' Court, and did you answer as follows: "Q Do you know whether there has been a strike in the grocery stores of James Butler? A Yes, there has been, but there hadn't been previous to my going there." A Yes.

Q And you answered that question in that way, did you not, so as to show that you were not a strikebreaker? A Yes, sir.

MR. BOHAN: I object to that question.

THE COURT: I will allow it.

BY MR. HENDRICK:

1705  
CASE #2851

Q Were you cross-examined as follows, and did you answer as follows: "Q You are a strikebreaker? A No, sir, I am not?" A Yes.

Q And at that time, when you answered that question, did you know that there was a strike? A I was told that there had been a strike, but the strike didn't exist while I was employed.

Q Were you asked the following question, and did you answer it as follows: "Q You went to work for Butler at the time the strike began? A No, sir; I went to work at 74 Third Avenue, a week ago last Saturday."? A Yes, sir.

Q "Q You haven't heard there was a strike? A Yes, that there had been a strike, but not that there was." Did you so answer? A Yes.

Q Well, do you now know that there was a strike there? A Previous to my going there?

Q Well, but didn't the attorney who asked you those questions tell you that there had been a strike? A That there had been a strike, but it had been settled.

Q Didn't the lawyer who got you to sign this paper in the suit in the Supreme Court, tell you that there was a strike? A That there had been a strike.

Q Did he tell you the strike had been settled? A No, sir, but I knew it was settled.

Q Well, when was it settled? A Well, if I'm not mistaken,

CASE #2851

1706

it had been settled previous to my going there.

Q Now, I want to ask you this question, and I want you to be careful in answering it. Did you know something about Malachy O'Beirne, besides what you told this Court and jury, that led you to think that he was the kind of man who would be there as a strikebreaker, and who would assault you for not closing the doors? A No, sir.

Q Do you know it now? A That he was what?

Q That he would be in that class of men? A And be a strike-breaker?

Q Yes.

MR. BOHAN: I object to that, as calling for a broad conclusion, that he was in a certain class of men.

MR. HENDRICK: I appreciate that the Court and jury don't know what I know, but I can't tell what I know. But I'm trying to get the witness to say if he knows what I know.

THE COURT: No, the question is very broad. Perhaps you had better ask him directly.

MR. HENDRICK: Now, may the two last questions and answers be repeated by the stenographer and then I will ask him.

THE COURT: Yes.

(They are repeated by the stenographer)

BY MR. HENDRICK:

Q Now, will you answer those questions? A No, I didn't

1987-2851  
CASE #

know anything about it.

Q Don't you know that, the week before, he was sent to jail for two days, for picketing against Butler & Company --

A No, sir.

Q Wait a minute. And didn't you say, on this stand, when I stopped you, that the Magistrate recognized him as the man that -- recognized him? A Yes, he recognized him.

Q And what did the Magistrate say? A The Magistrate said--

(Objected to. Allowed.)

A The Magistrate says to him, "Weren't you here before me, some days ago, and didn't I fine you, and put you in jail?" And he said, "Yes."

Q Well, you knew that, a minute ago; didn't you? A I knew it when he was brought to court, when the Judge told it.

Q Yes, but you knew it, a minute ago? A What do you mean?

Q You knew it a minute ago, when I asked you if you knew anything about Malachy O'Beirne that would that would make you class him with the strikers? A No, I didn't. I knew it, a year ago, when it was told in Court.

Q Did Griffith tell you that? A No, sir.

Q Did Griffith know? A I <sup>don't</sup> know whether he did or not.

Q Wasn't this equity suit based on the fact that Malachy O'Beirne had been held by the Magistrate, and sent to jail for two days? A I don't know sir.

Q Do you know whether Griffith knew it? A No, sir.

1708  
CASE #2851

Q Or McGowan? A No, sir, I don't.

Q Now, as man to man, is it not possible that your positiveness may have been, after your being certain or conscious of it, may have affected you, and strengthened you by something that Griffith and McGowan and the Magistrate told you about Malachy O'Beirne being sent to jail as a strikebreaker? A To try to influence me?

Q No. I am asking you, man to man. I realize that you may not have thought of that until now. A Well, what is it?

Q That those elements may now have entered into your testimony, your recognition, and the circumstance that this man was the man that Griffith knew, and fitted the description, too, was a man who had been a strikebreaker -- no, I mean a picketer -- in the strike against James Butler? A I don't know what the defendant was sent to jail for, for picketing or what it was for, and it didn't interest me. All that interested me was that this man had assaulted me. Whatever he had done to anybody else didn't concern me, at all.

Q And Griffith didn't tell you that about this man; did he? A No, sir. How could he tell me about the man, when I didn't even know the name of the man.

Q Then you can<sup>not</sup> say now to the Court and jury whether it was this man's record, with regard to Butler & Company, and with regard to Griffith, who sent you out with McGowan to get a man, described by Griffith as Malachy O'Beirne; you can't say

1709

CASE #2851

now that that didn't enter into your opinion as to the identification? Can you or not?

MR. BOHAN: I object to it. He has already said that it had no effect whatever.

MR. HENDRICK: That is a different question. This witness said, at first here that he had nothing but a desire to tell the truth, and I want to know whether he can now say that nothing else than the desire to tell the truth influenced him.

THE WITNESS: Nobody influenced me, one way or the other. I went out with a determination to get the man, if possible that assaulted me. Nothing else that the man may have done to the firm, or anybody else, didn't interest me at all. I was only interested in the assault that was committed on me.

BY THE COURT:

Q Well, when you pointed out this man and stopped him, and he was arrested, did you know at that time that it was Malachy O'Beirne? A No, sir, I didn't know his name then.

MR. HENDRICK: That is all.

BY MR. BOHAN:

Q When did you leave Butler's? A About three weeks afterwards I was discharged.

Q Have you been in the grocery business all your life?

A Practically.

1982-2851  
CASE #

Q Are you working for Legget now? A Yes, sir.

BY THE FIFTH JUROR:

Q Why were you discharged? A For not being able to do the work, and my firm will testify to that now.

Q What do you do at Legget's? A I'm assistant shipping clerk now.

BY MR. HENDRICK:

Q Was there not a general, wholesale discharge, when you were discharged? A I don't know of anybody else being discharged or not. I was discharged for not being competent -- that is, I had the ability, but not the vitality to do the work.

Q Do you tell me that you don't know whether other men were discharged at the time? A I don't know anything about it.

Q You don't know anything about it? A No, sir.

Q Were you under the doctor's care at that time? A No, I don't think so.

Q When did you get your next job? A That I can't tell you. About three weeks afterwards, or maybe a month afterwards, for all that I know.

Q Or maybe a week afterwards? A Yes.

Q Well, you get more pay from Legget? A I get less pay.

Q How much were you getting from Butler? A \$25 a week and one per cent.

Q And how much did you get from Legget? A \$27. a week.

MR. HENDRICK: That is all.

CASE #2851

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

THE COURT: The People rest.

MR. HENDRICK: If your Honor please, I move to dismiss the indictment, on the ground that the People have failed to make out a case, and particularly on the ground that the indictment specifically charges an assault with a weapon, and is based upon that, all of the three counts. The witness himself has testified that he saw no weapon.

And on the further ground that the only evidence is evidence of identification, and, there being only one witness, and the witness not being sure of many things, and being too sure of the one thing, and there being nothing qualifying the evidence of identification, which is the only evidence which can guide the jury, which must be evidence of qualification -- in other words, when the man says, "This is the man," that is a conclusion, and the real evidence is when he proves he knew the man.

THE COURT: Motion denied. It is a question of fact for the jury.

MR. HENDRICK: Exception.

(The court admonished the jury in accordance with Section 415 of the Code of Criminal Procedure, and adjourned the further trial of the case to Friday morning, August 6th, 1920, at 10:30 o'clock.)

1712

CASE #2851

## TRIAL RESUMED.

New York, August 6th, 1920.

## THE DEFENSE.

W I L L I A M    M c S H E R R Y, of 432 West 20th Street,  
a witness called on behalf of the defense, being duly  
sworn, testified as follows:

## DIRECT EXAMINATION BY MR. HENDRICK:

Q What is your business? A Grocer.

Q Do you own your own business? A I own my own business.

Q On the 5th of August, 1919, did you own your own business? A Not then.

Q You were a grocery clerk? A Grocery clerk, out on strike.

Q Were you president of the New York Retail Grocery Clerks? A Yes, sir, at that time.

Q How long was that organization in existence before August 5, 1919? A I joined it on the 13th of July, 1919.

Q And how long was it in existence, if you know? A It might have been in existence about five or six months before that. But that is when I joined it.

Q And is it now in existence? A I understand so.

Q Are you connected with it now? A No, not now.

Q Did you come here under subpoena? A Yes, sir.

Q Do you know the defendant, Malachy O'Beirne? A I know him as one of the members of the association.

CASE #2851

Q Did you know him before August 5th, 1919? A I guess I may have had a casual acquaintance with him, only casual. I never knew him before the 13th of July, 1919.

Q Have you had any relations with him since? A No, no relations with him since.

Q Did you see him on the 5th of August, 1919? A Yes, sir.

Q Wheredid you see him? A I saw him in the Painters' Hall.

Q Where is that hall? A 410 Eighth Avenue, where we used to hold informal or impromptu meetings.

Q Whereis that hall, between what streets? A Between 31st and 32nd Streets.

Q Now, what time of day did you see him there? A About three o'clock. I might be five minutes to or five minutes after; not more.

Q And how long after that time did you see him there? A And he was continuously in my company in the hall— neither of us left it — until we left thehall at five o'clock, when the hall was closed.

Q And what was going on during that time? A Well, we were playing cards part of the time, and Malachy O'Beirne had a quarrel with the keeper of the hall for putting his feet up on the seats.

Q Now, was there any incident that happened that you recall, during that period? A The keeper of the hall made him take his feet down off the seats. He had his dirty feet upon the

1587-2851  
CASE #

seats.

Q Did you see him in the morning; do you remember?

A No, I didn't see him that morning.

Q Now, were you in court on the day when he was arrested?

A That day, or the day after. I'm not sure which.

Q Do you know whether or not he served any time as a picket?

MR. BOHAN: I object to that as immaterial, irrelevant and incompetent.

A Every day he did.

Q Every day he acted as a picket for his Union?

(Objected to. Allowed.)

\* Each day certain men were assigned to do picket duty in a certain district, for a total of two or three hours each day.

Q On whom was the strike at the time? A It was against the James Butler Company.

Q Do you know the complainant in this case, Rogers?

A I never saw him until I saw him in court.

Q Now, did there exist at any time before or after the 5th of August any litigation between the Retail Grocery Clerks Protective Association and James Butler, Incorporated?

MR. BOHAN: I object to that, as immaterial, irrelevant and incompetent.

THE COURT: How is that relevant?

MR. HENDRICK: It is preliminary. I wish to offer

CASE #2851

in evidence the actual papers that were served on this man.

THE COURT: What difference does that make? Suppose he was served with papers. We are not trying the strike here; we are trying a charge of assault.

MR. HENDRICK: I understand, but this is an attempt —

THE COURT: I do not see the relevancy of it now. If it becomes relevant at any time, it may be different;

MR. HENDRICK: It is relevant, because this paper contains the affidavit of the witness in the case, the complaining witness; and I was not permitted to put in the papers.

THE COURT: Well, you examined the complaining witness at length on the subject.

MR. HENDRICK: Exception. That is all.

CROSS EXAMINATION BY MR. BOHAN:

Q Did you have charge of assigning the strikers to picket duty? A Not fully, partly. There was a committee for that purpose.

Q How many locals were there engaged in the strike? A Oh, just the one local; the only active local.

Q Do you know where O'Beirne was assigned to picket duty? A I can't remember.

BY THE COURT:

Q When did this strike finish? A Why it fizzled out about

CASE #2851

the middle of September.

Q It never finished; it just fizzled out? A Yes, sir.

BY MR. BOHAN:

Q What grocery store were you employed in? A 169 Tenth Avenue.

Q Near what street is that? A Corner of Tenth Avenue and 20th Street.

Q What store did the defendant work in? A I couldn't say.

Q Now, that's two things you can't remember about the defendant. First -- A I wasn't supposed to know everything about him.

MR. HENDRICK: I object to that. The District Attorney is importing something into the evidence. He charges this witness with failure to remember. But the answers were that the witness never knew.

THE COURT: Objection sustained.

BY MR. BOHAN:

Q How many members were in this Union? You were president of it. How many persons were there in it? A About 140 were enrolled.

Q Did you know them all personally? A How many did you know personally? A I might have known thirty, or forty or fifty. I knew most of the fellows on the west side. I knew very few of them on the east side.

Q Did you know the defendant? A I didn't know him, except as an ordinary member of the Union. I had no personal knowledge

CASE #2851

of him.

Q You knew him as an ordinary member? A Yes, sir.

Q And, as an ordinary member, that acquaintance only commenced on the 13th day of July, 1912? A Yes, sir.

Q Now, how many times did you see the defendant in the hall, between the 13th of July and August 5th? A Well, we had a meeting, three times a week, and he might have been there and he might not.

Q Were you ever introduced to him? A I can't say I was ever introduced to him.

Q When did you first know his name? A As far as I remember I first knew his name the day of the court proceedings, in 57th Street.

Q So that, before that, your acquaintance with the defendant was only casual? A Yes.

Q And didn't know his name? A No, didn't know him from any other member.

Q Now, did you ever talk with the defendant except in open meetings? A Yes, I may have talked with him; but as far as I know, I didn't know his name, individually.

Q Was he an officer of the Union? A No, he was not.

Q Was he one of the active members of the Union, in charge of the strike? Yes or no? A He was a pretty active member.

Q Well, I mean, by reason of his activity, were you thrown in close contact with him? A Not any more so than any other one of the members; yes; a little bit more so, I would say.

1987-2851  
CASE #

Q Well, on how many occasions did you talk with him before the 5th of August? A Well, probably I may have talked to him casually two or three times a week, saying to him, "How's things going on the east side?" I knew him as a member from the east side.

Q Well, knowing him as a member from the east side, did you know he worked on the east side? A Yes, I knew he had a store on the east side.

Q What part of the east side? A Around about the Forties somewhere I understood.

Q Well, did you understand that he worked in the store at 412 Second Avenue? A I couldn't tell you the store he worked in.

Q Well, did you visit the stores in the course of the strike? A I didn't make any business to any particular store.

Q I am asking you now, did you go near this store, 412 Second Avenue? A I may have. I can't tell you. I went around to see if the fellows were on picket duty.

Q Now, between the 13th of July and the 5th of August, did you ever see the defendant doing picket duty? A Well, I saw him with a sign on his hat.

Q Where? A Well, it might have been on the east side, or it might have been on the west side. We appointed them the night before, and they were supposed to go there.

Q Can you remember anything concerning this defendant's

CASE #2851

activities, so far as picketing was concerned, before the 5th of August? A All that I know is that we never found him off his job.

Q Well, where was he on the job? A Well, wherever he was sent.

Q Well, where was that? A Well, I haven't any record to show, now.

Q Well, you were president? A Yes, I was president.

Q Well, you say you remember what you saw him do on the 5th of August. Now, I want you tell the jury what you saw him do before the 5th of August. A Well, that was prominently brought before my mind when he was arrested.

Q Well, he wasn't arrested on the 5th of August? A No. The 6th or 7th, I believe. And then we remembered where he was on the day of the assault.

Q Well, was he arrested on the day of the assault? A No; probably two days after.

Q And you say these things are fixed in your mind? A Yes, certainly.

Q Now, can you tell anything that is fixed in your mind about the defendant, prior to the 5th of August? A No.

Q Can you tell how he was dressed on that day? A No, I can't tell how he was dressed.

Q Can you tell us anything that you and he discussed that fixed it in your mind, before the 5th of August? A No, only

CASE #2851

general business, connected with the business of the organization.

Q Now, you learned that he was arrested on the 7th of August; is that right? A Yes, that's right.

Q Did you talk to him in the court? A I talked with him down the street —

Q Down in the station house? A No, not in the station house. Down in the cells.

Q Did you talk with him before or after you heard what Rogers said about him? A It was afterwards.

Q You first heard what the complaining witness said about O'Beirne, and then you went down to the cell, and talked with O'Beirne; is that right? A Yes, sir, I went down to try to get him bailed out.

Q Well, you first found out from Rogers when, Rogers claimed this man struck him; didn't you? A While I was listening to the others.

Q In court? A In the court.

Q And were you a witness there at that time? A I wasn't called.

Q Did you take the stand? A I don't know whether I took the stand at that particular hearing or not. No, I don't think so.

Q Did you go before the Magistrate, at that time, and say that, at the time Rogers claimed this man struck him, he was

1721  
CASE #2851

in your company? Yes or no. A Yes, I think I did.

Q Are you sure you did? A Yes.

Q Do you want this jury to understand that you were a witness before the Magistrate? A I went over prepared to --

Q Did you testify, under oath, before the Magistrate?

MR. HENDRICK: I object. I ask that the witness be allowed to finish his sentence.

A (Answer continued) I went over prepared to give evidence in this man's behalf.

Q No, I asked you whether you testified under oath before the Magistrate in behalf of Malachy O'Beirne? A No, sir.

BY THE COURT:

Q You know the difference, do you not, between/<sup>going</sup>to the Magistrates' Court prepared to testify, and being called and sworn, and testifying as a witness? A Yes, sir.

BY MR. BOHAN:

Q Then you want to correct your answer that you made before, in which you said that you testified in behalf of the defendant? A I went over prepared to give testimony. As far as I know, I was not called.

Q Didn't you answer my question, before, that you did testify for O'Beirne? A Well, probably, I didn't get it right.

Q Then you didn't understand me; is that correct?

A Yes, sir.

Q Well now, what is your answer? You did or did not

1722  
CASE #2851

testify? A No, I don't think I was called.

Q You were in court? A I was in court, yes.

THE COURT: Are you talking about this case now or some other case?

MR. BOHAN: No, sir, no other case; the case of Malachy O'Beirne.

THE COURT: It has been brought out that the defendant was in the Magistrates' Court on another occasion; you understand?

MR. BOHAN: Yes, sir, I do.

BY THE COURT:

Q Were you there on that occasion? A Yes, I guess I was there also at that time, to give bail.

Q Did you take the stand on that occasion? A I can't remember.

Q And did you testify, on that occasion, that the defendant was in your company on the other occasion? A No, I don't think so

MR. HENDRICK: Will your Honor make it clear, so that that the witness can't make an honest mistake. I don't think the witness understands you when you speak of "other" occasion.

THE COURT: Oh yes, I think he does.

MR. HENDRICK: No, I don't think he understands your Honor quite.

BY THE COURT:

Q You understand, do you not, what I mean? In a case other than this one? A Yes.

1723  
CASE #2851

BY MR. BOHAN:

Q And were you in the Magistrates' Court when the complaint of Rogers was heard? A Yes, sir.

Q And you didn't testify? A I don't think I was called.

Q And you say, on the 5th of August, you were playing cards? A Yes, sir; we were waiting to get --

Q Why do you remember that you were playing cards on the 5th of August? A Well, that's what we generally were doing, to kill time.

Q And that is the only reason you remember that now, because you did that generally? A I say that we played cards to kill time, until we got news from the outlying districts; and I remember that day particularly because we went out to see Mr. Baker.

Q Who is Mr. Baker? A The representative of the American Federation of Labor. We had an appointment with him at 3:30, and we talked with him for about ten or fifteen minutes, and immediately went back to the hall, to give the results of our talk to the members.

Q Where did you meet Mr. Baker? A Up at the Continental Hotel at 49th Street.

Q And, when you came back, was there a large number of the strikers in the hall? A There was about six or seven.

Q Was there a meeting? A No, sir; only just the fellows come in from the picket duty, at lunch time, to see

CASE #2851

what news I would give from Mr. Baker.

Q Who was there? Now give me the names? A Eugene Dolan, John Frewen, Malachy O'Beirne, and I think, James Hessian, and the keeper of the hall, James Ward, the keeper of the hall; and also another man, called Ryan, was there.

Q This wasn't a regular meeting? A Oh no, no. It was just a place we used to call in, to get the news.

Q Now, from the time you were president, until the time you severed your connection with the organization, were you in this painters' Hall, daily? A What is that?

Q (Question repeated). A I guess so.

Q How much time did you spend there? A Well, I couldn't say how much time exactly, but I had no particular place to go, only to answer telephone calls, if there were any of the fellows in trouble about anything. I might not be in it for more than half an hour at a time, and I might be in it for three or four hours.

Q You are a friend of this defendant? A No, no friend, nothing except just --

Q Well, you would like to see him get out of his trouble; would you? A Well, I would like to see any man that I didn't consider guilty get out of trouble.

Q (Question repeated) A Yes.

Q You are not friendly to the James Butler Corporation; are you? A I have nothing against the Butler Corporation.

Q And, at the time, you were not friendly with any employe

CASE #2851

of Butler's, who was still on the job; were you? A Well, I guess, if you ask Mr. Butler, he would tell you that I carried out --

Q No. On the 5th of August, you were doing everything to persuade the then employees of Butler to quit their jobs?

A Yes, we were doing everything to persuade them, under the law.

Q You were doing everything that you could to close up the stores of James Butler, and render them helpless? A Yes.

Q And that is what this defendant was told to do? A Well, that is a part of his duty, when he went out on picket duty. That is always the rule of a strike.

Q Did you see Rogers in the Magistrates' Court? A This court?

Q No, in the Magistrates' Court? A Yes, I saw him.

Q Did you see his face? A I didn't notice anything the matter with him.

Q Did you see the lacerations on his face? A I didn't notice anything on him.

Q Did you see his teeth knocked out? A No, sir.

Q Are you in sympathy with that kind of business?

(Objected to. Sustained.)

Q Are you in business for yourself now Mr. McSherry?

A Yes.

Q How long were you with Butler? A I was for ten years with

CASE #2851

Butler.

Q Can't you tell me what store on the east side the defendant was employed in? A I really don't know.

MR. BOHAN: That's all. Just one question.

Q Can you tell me anything else that you can remember in connection with the defendant on the 5th of August, outside of the fact that he was in your company between the hours of three and five? A No, I don't know of any. But he walked as far as 23rd Street with me, and bid me good evening, and took the 23rd Street car to go home.

Q Do you know where he lived? A No, only that he lived on the east side somewhere.

Q Can you tell us anywhere else that you were with the defendant on any day prior to the 5th of August? A We often travelled with him on the train down to 34th Street, from our regular place at 136th Street and Eighth Avenue.

Q Well, can you tell us any particular day, prior to the 5th of August, that you rode on the train with this defendant? A No, I couldn't recall, at this time, any particular day.

Q Well, can you tell me any particular incident that occurred with the defendant, in your company, prior to the 5th of August? A No.

MR. BOHAN: That's all.

REDIRECT EXAMINATION BY MR. HENDRICK:

Q Did you, at or about this time of the hearing of this

1987-2851  
CASE #

matter in the Magistrates' court, sign an affidavit with regards to the present of Malachy O'Beirne anywhere at any time? A Yes, towards the end of July, we signed --

MR. BOHAN: I object to this, as immaterial, irrelevant and incompetent.

MR. HENDRICK: There is a well-known decision in the Tilton-Beecher case, that, when the door has been opened, a self-serving declaration may be brought in on cross-examination.

THE COURT: This is not cross-examination.

MR. HENDRICK: This is redirect, but the door was opened on cross, and your Honor was solicited to ascertain where else, if ever, he had testified; and he was cross-examined very sharply, and was put in an unfavorable light with the jury, I contend.

MR. BOHAN: But the self-serving declaration must be made at and near the incident, or ~~when~~ the time when the incident took place.

MR. HENDRICK: That's right.

MR. BOHAN: But, if this was made several weeks later, it cannot certainly be claimed to be within a reasonable time.

MR. HENDRICK: I except the construction of the rule by my friend. We will come within that rule very closely in this case, the issue being one of --

THE COURT: The point generally comes, reversely, where

1987-2851  
CASE #

a person has sworn to a matter, and it is then competent to show that, on a previous occasion, they said something different from what they said on the stand. But you come in with the different proposition that the witness said the same thing, on another occasion, that he said on the stand. I will allow it on the theory that the District Attorney has opened the door for it. Proceed.

BY MR. HENDRICK:

Q Did you make any affidavit? A Yes.

Q Can you tell me from your present recollection what that affidavit was, and in what matter it is made?

MR. BOHAN: I object to that, as incompetent, and I object as to form also.

THE COURT: I will allow it.

A We were served with injunction papers, and were required to show cause why the injunction should be thrown out of court. We had to swear to our grievances against the Butler Company.

THE COURT: That does not answer the question. Strike that answer out.

MR. BOHAN: I move to strike it out.

THE COURT: Yes, strike it out.

BY MR. HENDRICK:

Q Now, do you remember what you swore to in that affidavit? Do you remember the date of the affidavit? A Yes, I guess it would be about the 30th of August.

1729  
CASE #2851

Q Do you remember what you swore to in that affidavit?

MR. BOHAN: Now, I submit that, on the last answer of the witness, it is incompetent. I submit, on the answer to the previous question, that the affidavit was made on the 30th of August, and that such an affidavit does not come within that rule of self-serving declarations. I concede that there is a rule permitting a self-serving declaration to be offered, when a statement of a witness is contested or doubted, but I claim the rule to be that an affidavit, or self-serving declaration, must be made immediately after the incident takes place. Now, I submit, this incident having taken place on the 5th of August, and the affidavit having been signed on the 30th of August, no one can contend that that affidavit comes within that rule.

MR. HENDRICK: Now, I submit, if your Honor please, that my learned friend is arguing the res gesta rule.

MR. BOHAN: No, I am not.

THE COURT: Objection overruled.

BY MR. HENDRICK:

Q (Question repeated). A I can't remember everything in it, but, if you will ask questions on the affidavit, I will answer them. It was quite a long paper.

Q Do you remember what you swore to in regard to this incident? A Yes, I remember about that.

CASE #2851

1730

Q When were the papers served on you? A I can't tell you the exact date, but about the 12th or 13th of August.

Q Well, can you remember how long they were served on you -- whether they were served before or after Malachy O'Beirne was arrested? A Oh, after Malachy O'Beirne was arrested.

Q Well, can you tell us what you said in that affidavit with regard to the presence of Malachy O'Beirne?

MR. BOHAN: Now, I object to it, first, because it is leading; and, second, because it is immaterial, irrelevant and incompetent.

THE COURT: Sustained.

MR. HENDRICK: Exception.

Q Have you seen that affidavit since you signed it?

A Yes, I have -- a copy of it, I guess.

Q When did you see it? A I've seen it a couple of weeks ago.

Q Yes. Now I show you a paper, and ask you if the name McSherry is your original signature? A That is my original signature.

Q Now, I ask you to look at the paper, and tell me whether that is the paper that you signed. Look at the back of the paper. A Yes, that is the affidavit that I signed.

Q Now, did you employ the attorney in the Magistrates' Court for this defendant? A No, I don't think I did. He was employed when I went over there. It was under my instructions,

CASE #2851

though, that he was employed.

Q And you worked with that attorney? A Yes.

Q Now, was it the same attorney who handled the injunction matter? A No. He was a man called Jones that handled the case for the Union, in connection with O'Beirne.

MR. HENDRICK: I offer in evidence the original affidavit of William McSherry -- I ask that the affidavit be marked for identification.

(It is marked Defendant's Exhibit A for identification)

MR. HENDRICK: I offer in evidence the entire affidavit of William McSherry, verified the 4th day of September, 1919, in the matter in the Supreme Court of New York county of James Butler, Incorporated, against William McSherry and others.

MR. BOHAN: What is the date?

MR. HENDRICK: September 4th, 1919.

THE COURT: Let me see it.

MR. BOHAN: I object to it, as immaterial, irrelevant and incompetent.

THE COURT: I think that there is much in that affidavit that is entirely irrelevant to this issue.

MR. HENDRICK: Does your Honor rule as to the whole affidavit?

THE COURT: Yes.

MR. HENDRICK: Exception. I offer in evidence the last two paragraphs -- the last one paragraph -- with reference

CASE #2851

1732

to the presence of Malachy O'Beirne.

THE COURT: That I will admit.

MR. BOHAN: The same objection.

THE COURT: Overruled. I will admit it.

MR. HENDRICK: With your Honor's permission, I will read that to the jury.

BY MR. HENDRICK:

Q Do you know John Griffith? A Yes.

Q He was the district superintendent of James Butler, Incorporated? A On the east side.

Q Do you know McGowan? A Yes, sure. That's the fellow with the bad eye. Do you mean that fellow? He is a sort of detective. I know him.

Q Yes. Did you see him in the Magistrates' Court at the time that this investigation was held into this charge now being tried? A I guess I saw him there.

Q Well, do you know whether you did or not? I don't want any guesses? A Yes, I saw him there.

Q Have you ever seen McGowan and -- how long was McGowan in the employ of James Butler? A I can't tell you that. He was with him before I went to him.

Q He had been there a long time? A Oh, a long time.

Q And his duty was that of supervision of all the employees? A I can't tell you what his duties are. His duties are varied.

Q Well, do you know whether or not, of your own knowledge,

CASE #2851

before the 5th of August, 1919, he knew Malachy O'Beirne personally? A I am almost sure he knew every man --

MR. BOHAN: I object to it.

BY MR. HENDRICK:

Q Not that you are almost sure. Do you know whether he did or not of your own knowledge? A Yes, sir.

Q Now, were you in the Magistrates' Court in any matter in which he was a defendant -- I mean/Malachy O'Beirne--was a defendant, prior to the time he was in the Magistrates' Court, in the matter now being tried? A Yes, I was in the Magistrates' court on another occasion, when he was defending the charge of picketing.

Q Yes. A Something like that.

Q And what happened at that time, what sentence did he get? A I think he got two days, or something like that.

Q Now, did that call your attention to his identify?

A Yes, sure.

Q Now, do you remember whether or not Griffith was in the Magistrates' Court on that prior occasion? A He was.

Q And do you know whether McGowan was? A Yes, he was there also.

Q And they were attending to the prosecution of Malachy O'Beirne for picketing, of which he was convicted? A Yes, sir.

RECROSS EXAMINATION BY MR. BOHAN:

Q Did you read this affidavit before you came here, today, to testify? A Yes, that particular paragraph of it. I had

CASE #2851

forgotten all about this case, you know. I thought the case was gone, was dropped. I read that part of it.

Q You read this before you came to court to testify?

A I read that paragraph, in connection with this case.

Q Who gave you the paper to read? A I guess it was O'Beirne.

Q Where? A In my store, about ten days ago, about a week ago, when the trial first come up.

Q And who reduced this affidavit to its present, originally?

A I didn't get that.

Q To whom did you first make this statement? A Down in Ashley and Powell's -- I don't remember the last name -- down in their office, down in John Street.

Q And this paper was read to you? A Yes, sir.

Q And you signed and swore to it? A Yes.

Q And you read, also, a statement from Rogers as to what occurred? A Well, I don't think there is anything in that paper about Rogers.

Q You say, in reference to the affidavit of Christopher Rogers and John Griffith, that you read them? A Yes, sir.

Q And then you read the statement of Rogers as to O'Beirne? A Yes, sir.

Q And then you went on and said what you knew, as you claim, about O'Beirne, on the 5th of August? A Yes, sir.

Q And did O'Beirne make an affidavit? A No, he didn't.

CASE #2851

Q Why not? A Because that was up to Mr. Ashley, I suppose.

Q Well, Rogers made a statement in the affidavit in reference to this defendant? A Yes.

Q And you made an affidavit? A Yes.

Q And why didn't O'Beirne make an affidavit? A Well, we left that up to Mr. Ashley, our attorney.

Q You knew where O'Beirne was, at that time? A Well, it was his duty to get O'Beirne, as far as I know.

Q There was no reason to leave him out; was there? A Not that I am aware of.

Q Was it because O'Beirne was indicted? A I know no reason for leaving him out.

Q Did you have O'Beirne down at your attorney's office?  
A Yes, I think he was there.

Q And he didn't make an affidavit? A I don't think he was down the attorney's office in connection with that affidavit.

Q Was he asked to make an affidavit denying what Rogers said, in that civil suit? A No, sir, not that I know of. I left the matter in the hands of our attorney, Mr. Ashley, who, I thought, at the time, was a very capable man.

MR. HENDRICK: I offer the affidavit of Christopher Rogers, referred to in the affidavit of Mr. McSherry, appearing in the paper which was introduced in evidence, the door having been opened by the District Attorney, and Christopher

1736  
CASE #2851

Rogers testifying about it, yesterday.

MR. BOHAN: Yes, he was examined about it, yesterday, but I submit that there is nothing contradictory of what he testified to. He was fully examined about it.

THE COURT: Objection sustained.

MR. HENDRICK: Exception. And I ask that the affidavit be marked Defendant's Exhibit B for Identification.

(It is so marked, Defendant's Exhibit B for Identification.)

MR. HENDRICK: And I ask that the affidavit of John Griffith, the superintendent of Butler's, be admitted in evidence.

THE COURT: Denied.

MR. HENDRICK: Exception. Now I ask that it be marked for identification.

THE COURT: It may be marked for identification.

(It is marked Defendant's Exhibit C for identification.)

M A L A C H Y O ' B E I R N E, the defendant of 725 Third Avenue,

being duly sworn and examined, testified as follows:  
DIRECT EXAMINATION  
BY MR. HENDRICK:

Q Now, Mr. O'Beirne, raise your voice, as if you were talking at the back of the room, and then perhaps the gentleman in the last seat can hear you. Where were you born? A I was born in Ireland.

CASE #2851

Q Raise your voice. When did you come to this country?

A August 16, 1914 -- no, June 16, 1914.

Q How old are you? A Twenty-eight years. August 2nd, I was twenty-eight years.

Q Are you married? A No, I am single, sir.

Q Have you got any people in this country? A Yes, I have a brother here.

Q Anybody else? A I have uncles here-- not in New York, though. They are out west.

Q Now, since you have been in this country, where have you been employed and when? A Well, I've been employed by James Butler, Incorporated, and the Atlantic & Pacific Tea Company.

Q When did you start with James Butler? A About two weeks after landing in the country.

BY THE COURT:

Q And when was that? A I landed in June, 1914 and, about two or three weeks after, I went to work for James Butler.

Q 1914? A Yes.

BY MR. HENDRICK:

Q You went to work for Butler about two weeks after you landed? A Yes.

Q How long did you work for Butler? A I worked for him for about a year then. And then I went to work for the Atlantic & Pacific Tea Company, afterwards.

Q How long were you unemployed before you started with the Atlantic & Pacific Tea Company? A Well, perhaps three weeks

CASE #2851

or a month.

Q And did you go back to work for Butler? A Yes; after leaving the Atlantic & Pacific.

Q How long were you with the Atlantic & Pacific? A About a year and three months.

Q And what did you do then? A I went to work for James Butler again.

Q And how long did you work for him then? A Well, I worked about two months, down in the office at 390 Washington Street. That's Butler's headquarters. And afterwards I went to the Army.

Q When were you enrolled in the United States Army?

A About February 24th or 25th, 1918.

BY THE TWELFTH JUROR:

Q You were then enrolled in the American Army? A Yes, sir.

BY MR. HENDRICK:

Q How long were you in the Army? A About a year.

Q Where did you serve? A I served in Camp Upton, and then I was overseas.

Q What branch of the army service were you in? A 308th Infantry, 77th Division.

Q Did you sustain any injuries? A Yes, I was gassed overseas.

Q Where were you gassed? A At a place called Filmes.

Q Where is that? A It is proposed to be in the Chateau-

1987-2851  
CASE #

Thierry district.

MR. HENDRICK: I offer in evidence the defendant's discharge, dated the 23rd of February 1919, from the United States Army.

MR. BOHAN: The People will concede that the defendant was discharged.

MR. HENDRICK: I don't want the concession. I want to read the certificate to the jury. I offer it in evidence.

THE COURT: How is it relevant?

MR. BOHAN: I object to it.

THE COURT: Sustained.

MR. HENDRICK: Exception. I ask that it be marked for identification.

(It is marked Defendant's Exhibit D for identification.)

THE COURT: It has nothing to do with the question before the jury. They are not trying the question of whether he was honorably discharged from the army or not, but whether he assaulted this man.

MR. HENDRICK: I offer it as a matter of identification of Malachy O'Beirne, bearing upon his identity.

THE COURT: He is here.

MR. HENDRICK: Who he is, and what manner of man he is.

Q Where were you on the 5th day of August, 1919? A I left my residence at about 10:30 in the morning, and I came down to

1987-2851  
CASE #

the door, that morning, and it was raining, and I went back and got my raincoat; and I had a straw hat on, that morning, and I put on a hard hat when I went back.

Q Now, you must raise your voice. You are only talking to yourself, so far as this jury are concerned, because no one can hear you. The jury say that they don't hear you at all. Now, start that over again.

Q (Question is repeated by the stenographer). A On the 5th of August 1919, I left my residence at about 10:30 in the morning.

I came down to the door, on that morning, and it was raining, and I went back upstairs, and I got my raincoat, and I had a straw hat on, going downstairs, and I went back, and put on a hard hat, what they call a derby.

And, that morning, I was supposed to meet five or six men that were supposed to do picket duty at 29th Street and Third Avenue, and I got there about 10:45, and I found nobody there.

And I walked back to 34th Street and Third Avenue, and I didn't see anybody, and I walked up to 44th Street on Third Avenue, and I didn't meet anybody that I knew.

And I walked back again to 29th Street, and I didn't meet anybody I knew, and I stood around this neighborhood until about one o'clock, until the store closed at 29th street and Third Avenue.

Then I had lunch, I went in and had lunch; and, after-

1987  
CASE #2851

lunch I walked leisurely acrossdown to 410 Eighth Avenue, arriving there about 3:30 on that afternoon.

I stood there until the hall closed, that afternoon.

Then I walked to 23rd Street and Ninth Avenue, and took the crosstown car home, and had supper at home, and went to the meeting, that night, of the association, and came home, and went to bed. That's my transactions on that day.

Q Where are you now employed? A I am employed by the Metropolitan Life Insurance Company.

Q Do you know John Griffith? A Yes.

Q In what capacity are you employed by the Metropolitan Life Insurance Company? A I am a night watchman.

Q And you work nights? A Yes, sir.

Q And did you work last night? A Yes, sir.

Q And every night since you have been employed there?  
A Yes, sir.

Q How long have you known John Griffith? A Well, I've known John Griffith since I went to work for James Butler, almost six years.

Q And do you know Detective McGowan? A I know a man by that name. He is supposed to be a detective, but I don't know whether he is or not. He goes around as a detective.

Q Yes. And where is he employed? A I believe he is in Butler's employ.

Q Well, how long have you known him? A Well, about as long as I have known Mr. Griffith, about five or six years.

1582 ESCV  
CASE #2851

Q Well, how do you know him? A Well, anybody would know him. He's blind of one eye. It's very easy to identify him.

Q Did you ever speak to him? A Yes.

Q When did you first speak to him? A Well, I can't really say when I first spoke to him, but I was working for the Atlantic & Pacific Tea Company, and his wife and him used to come in, and deal with me, buy their groceries from me.

Q Now, do you know whether McGowan knew your name? A Oh yes, certainly, he knew my name. Every time he came in, he used to say, "Hello, Malachy." That's what he used to call me.

Q Were you sent to jail for two days for picketing? A Yes.

Q How long before the 5th of August? A It must be about a week, I think; five or six days or a week.

THE COURT: Well, the question of counsel cannot be correct. Nobody is sent to jail for picketing. That is a legitimate thing, picketing.

THE WITNESS: I was arrested for picketing, your Honor.

THE COURT: You were arrested, and charged with some act which you committed while you were picketing.

BY MR. HENDRICK:

Q Were you sent to jail for disorderly conduct? A Yes.

Q And for how long were you sent to jail? A Two days.

Q And did that disorderly conduct involve assaulting anybody? A No, sir.

CASE #2851

MR. BOHAN: I object to that, as immaterial, irrelevant and incompetent.

THE COURT: He may state the charge on which he was convicted, and the reason why I interrupted was that counsel inadvertently stated it erroneously, because it is well known that peaceful picketing is not an offense, and no one is ever convicted of that, because there is no such crime.

BY THE COURT:

Q The charge was disorderly conduct, was it not, Mr. O'Beirne? A Yes, your Honor.

Q And you were convicted by the Magistrate of disorderly conduct, and got a two-day sentence? A Yes, your Honor.

BY MR. HENDRICK:

Q Now, who were in the court, pressing the charge against you?

MR. BOHAN: Objected to.

THE COURT: Sustained. pressing is not a good word in that connection. You may ask him who the complainant was.

BY MR. HENDRICK:

Q Who was the complainant? A As far as I could understand, Mr. Griffith was the complainant.

Q And was anybody else there with Mr. Griffith? A Yes, sir.

Q Who was that?

THE COURT: What do you mean? Testifying?

CASE #2851

MR. HENDRICK: Yes.

A Yes, sir. He had a special detective, who stood outside of one of the stores where I was picketing; he had him as a witness.

Q Was McGowan there? A Yes, sir, he was there, too.

Q Was McGowan there on the later occasion, when you were arrested in connection with this matter? A Yes, every time I was in court, I saw McGowan there.

Q Now, was McGowan present with Rogers, when you were arrested in connection with this matter? A I didn't see McGowan.

Q In the saloon? A No. I didn't see McGowan.

Q What did Rogers say in the saloon, when he pointed you out to the officer? A He came into the saloon -- there was two officers along with him -- and he said, "That's Malachy O'Beirne. There he is." I was sitting at the table, reading a newspaper, and he said, "That's Malachy O'Beirne," pointing to me.

Q When did you first learn that there was a charge against you, besides the one on which you had served the two days in jail? A The night previous, I heard at the meeting of the association that there was a warrant out for my arrest, for assaulting a man in a store; but I looked on the thing as a joke; I thought the men were kidding me on account of being arrested before. I didn't believe it.

Q When Rogers came in, did you know him, when he came into the saloon? A No, sir, I never saw the man before.

1745  
CASE #2851

Q Now, did you, on the 5th day of August 1919, go to 410 Second Avenue -- I think that's the address -- or 412 Second Avenue, at any time? A No, I wasn't near the place at all on that date.

Q Did you at that time, or any other time, lay your hands upon the complainant Rogers? A I did not sir. I never saw him until he came into the saloon, and pointed me out, and he said, "That's Malachy O'Beirne." I never saw him before in my life.

Q Now, Mr. O'Beirne, you've heard the witness McSherry testify that you didn't make an affidavit in the injunction suit? A Yes, sir.

Q Is that true?

MR. BOHAN: Objected to.

A No, I made an affidavit, sir. McSherry wasn't there, though, and he might not know anything about it.

MR. HENDRICK: Do you press your objection?

MR. BOHAN: No, I will withdraw the objection.

BY MR. HENDRICK:

Q I show you a paper, and ask you if that is your original signature? A Yes, that is my signature, sir.

Q Now, apart from the time that you served two days in jail, for disorderly conduct, in connection with picketing, have you ever been convicted of a crime? A No, sir.

MR. HENDRICK: That is all.

1746

CASE #2851

BY THE FIFTH JUROR:

Q What was the nature of the disorderly conduct?

THE COURT: Wait until we finish with the examination of the witness, Mr. Juror. The District Attorney has not cross-examined him yet.

THE TWELFTH JUROR: If your Honor please, I have an important engagement at 93rd Street, at about a quarter to one, and I ask that, if this case will not be finished that you let us go at half past twelve. This is a very important engagement, and means a delay of three weeks or a month, if I don't keep it.

THE COURT: Well, telephone to have them wait for you. Go ahead Mr. District Attorney.

CROSS EXAMINATION BY MR. BOHAN:

Q You say that, on the 5th of August --

MR. HENDRICK: Excuse me, Mr. Bohan. I forgot several questions that I ought to have asked him.

BY MR. HENDRICK:

Q Who was present in Painters' Hall, from three o'clock on, on the 5th of August? A Well, when I arrived there, the custodian of the hall was there, James Ward, and several other men that didn't belong to our organization, and I didn't know them.

Q Well, did you know anybody who was present? A Only James Ward. That's the only man I knew. I was only a short time

CASE #2851

in the business at the time. I had only just come back from the army.

Q Is Mr. Ward in court? A Well, he told me he would be here, today.

Q And did you also subpoena another officer of the organization? A Yes, John Frewen.

Q Is he here in court? A Well, he is supposed to be. He told me he would be here.

MR. HENDRICK: That is all.

BY MR. BOHAN:

Q Did you serve the subpoenas yourself? A Yes.

BY MR. HENDRICK:

Q Were they in court yesterday? A Yes, sir.

BY MR. BOHAN:

Q On the 5th of August, you say that, at 11 o'clock, you started out to do some picketing? A No, I started about 10:30.

Q Who was with you? A Nobody. I was alone.

Q What place were you assigned to by your superior officers in the Union, to picket, on that day? A We were supposed to meet at 29th Street and Third Avenue.

Q You had a raincoat? A Not when I come down from the house. I went back to the house for it, because, when I got down to the street, it was raining.

Q And what kind of a hat did you have on? A I had a straw hat on, first, and I went back and put on a hard hat, before

1987-2851  
CASE #

I left the house.

Q When you got on Third Avenue, what kind of a hat did you have on? A straw hat, a soft hat or a cap? A A derby hat.

Q Now, you were up and down Third Avenue from what time on? A Well, I arrived at 39th Street and Third Avenue about a quarter to eleven, and from that time until one o'clock.

Q Until when? A Until one o'clock. The stores closed then for lunch, and I went and had my lunch myself.

Q Did you go back? A No, sir, I didn't go back.

Q Where did you go then? A Well, I walked leisurely across 34th Street to Eighth Avenue.

Q And who was with you? A Nobody was with me.

Q So that between eleven and one, or half past ten and one, you were on Third Avenue, alone? A Yes, practically alone.

Q Well, what stores did you visit? A I passed by two stores of Butler's, but I didn't visit any stores of Butler's; I didn't go into any store.

Q Well, what store did you have under observation? A On Third Avenue, between 39th and 40th Street, and the store I worked in, between 43rd and 44th Street, on Third Avenue.

Q Now, what was the furthest down on Third Avenue that you were, that morning? A 39th Street.

Q What store is that? A The store at 39th Street and Third Avenue, right on the corner.

Q Are you sure you were not down between 22nd and 23rd

1749  
CASE #2851

Street, on Second Avenue? A No, sir.

Q Were you ever on Second Avenue? A Oh yes, I have travelled up and down Second Avenue, at different times.

Q No. I mean during this strike? A Yes.

Q And you did work in that store, and knew it quite well; didn't you? A Yes.

Q When did you first work in there? A Perhaps five years ago.

Q Did you know the man that had worked there before the strike commenced? A I don't think I knew him, but I knew the man that worked there when I worked there, five years ago. They change so often, it's pretty hard to know them.

Q How many times during the strike did you picket the store at 412 Second Avenue? A I was never a picket on that store.

Q How many times did you go near it, during the strike? A I wasn't near the place at all. I wasn't in that neighborhood at all, during the strike, or for about a year and a half before that.

Q Well, don't you call 29th Street and Third Avenue near that neighborhood? A I was supposed to go there, that day, just that one day. I was assigned to go there, along with a bunch of other men.

Q Was that the only day during the strike that you spent on Third Avenue? A No, I spent several days on Third Avenue, but not in that neighborhood. I generally picketed my own store, between 43rd and 44th Street, on Third Avenue. I was managing

1987-2851  
CASE #

that store, and I generally picketed that myself.

Q You were manager of that store when the strike started?

A Yes, sir.

Q Did you ever see Rogers before the 5th of August?

A I never saw Rogers until the time he came into the saloon, and pointed me out, and said, "That's Malachy O'Beirne." I never saw him before in my life, and I told the officer that, too.

Q Now, that was in the afternoon of that day; was it not?

A No, sir, in the forenoon.

Q And that was at Third Avenue and what street? A 44th Street.

Q And you live where? A I was in the saloon at the time?

Q But where did you live at that time? A I lived on 36th Street, between Second and Third Avenue, number 236, east.

Q And the Union Headquarters were where? A The Union Headquarters were at west 136th Street. I forget the number.

Q Where was Painters' Hall? A That was at 410 Eighth Avenue.

Q Now, every afternoon, did you spend your time at Painters' Hall? A No, sir, I didn't.

Q How often did you go to painters' Hall, during the strike?

A Well, at any time that I was on picket duty, and didn't find anybody in the neighborhood, I went there to get information. It was a source of information there.

Q Now, can you give me a day, before August 5th, when you

CASE #2851

went over to Painters' Hall? A No, sir. I was there a couple of times before that, but I can't remember the dates.

Q How many times? A Three, four, five or six, perhaps. I really can't say.

Q You were there three, four, five or six times? A Yes, sir.

Q Is that your answer? A Yes, sir.

Q Now, at what time of the day? A I generally got there in the afternoon, after lunch hour.

Q After lunch? A Yes, sir.

Q On all occasions? A I can't say on all occasions. I was there a couple of times in the morning, to meet some men, to go out on picket duty.

Q And what did you find the men there doing? Were they playing cards, or what? A Well, generally, they were playing cards, or conversing among themselves.

Q And, on the four or five times you went there, whether they were in the morning or afternoon, did you find Mr. McSherry there? A Not all the time. I found him there on a couple of occasions.

Q How many times? A Well, I really can't say. I found him there on two or three occasions.

Q Now, did you know Dolan and Frewen and the keeper, Mr. Ward? A I knew them all by eyesight.

Q Were they there on every occasion that you went to Painters' Hall? A Well, sometimes they were, and, other times

1752  
CASE #2851

they weren't. That day that I went there, there was only the custodian of the Hall, Mr. Ward, and some other men, that I can't give you their names, not members of the organization.

Q How many times after August 5th, did you go to Painters' Hall? A I really couldn't say.

Q Well, did you go there at all? A Yes, certainly I did.

Q Were you in Painters' Hall on August 7th, the day you were arrested? A No, I was not, sir.

Q Were you in the hall on August 6th? A The 6th.

Q Yes. A I may have been. I can't say.

Q Were you there on August 4th? A No, I wasn't. I don't think so, sir.

Q What day was August 5th? A I can't say now what day it was. That's a long time ago. At that time, I knew.

Q Were you there on August 3rd? A I can't say, sir.

Q Or, August 2nd? A I can't say. I may have been.

Q Or August 1st? A I can't say, I may have been.

Q Can you give me any date, prior to August 5th, that you are positive you were in Painters' Hall? A Well, just on the supposition that I was supposed to assault a man, that day, I had to jog my memory to see where I was at that time.

Q Well, when did you first learn that Rogers had said you assaulted him? A Well, I learned of that, the night before I was arrested, of a charge being put against me, but I didn't know who put it.

Q Who told you of it? A It was a meeting of the organ-

1753  
CASE #2851

ization, and somebody said there was a warrant out for my arrest, for assault, and I laughed, and thought it was a joke.

Q Did you learn who had made the complaint against you?

A I didn't learn who made the complaint against me.

Q Did you learn where you were supposed to have assaulted the man? A No, sir.

Q So that, on the afternoon of August 7th, when you were arrested, you didn't know who or when the person charged you with an assault; is that right? A On August 7th, that man came in, in the morning, into the saloon, where I was reading a newspaper, and he pointed me out, and said, "That's Malachy O'Beirne."

MR. HENDRICK: You must speak louder. No one can

hear you. I am losing at least half of what you say myself.

BY MR. BOHAN:

Q When did you first learn the time and place where Christopher Rogers claimed that you assaulted him? A In the 51st Street Precinct, east 51st Street Precinct.

Q And who told you? A Well, I was charged with assault there. That's the first thing I knew about it.

Q Did you hear him say that, on the 5th of August, at three o'clock in the afternoon, at 413 Second Avenue, you assaulted him? A No. He said it was at 3:50.

Q And was that the first time that you learned the place at which you were charged with assaulting Rogers? A Yes.

1754  
CASE #2851

Q And you didn't know anything about 412 Second Avenue before that time? A No, sir. Well, the detectives said I was arrested for assaulting this man, but they didn't say where, when they arrested me, and the station house was the first place I learned.

Q I am asking now when you first learned where? A In the station house.

Q Who said there that it was 412 Second Avenue? A I heard this man, the complainant, say it was 412 Second Avenue.

BY THE COURT:

Q Do you mean Rogers, the complainant in this case? A Yes.

BY MR. BOHAN:

Q At that time did you say anything to the officer? A Well, I believe I told him that I didn't know the man at all; that it was the first time I ever saw him. I'm not really sure, but I believe so.

Q Well now, did you tell the officer, at that time, when Rogers made the complaint, charging you with assaulting him on August 5th, at 3:50 in the afternoon, as you say, at 412 Second Avenue, did you tell the officer where you were at that time of day? A Well, I really can't say. I don't know. I may have but I can't say.

Q Well, what did you say to the officer? A Well, I believe I told him I didn't know the complainant at all; that it was the first time I saw him. I really don't remember, but I think

1755  
CASE #2851

I told him that.

Q Did any of the officers ask you where you were at 3:50 in the afternoon of August 5th? A I don't think so, but I can't say now.

Q Well, did you tell him where you were? A Well I can't say, but I don't think so. A year ago is pretty hard to remember.

Q You said before that it was easy to identify McGowan, that you knew him for five years? A Yes.

Q By the cast that he had in his eye? Didn't you?

MR. HENDRICK: I object to that. There is no testimony about a cast.

BY MR. BOHAN:

Q Well, you said something was the matter with his eye?

A Yes, he was blind in one eye. His eye was closed.

Q And you said that it was very easy to recognize him, because of that infirmity? A Yes; but, anyway, I would recognize him.

Q You have a little trouble with your left eye? A No, sir, I haven't.

Q Isn't there a cast in your eye? A Yes.

Q Who else did you say was in Painters' Hall? A Well, when I arrived there, the custodian of the hall was there, and there was a bunch of other men, but I couldn't place them. I didn't know them.

Q Well, can you give the name of any man who was there?

1587-2851  
CASE #

A Well, Eugene Dolan. He was working for Butler at the time. That's the only man I can give the name of.

Q At what place were you previously arrested in connection with that disorderly conduct charge; where was that? A That was at 46th Street and Second Avenue.

Q On Second Avenue? A Yes.

Q So that you did do some picketing on Second Avenue?

A Well, the men --

Q How many stores of Butler's are on Second Avenue? A I really can't say.

Q From 14th Street to 59th Street? A I can't say. I have no idea.

Q And how many stores of Butler's are on Third Avenue, between those streets? A I couldn't say. I knew the store I worked in.

Q Did you work in any of the stores on Third Avenue?

A Yes, sir.

Q Which store? A I worked at 74 Third Avenue.

Q Where was that? A That's between 11th and 12th Street.

Q Did you ever work in any of the stores on Second Avenue, besides the one at 412? A No, sir, I did not.

Q You picketed the stores in which you worked; didn't you? A No, sir, I did not. I picketed the store that I worked in, at the time the strike came on, 686 Third Avenue. That's the only one that I picketed, besides the one at 46th Street and Third Avenue.

1757  
CASE #2851

Q Where did you make the appointment to meet these men, on the morning of August 5th? A It was made the night previous, at a meeting of the organization.

Q Now, who were you to meet there? A Beg pardon?

Q (Question repeated). A Well, there were several men delegated to come there. I really can't say the names.

Q Do you remember whom you met there on August 5th? A I didn't meet anybody there.

Q Well, who made the appointment with you? A Well, it was drawn up by the organization. Several men were told to go there, and I was the only man that turned up there, that day.

Q Well, how would you know then? A Well, I generally knew them by sight.

Q Can you give us the names of the men you were directed to meet, to picket, on that morning? A No, sir. Out of the 140 men that were on strike, I knew only a few of the men.

Q Did you meet anyone on the way to the Hall, that morning? A No, sir.

Q So that you didn't meet any of your striking comrades, at any time on the morning of August 5th? A No, sir, I didn't.

Q Between the time you started out on Third Avenue, from eleven o'clock to one, you didn't see any of your striking comrades? A No, sir.

Q Who made the appointment for you, the night before, on Third Avenue? A Well, as a general rule, men are picked to go

1987-2851  
CASE #

to certain places, but generally it was the organization that done it.

Q What places were you directed to picket, the night before? A I was told to go to 29th Street and Third Avenue, and meet a certain bunch of men, the next morning.

Q How long did you wait there for them? A Well, perhaps I might stay there ten or fifteen minutes, and then walk uptown and back again, and I might have stood there ten or fifteen minutes longer, and walked back again.

Q Did they give you the names of any of the men, the night before, that you were to meet? A Yes, the names were taken, but I got no names.

Q Did you know any of the men that you were to meet? A No, not personally.

Q Did you know them by sight? A Yes, I knew them by sight.

MR. BOHAN: That's all.

THE COURT: One moment.

REDIRECT EXAMINATION BY MR. HENDRICK:

Q Were you arrested by a uniformed officer, or a plain clothes man? A By two plain clothes men.

Q Two plain clothes men? A Yes.

Q At the time of your former arrest, upon the charge for which you were sent to jail for two days, were you charged with having a weapon? A No, I was not sir.

Q Were you searched? A No, sir, I was not.

Q At the time of the second arrest, were you searched?

1987  
CASE #2851

A No, I don't think so.

Q At any time, in connection with this charge, were you searched for a weapon? A No, sir, I wasn't.

MR. BOHAN: Oh, I object to this, as immaterial.

THE COURT: Overruled.

BY MR. HENDRICK :

Q In your picketing, at any time, did you carry a weapon of any kind? A No, sir.

Q Now, did Mr. McGowan know that you had a cast in your eye?

(Objected to. Sustained. Exception.)

Q Well, he must have. He knew me for five years.

BY MR. HENDRICK:

Q The same question as to Mr. Griffith?

MR. BOHAN: Objected to, if your Honor please.

THE COURT: Sustained.

MR. HENDRICK: Exception.

Q Are you now a member of this Retail Grocers' Clerks Protective Association? A No, sir.

Q Do you know whether the organization is in existence?

A I couldn't say.

MR. HENDRICK: That's all.

BY THE COURT:

Q You were sentenced to twodays? A Yes, sir.

Q What was the charge against you? A Disorderly conduct.

CASE #2851

Q What was the disorderly conduct? A Well, as far as I could learn, it was walking up and down in front of the store. That's all I did, sir.

Q Were you charged with assaulting anybody? A No, sir.

Q Who was the complainant? A The complainant was, I believe, Mr. Griffith, and another detective that was protecting the store.

THE COURT: Have <sup>you</sup>/those papers here, Mr. District Attorney?

MR. BOHAN: No, sir, I never heard of the matter until just now.

THE COURT: That is all. Step down.

MR. HENDRICK: The defendant rests.

THE COURT: Do both sides rest?

MR. BOHAN: Yes, sir, except if your Honor thinks the matter of the prior conviction is important. I don't think we can finish the case today.

THE COURT: Well, I think it should be shown what the disorderly conduct was. It was brought out, and one of the jurors wants to know, and I think we ought to have that proof here. We will adjourn now.

(The Court admonished the jury in accordance with Section 415 of the Code of Criminal Procedure, and adjourned the further trial of the case to Monday morning, August 9th, 1920, at 10:15 o'clock.)

1987-2851  
CASE #