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then he struck the Italian in the jaw here (indicating).

BY MR BUCKNER:

Q You mean he knocked the razor out of his hand first?

A First he knocked the razor and then he struck him here (indicating).

Q Just a minute. First he knocked the razor out of his hand? A Yes.

Q And it fell on the steps? A Fell on the steps.

Q Then he gave him one in the face? A Yes, he hit him here (indicating).

Q This man over in the corner (indicating)? A Yes.

BY THE SECOND JUROR:

Q² Smacked him or punched him? A Well, I think it was a punch.

BY MR BUCKNER:

Q Well, you saw him hit him with his fist? A Well, he hit him with the fist.

Q Pretty hard?

MR MURPHY: I object to that.

A Well, I don't know. I did not have the blow and I could not tell you.

Q Well, did you ever see him give any exhibitions of his skill?

Objected to. Objection sustained.

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WILLIAM STILLWAGEN, being called and duly sworn as a witness on behalf of the defense, testified as follows:

DIRECT EXAMINATION BY MR MURPHY:

Q Where do you live, Mr Stillwagen? A No. 790 Forest Avenue.

Q What is your business, Mr Stillwagen? A Saloon keeper.

Q And you are located where? A Forest Avenue and 158th Street.

Q 158th Street and Forest Avenue? A Yes.

Q On the 28th day of last June, 1909, did you see the defendant, Kelly? A Yes, I saw him when he come in with the two prisoners.

Q You did see him? A Yes.

Q About what time did you see him? A This was around four o'clock.

Q Where was he when you first saw him? A That was the first time I saw him when he brings them two prisoners in.

Q Where were you at the time? A I was in the saloon.

Q You were in the saloon? A Yes.

Q And Kelly brought the two in? A Yes.

Q Did you have any conversation with Kelly? A No.

Q Did he say anything to any one? A No, I had a little

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whiskey for upstairs, for that woman that was sick, for Mrs Dewald. Then I went upstairs. I did not see nothing at all then.

Q You left the barroom before there was any conversation on the part of Kelly and went upstairs to the woman who was sick? A Yes, right upstairs to the woman that was sick.

Q Who was the woman that was sick? A Mrs Dewald.

Q Is that the lady over here (indicating)? A Yes.

Q That's Mrs Dewald? A Yes.

Q She was upstairs in a room in the building in bed?
A Yes, in bed.

Q You went upstairs with some whiskey to that room?
A Yes, when Kelly came in with the two.

Q Did you see Kelly after that? A I seen him upstairs after he came upstairs.

Q You saw Kelly come upstairs in the bedroom where Mrs Dewald was? A Yes.

Q Were you in that room before Kelly got there? A Yes, I was upstairs before he came in.

Q When Kelly came upstairs, who was with him? A Mr Dewald, that was all, and I, myself.

Q Well, did he have Basso with him? A Yes, that Italian.

Q When Kelly came upstairs and the deceased, Basso and Mr Dewald, what took place up there? A Well, Mr Kelly here

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asked Mrs Dewald what he should do, shall he lock him up, or leave him alone and Mrs Dewald told him, "It is better he got a big family", and that he should let him alone, let him go.

Q She would not make a complaint against Basso? A No, she would not make a complaint against him.

Q What did Kelly do with Basso then? A Then I went out in my room to get something for the lady, and I don't know what she done. When I came in the room they went out, they went downstairs.

Q You left the room then, did you? A I left the room after that.

Q Where did you go then? A I left the room after that.

Q Where did you go then? A I was in my front room.

Q Did you go downstairs any time after that? A No, sir.

Q Did you see any of this alleged occurrence? A No, sir, I didn't see anything at all.

Q You do not know anything about that? A No, I did not see it.

Q Were you on the landing any time while Basso, Dewald and Kelly were there? A No, sir, I was not there.

Q Now, Mr Stillwagen, you have been conducting the liquor business at that place quite some time, have you? A Yes.

Q And you are reasonably familiar with the location of your bar? A Yes, sir.

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Q And also with the stairs going upstairs? A Yes, sir.

Q And with the way that door which leads from the barroom into the hall opens? Have you, either by yourself or Mr Furstenberg or with me, stood at the bar within about four feet of the Forrest Avenue end, or near the center of the bar, or any other place in the bar, when the door leading into the hallway was open, and try to see if you could see the landing? A You could not see only a little bit.

Q Have you done so, yes or no, did you try to see it?

A Yes, sir.

Q Could you see that landing on that stairway leading upstairs, standing outside of that bar, from any part of the bar? A You could not see nothing at all, only the stairs.

Q Now, is that bar as it stands to-day, in your barroom in the same position as it was on the 28th day of last June?

A Yes, sir.

Q Is that door which leads into that hallway now from the barroom in the same condition and position it was on the 28th day of last June? A Yes, sir.

Q Are the first short stairs leading from the hall floor up to the landing in the same position they were on the 28th day of last June? A Yes, sir.

Q And is that landing in the same position it was on that date? A Yes, sir.

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Q And the stairs going upstairs? A Yes, sir.

Q In other words, there has been no change in the condition of the stairs, the door, or the barroom since the 28th day of last June? A No change made.

Q Now, Mr Stillwagen, can you tell the Court and Jury about where you would have to stand in that barroom to see that landing? A You had to stand right in the door.

Q Right close to the door? A Close to the door.

Q Then the door would have to be opened? A Have to be opened, you had to stand right in the door.

Q Now, it has been testified here that the door was opened a distance of about a foot, and that the witness standing within about three feet of the bar and by looking ~~him~~ around the door he could see the landing? A He could not see nothing at all.

Q You have tried to see from that point, have you?

A Yes, I know this.

Q And it could not be seen? A No, sir.

CROSS EXAMINATION BY MR BUCKNER:

Q Can't you see the landing from the center of the barroom? A No, sir.

Q From the right side of the barroom? A No, sir.

Q If this is the bar right here, running along here (indicating) and if you walk over here in the barroom and look

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through this open door, can't you see that landing up there?
A Well, a little bit you could see, not much. You have to
step back to the door.

The Court admonished the jury in accordance with
Section 415 of the Code of Criminal Procedure and took a
recess until two o'clock p. m.

AFTER RECESS

Trial resumed.

GRACE DEWALD, called and duly sworn as a witness,
on behalf of the defendant, testified as follows:

DIRECT EXAMINATION BY MR MURPHY:

Q Mrs Dewald, where do you live? A 790 Forrest Avenue.

Q Mrs Dewald, you are the wife of Walter Dewald, who is
here in court? A Yes.

Q And on the 28th day of June, 1909, where did you re-
side? A In the kitchen.

Q No, did you live at the corner of 158th Street and For-
rest Avenue on the 28th day of June, 1909? A Yes, sir.

Q Were you employed by anybody there, did you work for
anybody in that place? A Yes.

Q Who? A Mr Stillwagen.

Q That is the gentleman who is here in court, sitting

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here? A Yes.

Q On the afternoon of that day, Mrs Dewald, did you see this officer here, the defendant, Kelly? A Yes.

Q Where did you see him? A Upstairs.

Q You say upstairs, where? A In my room.

Q In your room? A Yes.

Q When you saw Mr Kelly, who was with him? A Basso and my husband and Kelly.

Q Did they come in together, about the same time?

A Yes.

Q Did you have a conversation with Kelly, did you talk to Kelly? A No.

Q Did Kelly ask you any questions? A Yes, he asked me if I wanted to get that man arrested.

Q What did you say? A No.

Q Now, after that conversation, did they leave the room?

A Yes.

Q Who left the room first? A Basso.

Q Did Basso leave the room and go over to the stairway first? A Yes.

Q Then who followed him, who was second? A My husband.

Q Your husband was second? A Yes.

Q When your husband and Basso had left the room, Kelly was still in the room? A Yes.

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Q And he left later? A Yes.

Q That is all. Or did your husband return back to your room? A Yes, right away, because I called him.

Q Right away? A Yes, I called him.

Q You say right away, about how long a time? A Only about a second.

Q A second, you say? A Or two seconds.

Q You say you called him? A Yes.

CROSS EXAMINATION BY MR BUCKNER:

Q Now, Mrs Dewald,, Kelly stayed with you while the rest went out, is that right? A He stayed two seconds there.

Q He did not really stay and talk to you any length of time? A No, he goes very slow out.

Q He walked slowly, is that right? A Yes.

Q That is, Basso, when you said no, you would not make any complaint, Basso got out as quick as he could, didn't he? A Yes, very quick.

Q Now, here the officer brings Basso in to you? A No, he got him not in his hands, Basso came in alone.

Q But the officer was with him? A After him, yes.

Q Tgis man (indicating the defendant)? A Yes.

Q In uniform? A Yes.

Q And your husband? A Yes.

Q They walk up to where you are lying? A Yes.

Q And the officer asked if you want to make a complaint against him? A Yes.

Q And you say no? A Yes.

Q And Basso got right out? A Yes.

Q And your husband right after him? A Yes.

Q And Kelly right after your husband, only he walked slower? A Yes.

Qx Then in a second your husband came back? A Yes.

Q Because you called him? A Yes.

RE-DIRECT EXAMINATION BY MR MURPHY:

Q After these people left your room, did you hear anything particularly? A Basso was out on my husband, then I heard something drop, then I called my husband, and he came.

Q That is why you called your husband, because you heard something drop, or some noise? A Yes.

DAVID D. HESSELS, called and duly sworn as a witness on behalf of the defense, testified as follows:

DIRECT EXAMINATION BY MR MURPHY:

Q Where do you live, Mr Hessels? A 678 Westchester Avenue.

Q Mr Hessels, what is your business? A I am a ticket agent.

Q You are employed by whom? A The Interborough Rapid Transit.

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Q Were you so employed on the 28th day of June of last year? A Yes, sir.

Q Where were you stationed, if any place about that time?

A Jackson Avenue, down.

Q Do you recall the 28th day of June of last year? A I do, yes, sir.

Q On that day did you see this defendant Kelly? A Yes, sir.

Q Where did you see him? A When I called for him.

Q A little louder? A I sent downstairs for him.

Q You sent somebody downstairs for an officer? A Yes, sir.

Q And did Mr Kelly come up after that? A Yes, sir.

Q Did you see Kelly when he came upstairs? A Yes.

Q What did he do? A Walked out on the platform.

Q Did anything take place then? A Walked up the platform.

Q Yes. A And he went up to two Italians.

Q Louder? A He went up to two Italians, took them off the platform and went downstairs with them.

Q He left the platform with these two Italians? A Yes.

Q How, Mr Hessels, had your attention been drawn to these two Italians prior to Kelly coming there? A Yes.

Q In what way?

MR BUCKNER: Do not state anything that any one said

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to you.

A The two Italians came upstairs, they bought two tickets and went out on the platform. Well, there was a train just pulling into the station at the time, and there was some man come up, I think he was a bartender or something of that sort, and when he come upstairs he was sort of trembling, and he stopped at my window, and he says, "There is two Italians out on the platform killed a man."

MR BUCKERN: Now, counsel warns you not to state anything that anybody told you only what you saw, not what you heard.

BY MR MURPHY:

Q Well, Mr Hessels, as the result of the conversation which you had with this man whom you understood to be a bartender in the near neighborhood, what did you do with regard to the two Italians? A Well, I sent a boy downstairs to look for a policeman.

Q Well, did these two Italians try to get aboard the car?

A Yes.

Q Did you make any effort to stop them? A The gateman did.

Q And you saw the gateman do that? A Yes, sir, I did.

Q Then, these are the same two men of whom this man came upstairs and complained about that Kelly took away with him?

A Yes.

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Q That is all.

MR BUCKNER: That is all.

JOHN A. HAYNE, called and duly sworn as a witness on behalf of the defendant, testified as follows:

DIRECT EXAMINATION BY MR MURPHY:

Q Mr Hayne, where do you live? A 685 Wales Avenue.

MR MURPHY: If the Court please, I would like to state in the beginning that this witness is one of the defendants, and of course he may reserve his rights.

Q Mr Hayne, what is your business? A Physical instructor.

Q Do you recall the 28th day of June, 1909? A I do.

Q Mr Hayne, on that day did you see Mr Kelly, the defendant here? A I did.

Q About what time did you see him? A Around four o'clock.

Q Now, when and where was he when you first saw him?

A That time leading the two prisoners in, one by each sleeve.

Q When you say prisoners, you mean two Italians he had with him? A Yes, sir.

Q We will not call them prisoners. A Well, they were his prisoners, I admit that, I consider it so.

Q You saw him leading them into the barroom? A Yes.

Q And this barroom is the property of Stillwagen at 158th

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Street and Forrest Avenue, the Bronx? A Yes.

Q Go on, tell what you saw Mr Kelly do? A And in that moment, Mr Dewald come out through the door as Officer Kelly had them by the wrist, and Officer Kelly asked, "What is this trouble here?" or "What is it?" And Paul Knieper, the other bar tender that ran after the two Italians and brought Kelly to the question, as I understood afterwards, he said, "There is the two Italians", and Dewald said, "There is the one, this fellow didn't do anything", and upon that Officer Kelly left the other fellow go, and the question was put, by whom, I don't know, about making a charge, who was assaulted; it was just in a matter of form, and as that happened, I caused myself to utter a remark, saying to him, "You ought to be ashamed to strike a woman", and he told me to mind my own damned business.

Q That is, Basso told you that? A Yes, sir, and there-upon I walked away, and I saw Officer Kelly, with Mr Dewald going first, Officer Kelly and Basso going, three in a row, upstairs. Previous to that Mr Stillwagen had entered going upstairs with something in his hand, I presume, from what I heard here to-day in the testimony--

Q Well, you did not know what it was? A No, I did not know. I saw him carrying something. I thought no more of it, and I walked back into the gymnasium again where I had been called from in the first part, and as I come out towards the middle I suddenly heard a rumpus, a noise on the stairs, and

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as I did I saw Mr Calvor and Agostini hurriedly open the door and Calvor went first and Agostini second. I happened to be right in the neighborhood, and I looked in, and as I looked in I saw Calvor and Agostini, and I saw Dewald going up the stairs, which I presume it was Dewald, because he testified to that fact.

Q Well, you saw a man going upstairs? A Somebody going upstairs, on the second step from the landing. As I saw that I saw the flash of a razor, and I quick---

Q (Interposing) Whose hand was that in? A In Basso's hand. As I saw the razor I went to reach for him, and as I did, I struck the railing, and as I struck the railing I got hold of the railing and reached over and caught him here (indicating), and I caught him on the right arm and as soon as I caught him on the right arm the razor flew up and I saw he was disarmed. I walked out, and Agostini came out and Calvor came out after me. I didn't think any more about it. I came out and as I wanted to walk back to the gymnasium I opened the front door and I seen Basso and his helper joining right in front of the barber shop and saloom. The two entrances are alike. Saw him joining him and walking down the avenue and thought no more of it.

Q Now, Mr Hayne, did you see Kelly on the landing?

A No, sir, I did not.

Q The defendant Kelly? A No, sir, I did not.

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Q You saw all who were there, didn't you? A Yes.

Q Was Kelly there? A I did not see Kelly.

Q But you saw all who were there? A I did.

Q And if he was there you would have seen him? A I guess I would have.

Q But you did not see him? A I did not see him.

Q Your business is located at this place, is it? A Yes.

Q That is you gave a gymnasium there? A Yes, sir, children's classes that afternoon.

Q You had a class on that day? A Yes, and that is how I was notified of the facts, when the children came to me and told me, "Mr Hayne, there is somebody"---

MR BUCKNER: No.

Q Well, that is all.

THE WITNESS: All right, I only have the truth to tell. I have nothing else.

Q You saw Mr Basso pass around to Forrest Avenue, and meet his friend? A Yes, Giamatasseo. They joined together in front of the barber shop entrance.

Q About how far away from Basso were you at that time?
A Four or five foot.

Q Were you outside the barroom? A I opened the barroom door to look out.

Q Did Basso make any remark to you then? A Yes, he did. He made a sort of threat, "I will fix you", or something like

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that, I don't know what.

Q Did he turn towards you? A He turned towards me.

Q Did he indicate you with his hand? A Just a little bit of indication, something of that kind (indicating).

Q Did you have a full view of Basso? A Yes.

Q Did he have a wound on his forehead? A I did not see any.

Q Did you see any wound there? A I did not.

Q When he started to walk down the street did he walk steadily or wobble, or how? A He walked just the same as I walk.

Q Did you see the barber there that afternoon? A Yes.

Q Did you see the barber leave the saloon? A The barber? Well, I can state to you that the barber was there when Basso said to me I should mind my own damned business, and he upbraided him in Italian for it.

Q Well, I mean after they came downstairs? That was before they went upstairs? A Yes.

Q I mean after they came downstairs and you had come out of the hall and Basso was passing down the street, do you know whether or not the barber had left the saloon at that time?

A I am pretty sure that he stayed in front of his store, because it is the adjoining step.

Q But you are not sure what he did? A No, but I think so, I am pretty sure.

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Q Now, the entrance to the barber shop and the entrance to the saloon are about how far apart? A There is only a partition about that much (indicating).

Q That is, the thickness of the partition? A The pillar that divides them of the wall.

Q And there is a step entering both doors? A And they are both even. The barber shop and that step is one. You can step from the saloon on to this step here (indicating). Say that was divided off, a step here and a step here and into the barber shop (indicating).

Q And you think the barber was standing about there when Basso passed? A I think so, I am pretty sure, yes, sir.

Q You are reasonably well sure of that? A Positively, I think I am sure, yes, sir.

CROSS EXAMINATION BY MR BUCKNER:

Q Now, take all the time you want to answer my questions, Mr Hayne? A Yes, sir.

Q So that we will get it all straight? A Yes, sir.

Q You did not hit him in the face at all? A No, sir.

Q Even did not hit him on the side of the face? A No, sir.

Q Just hit on the shoulder? A No, sir, here on the chest (indicating).

Q And on the shoulder? A And on the right shoulder where

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he held the blade, I had to use quick action.

Q And when you first saw the razor it was in his hand?

A In his hand, ready.

Q Open? A Positively open.

Q Ready for use? A Ready for use, and of course he would have cut Calvor to pieces if I would not have hit him.

Q He would have cut Calvor to pieces? A I shouldn't wonder, because he interfered with the scrimmage they had.

Q Calvor was there holding him? A He was wrangling with him. It was a general wrangle and took about ten seconds and the whole thing was all over.

Q Calvor was right there when you hit him, wasn't he?

A Calvor was up above, but Calvor I don't think he knew what the whole thing was wrangling about.

Q Now, let us imagine that this is a little--

MR MURPHY: Well, do not imagine anything. Just ask questions.

THE COURT: Yes.

Q Mr Hayne, if we imagine this is the hall, right here (indicating)? A Yes.

Q And that this is the door that leads in from the barroom (indicating)? A Yes.

Q And that this is the door that leads in from the little hall (indicating)? A Yes.

Q Will you state which door you went through when you

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went into this? A The one leading in the barroom.

Q This one right here (indicating)? A Yes, sir.

MR MURPHY: Use this paper, it is in evidence.

THE COURT: I suggest if you have a diagram and it is accepted, you had better use it.

THE WITNESS: I have a diagram, your Honor.

MR BUCKNER: I do not wish to use the diagram at this point.

THE COURT: Then the Court will strike out anything based on your imagination. You may assume that such and such things are there, but as long as you have a diagram itself introduced in evidence, I think it better you should use it.

Q You went in the door that leads from the barroom?

A Yes.

Q What is the first thing you saw? A I saw the flash of the razor. I saw two men struggling and I recognized them as Agostini and Calvor.

Q Calvor was scuffling with Basso? A Calvor had hold of him, don't you know, and I saw something shooting upstairs, some human being, and Agostini went to, or did try to get hold of him, and as he did I saw the razor, and I quick struck, and as I struck I struck the banister. Then I used quick action, believing that it had to be a case of immediate action to disarm the man and I struck him in the chest, and that did not af-

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feet, and I reached over and struck him on the right shoulder, and the razor fell out of his hand.

Q Now, I will ask the question again: Calvor was the man that was there? A He was on the top.

Q Calvor was the man that was about to be assaulted?
A Well, I don't know whether he was about to be assaulted. I think he was trying to save the others. I don't know.

Q Well, Calvo was right there? A Yes.

Q And he was in a position to see you? A Hardly.

MR MURPHY: Now, if the Court please, I object.

THE COURT: Objection overruled.

Q Why? A Because it was a scuffle. Perhaps he had his head turned. I don't know.

Q A scuffle between him and Basso? A Well, I presume so.

Q Well, don't you know? A Well, I saw the razor, then I thought I would disarm the man.

Q I know you saw the razor, but you must have seen Basso?
A I saw Basso, positively.

Q And you must have seen Calvor? A Well, I positively saw him.

Q And Basso had hold of Calvor, did he? A They were wrangling together. I don't know who had hold of the other.

Q And at that time, while Calvor was right there you went in and struck Basso? A No, I didn't go in and strike Basso. I

reached over the railing to strike him, to disarm him.

Q But you were in this little hall? A Yes, sir, I was at the bottom.

Q And Agostini was up there? A He was on the lower end.

Q Did you notice which one went out first, Calvor or Agostini? A I was the first one that went out and Agostini followed and then Calvor came in the saloon, too, and I walked to the front door.

Q Did you testify before the Coroner? A I did.

Q Did you testify before the Coroner as follows:---were you asked and did you testify as follows, on page 4, did you testify as follows: "All of a sudden I heard a scuffle"? A Yes.

Q "And just as I opened the door Mr Calvor and Mr Agostini and the officer and he, the deceased--and he, the deceased was wriggling to get this thing out of his pocket, and I surmised it was something, it turned out to be a razor. Before Mr Calvor, I only hit him to get it away, and I saw he dropped the razor." Did you give that testimony? A I don't know anything about the officer. There is a mistake there because I never saw the officer there.

Q Well, did you make this testimony? A I admit that it is written that way, but I did not testify that about the officer.

Q Then the next question, was this question asked you and did you give this answer: "You hit him with what?" A My fist..

Q "With my fist, and then he dropped the razor."? A Yes.

Q Was that correct? A That is correct.

Q Was this question asked you: "Where was the officer?" Do you remember that question? A I don't remember being asked that.

Q And did you give this answer: "He was trying to hold him."? A Not that I know of. There was something wrong there.

Q "Is this the officer--(indicating Officer John Kelly)? A Yes, sir." Do you remember that? A No.

Q Then, after Kelly testified, do you remember that Kelly testified at the same time? A I remember the hearing, yes.

Q Then, after Kelly testified you were recalled again, weren't you? A I think so, yes.

Q You went on the stand the second time, did you? Now, when you went on the stand the second time was this question asked you again: "Where was the officer at the time you struck the deceased?" And was this your answer: "There was such a mix up before he was above the stairs, I don't know if he had him, but I saw him wriggling, and I saw the policeman. Then I had to reach over and drop the razor"--

MR MURPHY (Interposing): "And he dropped the razor".

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BY MR BUCKNER:

Q "And he dropped the razor." "You don't know if the officer was there all the time?", and then you say at first he was upstairs with Mrs Dewald. Then the question was asked you, "Was he there at that time?" And you answered, if you did, "Yes, sir, he was on the stairs." Do you remember that answer?

A Oh, that was the upper stairs, this description, your Honor. I would like to just clear that matter up. There is some discrepancy there, there must be.

Q All right. A And if my statement is to be accepted, I wish to make that much, that the officer was upstairs, and who the officer was--I certainly knew it was Kelly--nobody else went upstairs. He was on the upper stairs, and I saw his buttons and everything, but I never testified, to the best of my knowledge that I saw him on the bottom wriggling. There is some misunderstanding there.

Q And you did not testify that he was trying to hold him?

A Not to my knowledge. I don't know where that should come from.

Q In other words, you now say that you did see an officer?

A Away up on the upper stairs.

Q Oh, you saw this uniform up on the upper flight? A On the upper flight.

Q And the reason you did not testify about the officer in

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your direct, was because your attention was not called to it?

A Well, there is something wrong there. I don't understand that.

Q Well, I mean just now, when Mr Murphy asked you to describe what you saw, you did not say anything about an officer, did you?

MR MURPHY: If the Court please, my question was to describe what he saw on the landing.

Q All right. So the officer was not there? A Not to my knowledge.

Q And he was not trying to hold Basso? A He was upstairs above, I saw something in the line of an officer.

Q He was not trying to hold Basso? A No.

Q And he was not up above when you were trying to strike Basso? A Not on the landing, no, he couldn't be, because there is not room there for four or five men.

Q Did you tell Officer McCarton when he arrested you that you gave Basso a couple of wallops?

MR MURPHY: If the Court please, how is this binding on Kelly? I object to any statement this man may have made to the officer who placed him under arrest, that it cannot be binding upon Kelly.

THE COURT: I will allow the question. There is something in his evidence here on the stand about striking twice.

Q What did you say then, if you remember? A I did say something about striking him, yes, sir.

Q But you only had reference to these body blows, is that right? A Yes.

Q Now, you did not see Basso leave the saloon, is that right? A Not the side door. I saw him passing the front door.

Q So you don't know how he got out? A No, I walked out of the place first.

Q You mean just the minute you struck him you walked right away? A When I saw he was disarmed I did not bother myself any more.

Q When you saw he was disarmed you thought your duty was done? A Yes.

Q Didn't you see where the razor went? A Why, they all filed downstairs. Then Calvor that moment went in, he says, "I will look for my pipe", and he walks in and he looks for his pipe and he says, "Here is a razor, too." That's how that thing came up. Then we saw it; ~~that~~ all happened in the fraction of a moment.

Q But now you were here in this hallway, and the minute you got in there you say you sized up the situation and saw that it called for quick action? A Yes.

Q And you struck the deceased? A I did.

Q You say you knocked the razor out of his hand? A Yes.

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Q And immediately you went away? A Upon that, yes.

Q Did you see where the razor stopped? A It dropped on the steps.

Q Why didn't you pick the razor up? A I couldn't go over the steps. They were coming down then.

MR MURPHY: Objected to.

Q That is, Calvor? A There was a small railing there, you understand that?

Q Calvor and Basso were coming down this way (indicating)?
A They all come down together. They all filed down and I filed down and I went in the saloon.

Q You did not stop to see what became of Basso? A No.

Q You did not stop to pick up the razor? A Why, I had no opportunity to.

Q Well, just answer the question, you did not, did you?

A I did not.

Q And the first you saw of the razor was when Calvor came back in the saloon and he says, "See what I found"? A No, he says he is going in for his pipe.

Q I understand, but then he came back again with his pipe and said, "See what I found"? A That he has got a razor?

A Yes, he says, "There is the razor."

Q That is the first time you saw it after the other time? A Yes, after that.

Q Have you any explanation to make why you testified that he was wriggling to get the thing out of his pocket and you surmised it was something? A Well, that was the first statement, then I suppose--

Q That was your first statement? A Well, you see that, you know that goes so quick, there is hardly any other explanation to make.

Q Now, wait, let us see, that is to say, you mean to say that you think that the statement that he was wriggling to get something out of his pocket and you surmised it to be something, is the same statement as saying that you saw the razor open in the man's hand, is that correct? A Well, I substantiated that afterwards. That was the actual conviction of the fact, when I saw him wriggling. I was not interfering with anything at all, and all of a sudden, while looking at it, and the wriggling which I admitted to say, all of a sudden I saw the razor and I took quick action, I went to reach for him and there is now I got mixed up in it.

Q And as I understand you, you say now that you regard the statement that he was trying to get something out of his pocket and you surmised it to be something, is substantially the same statement as saying that he you saw a razor half open in his hand, is that right, you regard that to be the same kind of statement? A Well, it alludes to it.

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Q Now, you knew, you had been told that there had been some little trouble between the bartender and his wife and Basso, didn't you?

MR MURPHY: I object to that, anything which occurred prior to Kelly's getting there, as not binding upon the defendant.

A I saw the whole thing.

THE COURT: Objection sustained.

Q You did not feel very kindly toward Basso, did you?

A Always, I was the best of friends I guess he ever had in the building.

Q I mean right then and there? A Oh, that was my duty to do so.

Q And you upbraided him in the barroom? A For striking a woman.

Q And you saw him coming downstairs? A Yes.

Q Then you went in there? A I was the third party in there.

Q But you did not strike him except to get the razor out of his hand? A That is all.

Q And then simply on the shoulder? A Yes, sir, the chest and shoulder.

Q Did you know that he had been turned loose? A I didn't know anything about it.

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Q Did you get that idea? A I did not know anything about it. I saw them wrangling.

Q Now I mean when you rushed into this hall here, had you been informed that they were turning him loose? A No, sir. I heard the same noise as everybody else did when the door was opened by Mr Calvor and Mr Agostini rushing in.

Q You struck the banister pretty hard, didn't you? A I did.

Q Your hand was black for a long time? A No, just swelled up a little bit.

Q When the officers arrested you, wasn't it very black here, these two knuckles (indicating)? A No, it was not black, it just swelled here, just raised. I get these things very often in my line.

Q In your line? A Yes, sir.

THOMAS KELLY, the defendant, being called and duly sworn as a witness on behalf of the defense, testified as follows:

DIRECT EXAMINATION BY MR MURPHY:

Q Mr Kelly, where do you live? A 52 Dominick Street.

Q Mr Kelly, you are a police officer of the Police Department of the City of New York? A Yes, sir.

Q And you are now attached to the 61st Precinct? A Yes, sir.

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Q And on the 28th day of June, 1909, were you attached to that precinct? A Yes, sir.

Q Were you assigned to perform a tour of duty that day? A Yes.

Q What tour were you assigned to perform? A The afternoon tour from 2 P. M. to 8 P. M.

Q Where were you assigned to patrol? A Post 20 and 22, which covers Forrest Avenue, Jackson Avenue and Trinity Avenue, from Westchester to 159th Street.

Q Were the premises of Mr Stillwagen's saloon on that post? A Yes, sir.

Q When you turned out that day, Mr Kelly, how were you uniformed? A Blouse coat.

Q That is a short coat? A What we call, the summer uniform.

Q And you carried a billy and stick with that? A No, sir.

Q Did you have a stick with you? A I had a pocket billy.

Q In your pocket? A Yes.

Q Now, about four o'clock in the afternoon of that day, did anything occur of any importance that you know of?

A Well, I was down at the corner of Jackson and Westchester Avenues.

Q How was the weather, clear or what? A No, raining.

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Q It was raining at the time? A Yes, at the time.

Q Was it raining hard, or not? A Well, pretty hard.

Q What occurred, please? A I was standing under the stairway when a man came down and told me that he was---

MR BUCKNER: I object to what he said.

MR MURPHY: This is the defendant in the case, if the Court please.

THE COURT: I will allow it.

A (Continuing) He come down and told me that two men had been stopped by the ticket agent from getting on a train, who were after strangling a woman in Stillwagen's saloon at 158th Street and Forrest Avenue.

I went upstairs, asked the agent if the two men were on the platform. He told me yes. He told me to ask the ticket agent and he would point them out to me. So I went up and asked the ticket agent and he pointed out these two men. I took them back to the saloon.

At the saloon I met Mr Dewald, and I asked him was those the two men that were wanted, and he said yes. I says, "Which one of them do you want?" He says, "This one here". I says, "Did the other man do anything?" And he said, no. Well, I let him go then.

Q Well, he said this one here, and whom did he indicate?

A Basso.

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Q And the saloon that you have reference to is Stillwagen's saloon? A Stillwagen's saloon.

Q Proceed, Mr Kelly? A I says, "What has he done?" He says, "He is after assaulting my wife". I says, "A complaint must be made in this case", and Mr Dewald said to me--

BY THE COURT:

Q Just a little louder? A Mr Dewald said to me, "I don't like to have any complaint made now because my wife is very sick." Well, I says, "As I have taken him so far now I have to make an arrest, and if the woman is so much injured as you say she is, I certainly must make an arrest, and I want her to identify this man", and on that Mr Dewald says, "Come on upstairs", and he led the way.

Q A little louder? A Mr Dewald told me to come upstairs and he led the way through the door. Basso followed and I after him. We got upstairs and I took him before Mrs Dewald, confronted him with her, and asked her if she wanted to make a complaint, and she said no, she would not make any complaint. So then I told him, "You can go downstairs".

Q When you got upstairs, Mr Kelly, was Mr Stillwagen in the room? A Yes, Mr Stillwagen was in the room.

Q When you entered the saloon downstairs was Basso and Giamatasseo, who was in the saloon if you noticed? A Well, I will tell you the truth, I didn't take any particular notice.

Q You cannot say who was there? A I cannot say who was

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there.

Q After going upstairs with this fellow Basso, and Mrs Dewald refusing to make a complaint against him, what took place then? Did they leave, or did you remain, or what happened? A I told him to go downstairs, that he could go.

Q That is, you told Basso? A Yes, that is what I told Basso.

Q Did he go? A He went.

Q Did you see him leave the room? A I saw him leave the room.

Q Where did Dewald go? A Dewald followed him.

Q Where did you go? A I stood for a few minutes to speak to Mrs Dewald.

Q You remained to speak to Mrs Dewald? A Yes, she seemed to be hysterical.

Q You say you remained a few minutes. What do you mean by that? A Well, a little time; she seemed to be hysterical, and very nervous.

Q What did you do then? A I come downstairs. Then I met Dewald coming up against me.

Q About how far down had you got when you met Dewald? A About three or four steps.

Q And Dewald was coming upstairs past you? A Past me.

Q Did he complete his journey upstairs? A He went right on upstairs.

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Q And got away out of your view? A Went out of my view.

Q That was while you were on the third step on the first landing leading from the upstairs part down to the landing?

A The third or fourth step. That is about all I could be down.

Q When you were on that step, when Dewald was passing you, did you notice anything taking place down below? A Well, I noticed a couple of fellows down at the landing, a couple of men.

Q Did you see who they were? A I did not get a good view of who they were.

Q Well, the time you got down at the landing, was anybody else there but yourself? A Yes, Basso was.

Q On the landing? A On the landing, and I sent him down stairs.

Q You told him to go downstairs? A To go downstairs.

Q Did you see Calvor there? A There was some men going in the door.

Q Going in the barroom? A Going in the barroom.

Q Did you see anything else around there? A No, nothing else.

Q What did you do after that? A I sent him out the door and went out the door after him.

Q Sent who out of the door? A Basso.

Q When Basso left the hall to go out of the door was anybody else in there besides yourself? A No.

Q They all had left the hall and left you and Basso in there? A All had left the hall.

Q And Basso went out the door? A Basso went out the door.

Q And what did you do? A I went out after him.

Q At the side door? A The side door.

Q Where did you go after that? A I walked over to the corner of 158th Street and Forrest Avenue.

Q And did you see Basso after that? A I saw Basso go down the line after that.

Q Who did you see him with? A I saw him with the other young fellow I took before.

Q Did you go back to the station that afternoon, after?
A No, I did not.

Q Did you see any other officer around that afternoon?
A Yes, Officer Gibson came to me at the same time.

Q Where did you meet him? A Right on the corner of 158th Street and Forest Avenue.

Q Was Basso there then? A Basso was going down the line against him.

Q Did Basso and Gibson meet each other? A They did.

Q How far from you? A Well, I should reckon about ten or fifteen yards.

Q Did you see anybody strike Basso in your presence?
A No, sir.

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Q Was he struck in yourmpresence? A No, sir.

Q How long have you been in the Police Department?

A Over three years.

CROSS EXAMINATION BY MR BUCKNER:

Q So you did not follow Dewald on out? A No,, sir.

Q And you did not go out, simply walking a little slower, rightnafter Dewald? A No, sir.

Q You simply told Basso that he should go? A Yes.

Q And he went? A Yes, I sent him downstairs.

Q You did not intend to do anything more to him? A No.

Q And when you did go down you say he was still on the landing and in the hall? A Still on the landing and in the hall.

Q And everybody else had gone? A They were going.

Q Did you take him out on the sidewalk, or did he go out?

A I did not put a hand on him. He walked out ahead of me.

Q You did not direct him to go out? A I told him to get out of the hall.

Q You did not help him out? A No.

Q And you did not say anything to him on the sidewalk?

A No, sir.

Q Will you pay close attention to what I want to ask you, here on page 5, was this question asked you before the Coroner, and did you make this answer:--Well, after saying that the wife

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refused to make a complaint against him, the question was asked: "That is this lady here? A Yes, sir--(indicating Mrs Dewald)-- I think so. After she refused to make a complaint I took the man downstairs"? A Allow me to correct that. I sent the man downstairs.

Q Just a minute until I get through: "I took the man downstairs and he became very quarrelsome. I took him out on the sidewalk and left him". Did you make that statement?

A I sent the man downstairs.

Q You sent the man downstairs? A Exactly, and he did there, from what I understand, become quarrelsome down there, and I come right down when I heard the disturbance and sent him out.

Q You sent him out? A I sent him out.

Q So you did not take him downstairs? A No, sir.

Q And you did not take him out on the sidewalk? A No, sir, I sent him out.

Q You did not have any feeling of resentment toward him?

A Nothing whatever, because I never knew the man before.

Q Did Calvor and Agostini and Hayne, or anybody tell you immediately that Basso had had a razor? A No, sir, they told me a little while afterwards, about ten or fifteen minutes after ward.

Q They did not tell you that Basso had a razor so you could arrest Basso before he got away? A No.

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Q And you would have if they had? A I certainly would.

MR MURPHY: I object to this. That is not a matter of evidence, what he would have done.

THE COURT: Objection sustained. Strike out the question.

Q When was the first time you heard anything about a razor? A Well, possibly ten minutes afterwards.

Q Did you come back in the saloon? A No, I didn't go back in the saloon. I stood on the corner. It was raining.

Q Who came up to you? A Well, I don't know now, I think it was, the first one came up to me was Mr Hayne.

Q Mr Hayne? A Mr Hayne, and the conversation we had, he told me he had been threatened.

Q Wait, I do not want that at all. I did not ask you for that. It is incompetent? A Now, I cannot give you a definite answer. I don't know which one of them told me, only I know I was told he had a razor.

Q That is right, Mr Kelly, if you do not know, it is all right with me, but somebody told you? A Yes, sir.

Q But in the meantime Basso had gone? A Had gone.

Q Did you consider going after him? A No, I did not.

MR MURPHY: I object to that.

Q Did you ask where he lived? A No.

Q Well, you had not the slightest idea that the man had been injured, had you? A Not at all, nor no mark on his body

that would indicate an injury to me.

Q Weren't you very much surprised when you learned that he had died? A No, I don't know if I was, I don't think so. I certainly was much surprised to hear that he had died.

Q Yes, you were surprised to hear he had died? A Yes.

Q You did not know when he left the saloon that he was injured, did you? A No.

Q When you learned that he had a razor in his hand, why didn't you go down and arrest him? A I didn't know where he lived.

MR MURPHY: Wait, I object to the question. This man is here charged with what he is said to have done, not what he did not do.

THE COURT: We will not go any further into it, Mr Buckner.

MR BUCKNER: All right.

Q Well, did you ask when you were told about the razor, did you ask where Basso lived?

Objected to. Objection sustained.

THE COURT: The jury are directed to disregard absolutely any testimony concerning any inquiry or failure to inquire by this officer about any razor in the case.

Q You did not see Dewald kick him downstairs, did you?

A No, sir.

Q Did you hear any falling downstairs by anybody? A Yes,

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I did, that was the first thing that drew my attention.

Q You don't know who it was that fell? A I don't know.

Q Of your own knowledge? A I don't know who it was, of my own knowledge.

Q And you were a little slow going out of there? A I stayed, as I told you before, I stayed for possibly some fractions of a minute speaking to Mrs Dewald, because she seemed hysterical, and as I was going downstairs Dewald was coming back.

Q And the first thing you did see when you did get out, in, you say, a fraction of a minute, was Dewald coming on back upstairs? A Coming back upstairs.

Q You did not see Dewald on the landing on his back with Basso over him? A No, why, if he was coming upstairs?

Q Just answer the question, did you? A No, I did not.

Q But you came out the fraction of a minute afterwards?

A Yes.

Q As a matter of fact you did not see anybody hit Basso at all? A No, positively no.

Q If Dewald hit him you did not see it? A No.

Q And if Hayne hit him, you did not see it? A No.

Q As far as you know he went away from there absolutely scatheless? A To my mind he went away from there uninjured.

RE-DIRECT EXAMINATION BY MR MURPHY:

Q After the matter was over, Mr Kelly, did you have a

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talk with Mr Savino at his fruit stand? A Yes.

Q And did you speak to him in Italian or in English?

A I spoke to him in English, and he spoke to me in English, answered me back in English.

Q Was anybody with you at the time you spoke to the Italian? A Yes, Hayne was with me.

Q And what was said to the Italian? A Hayne told me that this Italian was after threatening to fix him, and he says, "Come across the street with me and tell this fellow to keep quiet." So I did go across the street with Mr Hayne, and I says to this Italian, "Now, this trouble is all over, and drop it, let us have no more of it". That is all that was said, and he says to me, "All right, all right, there will be no more trouble."

JAMES E. GIBSON, called and duly sworn as a witness on behalf of the defense, testified as follows:

DIRECT EXAMINATION BY MR MURPHY:

Q Mr Gibson, you are a police officer of the Police Department of the City of New York? A Yes, sir.

Q And attached to the 61st Precinct? A Yes.

Q Were you attached to the 61st Precinct on the 28th day of June, 1909? A Yes.

Q Did you know the defendant Kelly at that time? A Yes.

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Q Did you see him on the 28th day of June, 1909? A Yes.

Q What duty were you doing on that day? A I was doing what they call house duty.

Q Yes, house duty; explain to the jury what house duty means? A Well, it is after you regular tour, when you are held on reserve and you are then sent out on special calls.

Q You were held in reserve until sent for by the lieutenant to go out on special calls? A Yes.

Q At this afternoon had you received one of these special calls? A Yes.

Q And as a result of receiving instructions from the lieutenant for a special call, where did you go? A I went to Stillwagen's saloon, 158th Street and Forrest Avenue.

Q Did you go there? A Yes.

Q Did you see Kelly there? A Yes.

Q Well, did you have a conversation with Kelly? A Yes.

Q Did he tell you what took place in the saloon? A Yes.

Q Prior to reaching Kelly had you met anybody on the street near the saloon? A Yes.

Q Who did you meet? A I met this Basso.

Q Well, did you know who he was at the time? A No, I did not.

Q You met an Italian? A Yes.

Q You met him in the street? A Yes.

Q Did you have a look at him? A Yes.

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Q Did you look at him? A Yes.

Q And tell what you noticed about him, if anything. Did you notice anything about him? A I didn't notice anything particular about him.

Q Did you see his face? A Yes.

Q Are you sure you saw his face? A Yes.

Q Which side of this Italian did you walk past by?

A To the left.

Q He was coming toward you on the same sidewalk? A Yes.

Q Which side did you pass him by? A On the inside.

Q He was between you and the curb? A Yes.

Q And you looked at him? A Yes.

Q Did you see anything the matter with his face? A Nothing.

Q Nothing at all? A Nothing at all.

Q Did you see Kelly after that? A Yes.

Q Did Kelly tell you who this man was? A Yes.

Q And he told you he was--well, what did he tell you?

A He told me that was the man, he explained--

MR BUCKNER: I object to that.

Q What did Kelly tell you?

MR BUCKNER: I object as incompetent, what Kelly may have told this officer. That is under no rule of law, to get in that kind of evidence.

THE COURT: Objection sustained. If he learned who

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he was he may say.

Q Did you learn who Basso was or who this Italian was?

A Yes.

Q Who told you? A Kelly.

Q That is all.

CROSS EXAMINATION BY MR BUCKNER:

Q Where did you pass the man that you think is Basso?

A I passed him about 25 to 35 feet south of the corner of 158th Street and Forrest Avenue.

Q Was another Italian with him? A No.

Q He was all alone? A All alone.

Q His partner was not with him? A No, there was nobody with him.

Q Did you ever see Basso before? A No.

Q Did you go to the autopsy? A No.

Q You never saw him dead? A No.

Q And the only reason you think this particular man is Basso is what Kelly told you afterwards? A That is the only knowledge I have of him.

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C A E S A R S A N T O M A S I M O , called and duly sworn
as a witness on behalf of the defense, testified through
Official Interpreter DeVille, as follows:

DIRECT EXAMINATION BY MR MURPHY:

Q Where do you live? A 304 Morris Avenue.

Q Mr Santo Masimo, what is your business? A Bowling
Alley.

Q Did you know a man by the name of Basso who was employ-
ed or worked in the bowling alley? A Yes.

Q How long have you known, or had you known Mr Basso?
A About forty days.

Q Forty days? Was that before the 28th day of June,
1909? A It was during the month of May last year that I met
him first.

Q That you met him first, and you knew him about forty
days? Did you work with him? A Yes, sir, forty days I worked
for him.

Q Were you a friend of Mr Basso's? A We were friends,
a few days before the month of June last year I left that place.
I had a slight difference with him and we were no longer friends,
but at the beginning we were friends.

Q Was that difference a quarrel? A Yes.

Q Did you have a fight?

MR BUCKNER: I object to this as improper.

THE COURT: We will find whether it is or not.

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MR BUCKNER: Well, he is asked if he had a quarrel with Basso, this man, that is not the proper way to prove Basso's disposition.

THE COURT: That last remark is perfectly proper, unless there is something besides this, but if there is not anything besides this, it will not be considered.

MR MURPHY: Do you sustain the objection, your Honor?

THE COURT: No, the objection is not sustained at present, but unless you will lay the proper foundation for the kind of testimony you are trying to elicit, it will not be allowed.

Q Mr Witness, did you at any time during your acquaintance with Mr Basso, see in his possession a razor? A Yes, when he had a quarrel.

THE COURT: Yes, is the answer.

Q When did you see the razor with Mr Basso? A All the time that I was there he had it in his possession. I saw him shave with that razor.

Q Did he carry it in his possession all the time? A Yes.

Q On the day that you had the quarrel with Mr Basso, did he have the razor then? A Yes.

Q Did you see the razor on that day? A Yes, I saw him take it out.

Q What did he do with it? A He put it back again in his pocket.

Q How did he come to take it out of his pocket? A At the very moment when we were quarreling and exchanging insulting words, he pulled the razor from his pocket and lifted his hand.

Q Did he say anything? A He said to me, "If you don't shut up I will cut your face", or something like that.

CROSS EXAMINATION BY MR BUCKNER:

Q This was in May, was it, before June? A The beginning of June, about the 3rd or 4th of June.

Q You did not see him after he left the saloon, is that right? A No.

Q Now, do you say that you have seen him shave himself?
A Yes.

Q Where? A Downstairs where we were both working.

Q In the kitchen? A No, in the bowling alleys.

Q Who else, can you name any one else who was there at the time? A No, only us two.

Q Where do you live? A 304 Morris Avenue. I believe it is 304 East 148th Street.

Q Did you know where Basso lived? A No.

Q Were you ever in his house? A No.

Q Do you know Zambino, who testified here as his barber?

MR MURPHY: I object. Zambino did not testify he was Basso's barber.

MR BUCKNER: Well, that was his testimony.

THE COURT: Objection sustained.

MR BUCKNER: This is a question of the testimony, your Honor.

THE COURT: Well, let us have ~~no~~ remarks about the testimony.

MR BUCKNER: Well, that is all.

MR MURPHY: If the Court please, that is the defendant's case.

MR BUCKNER: I have two or three witnesses in rebuttal that are very short.

THE COURT: Very well.

MR BUCKNER: I will call Mr Dewald.

MR FURSTENBERG: If the Court please, I object to Mr Dewald taking the stand. I am his attorney, and he is a defendant in the action, and I object to him taking the stand.

THE COURT: You are his attorney?

MR BUCKNER: I suppose he has a right to refuse to answer any particular question, but I certainly can call him as a witness. He is not on trial at this time. He can claim his constitutional rights, not to answer any particular question that incriminates him.

THE COURT: No, if his lawyer, who is his attorney connected with this case--

MR BUCKNER: He is a co-defendant.

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THE COURT: Yes, I will sustain the objection.

MR BUCKNER: Well, I move to dismiss the indictment against Dewald and ask leave to call him as a witness.

THE COURT: Motion denied.

MR BUCKNER: That is all. (Galling) Mr Christiana.

THE COURT: After the remarks between the District Attorney and the Court, the Court deems it wise to say to the jury that they are to disregard absolutely the motion made by the District Attorney. If they were to entertain any opinion concerning the facts in this case on account of that motion, they would be false to the oaths which they have taken, and you are not to entertain any idea whatever prejudicial to the defendant, on account of the motion made by the District Attorney, and denied by the Court. Proceed.

REBUTTAL

RAFFAELE JOHN CRISTINA , a witness called on behalf of the People in rebuttal, testified as follows:

DIRECT EXAMINATION BY MR BUCKNER:

Q Raffaele, during the events that you have already testified to, did you at any time see a razor either in Basso's hand or any one else's hand? A No.

MR MURPHY: If the Court please, I believe--well, let it go.

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Q Or on the floor? A No.

Q Did Basso ever shave at your shop? A A couple of times.

Q Did he ever make any statement to you why he did not patronize you more? A No.

Q That is all.

BY THE TWELFTH JUROR:

Q I would like to ask one question. Are you a tenant of that gentleman that owns the saloon? A (No answer).

BY MR BUCKNER:

Q Yes, are you a tenant of Mr Stillwagen's? A Yes.

BY THE TWELFTH JUROR:

Q You are still there? A Yes, sir.

BY MR MURPHY:

Q You were asked a question whether or not you saw a razor on the floor. Did you go in that back room to look, for a razor?

A No.

BY MR BUCKNER:

Q Did you see any razor in Basso's hand at the time you say Hayne struck him? A No.

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MATTEO GIANATASSO, a witness recalled in rebuttal on behalf of the People, testified as follows through Official Interpreter DeVille:

DIRECT EXAMINATION BY MR BUCKNER:

Q Matteo, during the time you saw what you have testified that you saw on the stairway in the saloon, did you see a razor in anybody's hand? A No.

Q Or on the floor? A No.

Q Or anywhere else? A No, sir.

Q Did you ever see Basso have a razor at any time? A No.

Q Did you ever see him shave himself? A No.

CROSS EXAMINATION BY MR MURPHY:

Q Did you go into the hallway looking around the floor for anything? A No.

BY MR BUCKNER:

Q Just one question. How large a man was Basso? A He was shorter than I am.

THE COURT: Meaning the interpreter or the witness?

THE INTERPRETER: Meaning the witness, your Honor.

BY MR BUCKNER:

Q Was he stout or thin? A Medium.

ROCCO SAVINO, a witness recalled in rebuttal on behalf of the People, testified through Official Interpreter DeVille, as follows:

DIRECT EXAMINATION BY MR BUCKNER:

Q During the events that you have testified to as happening on the stairway of Stillwagen's saloon, did you see a razor in Basso's hand, or any one else's hand? A No.

Q Did you see a razor anywhere? A No.

CROSS EXAMINATION BY MR MURPHY:

Q And during the time you could not see this thing, you were standing at the bar, up against the bar drinking your glass of lager beer? A Yes, and I was looking at what was going on.

ANTONIO ZAMBINO, a witness recalled on behalf of the People in rebuttal, testified as follows:

DIRECT EXAMINATION BY MR BUCKNER:

Q You said that the deceased Sabato Basso patronized you, I believe, in your testimony? A Yes.

Q How often? A Pretty near--

MR MURPHY: Well, I object to this. What materiality has this?

THE COURT: Objection sustained.

Q Did you shave him in his lifetime, Sabato Basso?

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Objected to. Objection overruled.

A Yes, sir, there was twice--

Q Just yes or no? A Yes.

Q How often? A He missed twice since I knew him.

Q Well, how often did he come when he did not miss?

A Once a week, sometimes twice. About once, steady.

Q Did you ever do anything else for him besides shave him?

Objected to. Objection sustained.

MR BUCKNER: Well, I cannot, without asking a leading question, bring out the testimony that I think material. It is not prejudicial to ask if he ever did anything else for him, and I ask the Court to allow it.

THE COURT: You may ask the leading question.

Q Did you ever at the time you knew Basso trim his corns for him? A Yes, once.

CROSS EXAMINATION BY MR MURPHY:

Q Did you ever trim his finger nails? A No, sir, I ain't no manicure.

Q You are not a manicure, are you? A No.

Q You trimmed his hair, too, didn't you? A Yes, sir, and I shaved him, too.

Q Would you swear he did not own a razor? A No, sir.

Q You would not swear to that? A No, sir, I can't say what I did not see.

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BY MR BUCKNER:

Q Did you ever see him have a razor? A No.

BY THE SIXTH JUROR:

Q Was this witness here employed in that barber shop (indicating the previous witness Cristiana)? A (No answer).

BY MR BUCKNER:

Q What is your place of business? A 117th Street.

Q Are you the proprietor? A Yes.

Q Do you know this Raffaele John Cristiana? A No, I only know him once.

Q Where did Sabato Basso live with reference to your barber shop? A Lived right upstairs next door to me.

BY MR MURPHY:

Q How many times did you say he missed, about twice?

A About twice or three times.

MR MURPHY: I might state, if the Court please, before I closed my case, I wanted to call Captain Tappin who has now arrived.

MR BUCKNER: I want to recall Mr Stillwagen.

WILLIAM STILLWAGEN, a witness recalled in rebuttal on behalf of the People, testified as follows:

DIRECT EXAMINATION BY MR BUCKNER:

Q Mr Stillwagen, how long a time did Basso work for you?

A About eight months.

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Q How much did he get? A \$7 a week and board. He got his eating.

Q Did you ever see him shaving himself around the saloon?

A I never saw him.

MR BUCKNER: That is all. The People rest.

MR MURPHY: I would like to call Captain Tappin, just to have him testify what sort of an officer Kelly was.

MR BUCKNER: I am very willing to concede as to that.

THE COURT: But the defense has a right to the testimony of their own witness.

MR MURPHY: He has just gotten here.

J O H N T . T A P P I N , called and duly sworn as a witness on behalf of the defense, testified as follows:

DIRECT EXAMINATION BY MR MURPHY:

Q Mr Tappin, you are a Captain of Police in the Police Department of the City of New York? A Yes, sir.

Q Are you in command of the 61st Precinct? A Yes, sir.

Q Were you in command on the 28th day of June last year?

A Yes, sir.

Q And had you been for some time prior thereto? A Yes, sir.

Q Is the defendant here, Officer Kelly, a member of your command? A Yes.

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Q Has he been a member of your command, how long? A Sixteen months, about.

Q Now, Captain, what kind of an officer is Kelly?

A Well, I found him an efficient officer.

Q A good, efficient officer? A Yes, sir.

Q Is he a sober fell-w? A I never saw him otherwise.

Q And as his commanding officer you considered him a good and efficient officer? A Yes, sir, I found him such.

Q That is all.

MR BUCKNER: That is all.

MR MURPHY: Mr Furstenberg will take the stand.

SAMUEL FURSTENBERG, a witness called and duly sworn on behalf of the defense, testified as follows:

DIRECT EXAMINATION BY MR MURPHY:

Q Mr Furstenberg, where do you live? A 17 East 131st Street.

Q Mr Furstenberg, you are an attorney and counselor-at-law? A Yes.

Q You are attorney for one of the defendants, for MrDe-wald? A Yes.

Q Who is indicted in conjunction with Officer Kelly?
A Yes, sir.

Q Mr Furstenberg, do you know the premises, Stillwagen's saloon, 158th Street and Forrest Avenue? A I do.

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Q Have you been in there? A I have.

Q Do you know where this door is that leads to the stairs going upstairs? A I do.

Q Do you know the location of the barroom? A Yes, sir.

Q Do you know how that door opens? A Yes, sir.

Q Now, Mr Furstenberg, tell me, have you ever stood by that bar when that door leading into the hall was open at the foot of the bar? A I have.

Q Have you stood there for the purpose of seeing what you could see? A Yes, sir.

Q Can you, standing from any place in that bar, see the landing? A At no part of the bar can you see the landing.

Q Can you, standing at a point four feet from the Forrest Avenue end of that bar, leaning against the bar, see the landing?

A At no point leaning against the bar can you see the landing.

Q Or at the middle of the bar? A At no point of the bar.

Q Can you see any part of the short stairs leading from the floor up from the landing from that bar, I mean the steps, not the bottom of it? A You may see one of the steps, that is through the banisters, but no more.

CROSS EXAMINATION BY MR BUCKNER:

Q Can you see the landing from anywhere in the room?

A If you stand against the wall, or near the table which is placed against the wall you may see the landing.

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Q But as you approach the door which leads into the hall where the stairway is, you can see the landing from about the center of the room, can't you? A If you approach it at a sharp angle you can, yes. It must be at a sharp angle, otherwise you cannot see it.

MR MURPHY: The defense rests.

MR BUCKNER: The People rest.

MR MURPHY: Now, if the Court please, I move to dismiss the indictment against the defendant on the ground that there has been no case of manslaughter made out against him, beyond a reasonable doubt. I move to dismiss the indictment on the ground that it has not been proven here in this court that this man Basso, who is deceased, ever came to his death by any blow received from the defendant Kelly.

THE COURT: Motion denied.

MR MURPHY: I move to dismiss upon the ground that even if this man did come to his death by a wound which was found by the Coroner's physician on his temple, that there is no evidence here to show that the defendant Kelly ever did inflict that wound.

THE COURT: Motion denied.

MR MURPHY: I move to dismiss the degree of manslaughter as set forth in the indictment.

THE COURT: Motion denied.

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MR MURPHY: Exception to all denials.

(The Court admonished the jury in accordance with Section 415 of the Code of Criminal Procedure and adjourned the further trial of the case until Monday, May 16, 1910, at 10:30 o'clock A. M.)

THE COURT: I desire to say this, gentlemen, in particular, that there might be, through a spirit of curiosity upon the part of any juror who lives within a moderate distance of the place alleged in the indictment as the place of the assault, there might be a curiosity on your part to visit that place. By so doing you would invalidate this trial, and I charge you, gentlemen, that while there is no probability that you would do it, still I can understand how men, quite desirous of knowing for themselves what certain situations might be, might be tempted to do it. Therefore, the Court admonishes you not to pay any visit to the place described in the indictment as the place of the alleged assault.

You have been admonished now, gentlemen, Monday morning at half-past ten.

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PEOPLE V. THOMAS KELLY.

(Manslaughter, First Degree).

THE COURT'S CHARGE.

THE COURT:

Gentlemen,

The defendant at the bar is charged in the indictment herein with manslaughter in the first degree.

Manslaughter is among the different kinds of homicide. Homicide is the killing of one human being by another. It may be criminal or it may be justifiable or excusable but, when homicide, the killing of a human being, is committed without premeditation or deliberation, and without design to take the life of the person killed, unless the killing be justifiable or excusable, it is manslaughter. Again, the killing of a human being by another, when such killing is done without premeditation, without deliberation, and when there is no design to take the life of the person killed, but when such killing is without excuse or justification, or, as the law says, unless it be justifiable or excusable, it is manslaughter.

I want to say to you, gentlemen, that no person can

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be convicted of manslaughter unless the death of the person alleged to have been killed, and the fact of the killing by the defendant as alleged, are each independently established. If they are each established as independent facts,--first the death of the person said to have been killed -- that must be established by direct evidence -- and the fact of the killing by the defendant, that must be established by evidence beyond a reasonable doubt, before any person accused of such a crime can be convicted.

A person concerned in the commission of a crime, whether he directly commits the act constituting the offense, or aids and abets in its commission, is a principal. Therefore, if you should find from the evidence in this case beyond a reasonable doubt that there was an assault committed upon the body of the decedent Basso, and then you find beyond a reasonable doubt that as a result of such assault, Basso died from a wound received by him at the hands of the several parties here indicted, and that one of these parties was the defendant, you would find the defendant guilty as charged.

You will have to find, gentlemen, that the cerebral hemorrhage or the fractured skull was beyond a reasonable doubt the result of the assault committed by the defendant upon Basso. If you cannot find from the evidence in the

case beyond a reasonable doubt, that the defendant did inflict upon Basso that wound, you will have to acquit him.

The charge in the indictment is, that the said Thomas Kelly, the defendant ^{here}, and John W. Dewald and John A. Hayne, on the twenty-eighth of June, in the year of our Lord one thousand nine hundred and nine, in the Borough and County aforesaid, that is, in the Borough of The Bronx, did make an assault with the hands and fists of the three named defendants, and did wilfully and wrongfully strike, beat, bruise and wound the said decedent Basso; it goes on further to say, and with a certain club, which the said Thomas Kelly, John W. Dewald and John A. Hayne then and there held in their right hand, and did beat, bruise, wound, etc. -- which is a common law statement of the act charged.

In considering the evidence, I charge you, gentlemen, that there is no consideration whatever to be paid to the nationality of witnesses. You are concerned with the credibility of the witnesses. It is unfortunate in our cosmopolitan city that references of that character should be made, and you are not, on account of the occupation of the defendant, to entertain any prejudice of any kind or character against him. You are not to believe that it is natural for a policeman who, having arrested one and

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brought him before a person who might have a complaint to make against him, then and there finding there was no complaint, that it was natural for the policeman to strike the person in his custody as he was about to release him. It would be very unfortunate, gentlemen, if you should go into the consideration of this case with your minds in any wise turned in that direction, that is to say, to believe that it is likely that such an offense was committed on account of what the District Attorney says was the natural thing for a policeman to do.

In determining whether the wound inflicted upon Basso was inflicted then and there, the first question to ask yourselves, gentlemen, is, was there any proof that he had no such wound at the beginning of the alleged assault? Is there anything in the evidence to show whether the mark alleged to have been upon his left temple was there at the beginning of this alleged affray or was not?

Then you will take up your witnesses one by one, and the standard of belief which you will establish for them is for you, not for the Court.

It is rather a conflicting case, a sharp conflict of testimony, and it is for you, gentlemen, to determine if you can where the truth is.

One witness for the prosecution declares that he saw

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the officer strike this man with a club. Another witness for the prosecution says that he saw the affray and never saw the policeman use a club at all. Another says that he saw him hold the deceased by the collar.

I charge you that if others did assault Basso, the alleged victim in this case, and that during that assault the policeman aided or abetted by holding the defendant, you would then say from that circumstance whether he was guilty or not, and if you believed beyond a reasonable doubt that the defendant did as outlined by testimony to that effect, it would be your duty to find him guilty.

Of course, you will recall with as much accuracy as possible the character of the stairway in that place, and whether it was, according to the testimony, possible for the witnesses for the prosecution to see what took place then and there on the landing. It would then be your duty to sift out from the contradictory statements of the witnesses, not what you guess at being the truth, but what is the truth, and beyond a reasonable doubt.

Up to the time of going to the upper floor of the premises where the alleged assault is said to have occurred, there is no dispute at all. The officer in the performance of his duty, according to the evidence, was called by a station agent to go up to the platform where one was charging two others with an offense committed at a

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place nearby. The officer in response to the call went up and made the arrest, or took them down to the saloon, so that they might be identified, or that some person might complain against them if a crime had been committed. The proprietor of the saloon, it appears, or some person there, refused to make a complaint.

Gentlemen, do not be led away by any statement that the officer was not being his duty when he still held that party, under the information that the one who was attacked was upstairs. He went up with this prisoner as he should have done to find who the complainant was, what the complaint was, and to identify the prisoner. Had he done anything else he would have been negligent in the performance of his duty. He had arrested a man, or at least had taken him into his custody, and he met another who said "The offense was not committed against me, I have no complaint to make." "Against whom was the offense committed?" "A woman upstairs, a domestic in our employ here." They brought him upstairs.

Now, you have heard the evidence of the defendant. How these people came downstairs is a question surrounded by conflicting testimony. What happened on the stairway; That is the crucial thing in this examination, and, gentlemen, if you can determine that then you will find the

answer to this charge. In order to find it so as to support the testimony of the prosecution to a conviction, you have to find beyond a reasonable doubt that this defendant was engaged in the alleged assault upon Basso, and that either by himself or in concert with the others accused he caused the injury which resulted in this man's death.

Unless you can find that to satisfy yourselves beyond a reasonable doubt, this defendant is entitled to an acquittal.

There is a statement in the testimony of a razor in the case. You may consider the character of the person alleged to have had that dangerous implement in his hand at that time. And if there is any evidence in the case that the decedent, Basso, did theretofore and within a short time make an assault or an attempted assault upon another with a razor, that will be something for your consideration.

I charge you that homicide is justifiable when committed in a lawful defence of the slayer or of any other person in his presence or company, when there is a reasonable ground to apprehend a design on the part of the person slain to commit a felony, or to do some great personal injury to the slayer or to another, and there is imminent danger of such design being accomplished; that is to say,

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whether Basso took out a razor and made an attack upon some person on that stairway is a matter for you to determine from the evidence, and if he did, and a defendant on that stairway or near that platform struck him with the intention of knocking that razor out of his hand, then such defendant was justified in so striking him. If he did no more to Basso to unarm or disarm him than was reasonably necessary and the deceased thereafter died as a result, the homicide would be a justifiable one. But whether justifiable or not, gentlemen, is for you to determine.

It is an important case; important to the People; important to this defendant, and as the Court said in the beginning, there is a hope that you gentlemen will not allow your minds in any wise to be prejudiced towards any witness on account of his nationality or towards any defendant on account of his occupation. The rule for you to follow, under your oaths, is simply to weigh the testimony carefully, scrutinize it faithfully, and in the end if you find beyond a reasonable doubt from all the testimony, that this defendant did inflict a blow without intent to cause the death of the person so assaulted, or without premeditation or deliberation, but that he did commit an assault upon Basso, from which Basso thereafter

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died, and that assault was neither justifiable nor excusable, you would under your oaths find him guilty of manslaughter in the first degree.

In every criminal action the defendant is presumed to be innocent until the contrary appears. Unless guilt be proved beyond a reasonable doubt the defendant is entitled to an acquittal. That presumption of innocence goes with the defendant throughout the trial.

In the event that there has been evidence of good character, you are charged that good character of itself is enough to introduce the element of reasonable doubt. You may recall the evidence of good character, gentlemen, and say whether from that you believe it likely and probable that such a defendant would commit such a crime; and if such a reputation ^{renders it} reasonably doubtful that he would commit such an offense, then it introduces reasonable doubt into the case, and, if it does, he is entitled to an acquittal.

Once again, gentlemen, recalling the character of the place, the stairway back of the partition running to an upper room from a platform below, at which platform was a door opening into the saloon, and giving a view of the landing there; is there any testimony in this case to show that any person on the floor of that saloon could see the stairs? The testimony here leads to an open door

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and to a landing at the open door. What can be seen up or down these stairs by any person standing in the saloon? You are to look into the testimony to see if there is any possibility of doing that. But the charge as supported by the prosecution leads us to that platform or landing at the bottom of the stairs, and it is concerning the transaction there that this charge arises, not from anything that was done elsewhere, in the room above or on the stairs descending to the platform, but on the platform.

Now, if you believe from the evidence that this officer, in concert with others, the defendants herein named, did commit an assault upon Basso, which resulted in Basso's death from a fractured skull received in such an assault, and you believe that beyond reasonable doubt from the testimony, you have no other duty than to pronounce the defendant guilty; or, if you believe that this defendant with a dangerous weapon, with a "Billy," did strike and assault the deceased to such an extent that his skull was fractured thereby, and that he died thereafter from that injury, which is the only injury, according to the doctor, that was found upon the body, you would find the defendant guilty of manslaughter in the first degree.

Gentlemen, my last word to you in this case is this: if there is any reasonable hypothesis from the evidence

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in this case consistent with the innocence of this defendant, then there is a reasonable doubt of his guilt. Understand that, if you gentlemen can from all the testimony in this case arrive at its close and say "there is a reasonable hypothesis which is consistent with his innocence" then you could not find him guilty. If that wound could have been inflicted elsewhere; if that wound was inflicted before the beginning of the encounter between this defendant and Basso, or if there was any probability that it might have been inflicted in some other encounter, or between the time of Basso's leaving the saloon and the time of his reaching home, then you would have to give the benefit of that doubt to this defendant. But, if after a careful and honest consideration of the testimony, bound by your oaths to return a verdict which you believe to be according to the evidence, if it establishes guilt beyond a reasonable doubt, you have no other duty but to find the defendant guilty; if you cannot find him guilty to that extent, namely, beyond reasonable doubt, then it is just as much your duty to declare him innocent of the crime charged against him.

The case is with you, gentlemen.

Gentlemen, you will retire to the consideration of the case.

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The jury retired at 1:57 P. M. and returned to the court room at 4:15 P. M.

THE COURT: You have requested to hear the evidence of Cristiana and Matteo Giamatasseo as relates to the holding by Kelly of Basso on the stairs or landing. You had better hear all their testimony, and the stenographer will read it.

(The stenographer repeated the testimony).

THE FOURTH JUROR: Your Honor, I would like to ask, that if the jury disbelieve a portion of the evidence of one witness, if they should disregard it entirely?

THE COURT: If the jury believe that any of the witnesses have sworn falsely and knowingly to any material thing, they may disregard altogether the evidence of that witness and not consider any of it.

The jury again retired at 4:43 P. M.

Disagreement

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