

Q Is there any rule in the printed book relating to the speed at which a train shall pass a cautionary signal?

MR. TRAIN: That has been answered in the negative.

Objection sustained. Exception.

Q Is there any rule in the book defining the rate of speed at which an engineer shall run or a motorman shall run in order to get his train under control?

Objected to. Sustained. Exception.

RE-CROSS EXAMINATION BY MR. TRAIN:

Q Do you say there is a rule of the company that a yellow light shown at No. 1 signal and a green light shown at the home signal and a yellow light shown at the pot signal means stop?

A For a Ninth Avenue train.

Q Do you say there is any such rule of the company?

A That is an improper signal.

Q Is there any rule of the company that says that that combination of signals means stop for a Ninth Avenue train?

A Not specifically in black and white, I don't think.

Q In any colors? A No more than it is an improper signal, that is all.

Q Then when you said there was a rule to that effect, you did not mean precisely that? A I did not mean it was in a book of rules that way.

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Q We want to know --- at least the jury want to know exactly what the rule is to which you refer, such a combination of signals? A Every man running a train of cars ---

Q What is the rule, give us the rule? A The rule is that a man running a motor train must observe the position of his switches and signals and see they are properly set up for his route that he wants to go; if they are improperly set he must stop.

Q He must stop if he can? A Yes, sir.

Q That is true of any irregularities of any sort in connection with the signalling system? A Any irregular signals, yes.

Q Anything out of the ordinary or usual? A As far as signals are concerned.

Q Any irregularity is in itself a danger signal? A As far as signals are concerned, yes.

BY MR. NAYLOR:

Q There are some rules that are not printed? A Some rules, yes.

Q How far north towards 59th Street can you see the three signals at the junction of 53rd Street and Ninth Avenue?
A How far can you see them?

Q Yes. A It depends upon the weather, the condition of the weather.

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Q On an ordinary day? A About 58th Street.

Q Can you see them all at once? A Yes.

G E O R G E H . P E G R A M , called as a witness in behalf of the defense, being duly sworn and examined, testified as follows:

DIRECT EXAMINATION BY MR. NAYLOR:

Q You are the chief engineer of the elevated railroad?

A Yes.

Q And are familiar with the signals at 53rd Street and Ninth Avenue? A Yes, sir.

Q The care of the structure and of the signals falls under your jurisdiction? A Yes, sir.

Q The signals at that point are the ordinary mechanical signals? A Yes, sir.

Q There are no automatic signals? A No, sir.

Q What is known as the block system in vogue there?

A No, sir.

Q And this system has been there for many years?

A I think since 1892.

Q The system has not been materially changed, notwithstanding the change of the motive power from steam to electricity? A No, sir.

Q There are more trains run over that system now than

there were when it was installed? A I think so.

Q How far is it from the cautionary signal No. 1 down to the home signal? A I believe the distances are given in a diagram you have.

MR. TRAIN: We have it --- it is 395 feet. It is conceded that it is 395 feet.

MR. NAYLOR: It is not 395 feet.

MR. TRAIN: What is it. I will take your statement.

THE COURT: It has been stated to be 395 feet.

I do not know if that is in evidence or not.

BY MR. NAYLOR:

Q 395 feet from the point of the switch --- this diagram shows 352 feet, that is correct, is it? A Between what points?

Q That is between the home signal and the cautionary signal? A Yes, sir, 352 feet.

Q And then between the home signal and the point of switches is 37 feet six inches? A 37 feet five inches I think.

Q Are you familiar with the grade, the percentage of the incline between 57th Street and 53rd Street? A Yes, sir.

Q About how much? A Very slightly less than two per cent.

Q That is two feet in one hundred? A Two feet in one hundred.

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Q After the first wheel of the front car of a train has passed the home switch, it runs upon this trailing bar, and in that way binds the signals in such a way they cannot be changed until after the train passes off?

MR. TRAIN: I object.

THE COURT: You have that, Mr. Naylor. Mr. Hedley testified to that.

BY MR. NAYLOR:

Q Is it not a fact that the trailer bar begins at the home signal and runs down to the point of switches? A Very near, I think it is about 30 feet long, very near the entire distance.

Q Do you have jurisdiction of the tower? A No, sir, except as to its maintenance and repairs, but not the operation of the levers in the tower.

Q Is the train despatcher under your supervision? A No, sir.

Q Have you known Jackson some time? A No, sir.

Q He was never in your department? A No, sir.

No cross examination.

EDMUND M. COCKS, called as a witness in behalf of the defense, being duly sworn and examined, testified

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as follows:

DIRECT EXAMINATION BY MR. NAYLOR:

Q You are connected with the elevated railroad? A Yes, sir.

Q In what capacity? A As trainmaster.

Q Do the tower switch men come under your jurisdiction?
A Yes, sir.

Q You are acquainted with the method of operating the towers? A Yes, sir.

Q Do you know how the tower at 53rd Street and Ninth Avenue is operated? A Yes.

Q Are you acquainted with the signals that are located at that point? A Yes.

Q Are you acquainted with the duties of a motorman?
A Yes.

Q To a Ninth Avenue motorman going south on the west track, Ninth Avenue, approaching 53rd Street, what does the combination of signals, yellow at No. 1, green at the home and yellow at the pot signal mean?

MR. TRAIN: I object. An irregular signal always means stop, if a man can stop.

THE COURT: Mr. Hedley testified to that, saying that it meant stop.

MR. NAYLOR: I am trying to show that it is a

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general understanding.

BY MR. NAYLOR:

Q It is the duty of a motorman to observe the signals along his route? A Yes, sir.

Q And to stop when he finds a route set up against him?

A Yes, sir.

THE COURT: You have that in evidence.

BY MR. NAYLOR:

Q Do you know Mr. Jackson? A Yes, sir.

Q How many years? A Nine or ten years I have known him.

Q Do you know people who know him? A Yes.

Q Do you know his reputation for faithfulness as an employee and attention to duty? A Yes, sir.

Q What is his reputation in that regard? A First class.

Q He has worked under your immediate supervision? A Yes, sir.

The Court admonishes the jury in accordance with Section 415 of the Code of Criminal Procedure and takes an adjournment until to-morrow morning, February 15th, 1907, at 10:30 A. M.

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New York, February 15, 1907.

TRIAL RESUMED.

S Y L V E S T E R D . S M I T H , called as a witness
on behalf of the defendant, being duly sworn and examined,
testified as follows:

DIRECT EXAMINATION BY MR. NAYLOR:

Q You are superintendent of the elevated railroad?

A Yes, sir.

Q And have been such officer for a number of years?

A Sixteen years the first of this month.

Q You have been in the employ of this company in one
capacity and another for how many years? A About thirty
or thirty-two years.

Q Part of your duties as superintendent is the employ-
ment and discharge of motormen and tower men, is it not?

A Yes, sir.

Q Motorman Kelly was employed by you? A Yes, sir.

Q Along about what time? A March 7, 1905.

Q He had always before that been employed on a street
railway?

Objected to as immaterial. Sustained. Exception.

Q Had he ever had any experience on an elevated railroad?

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Objected to. Sustained. Exception.

Q Do you know whether he had any experience on any line where signals were in use?

Objected to. Sustained. Exception.

Q Jackson was employed as a tower man at what salary?

Objected to as immaterial. Sustained. Exception.

Q You are the officer of the company who makes all rules, are you not? A No, sir, I do not make them, I visa them after they are made.

Q You are familiar with all the rules that are made by the company for tower men and motormen? A Yes, sir.

Q Is it not a fact that the tower men are instructed in the rules given to the motormen?

Objected to. Sustained. Exception.

Q Is it not a fact that tower men are expected to have some knowledge of the general rules under which trains are operated on the structure in front of their towers?

Objected to. Sustained. Exception.

Q What would be the duty of a Ninth Avenue motorman, coming down Ninth Avenue at 53rd Street junction, finding there the cautionary signal yellow, the home signal green and the pot signal yellow?

MR. TRAIN: Is that not cumulative? We have had that a dozen times.

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MR. NAYLOR: I desire to show by all the departments of the road --- here is the superintendent of the road whom the people did not call.

THE COURT: There is no dispute about it and you have proved it by one or two witnesses. It is in evidence. Why give further testimony on the point.

MR. NAYLOR: I want to make it emphatic, and show that it is recognized in all parts of the service.

THE COURT: When you have proof of a fact and there is no dispute about it I think that is very emphatic, but I will allow it if you think there is any reason for having it in a third time.

THE WITNESS: It is his duties and his orders to stop.

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

THE COURT: Strike out the answer.

THE COURT: Just answer the question briefly.

Question repeated.

THE WITNESS: His duty to stop.

BY MR. NAYLOR:

Q Is such a signal any more effective than a signal of red displayed at home?

Objected to.

THE COURT: You have that in evidence -- it is his

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duty to stop also, and I can tell the jury that is the evidence.

BY MR. NAYLOR:

Q With the tracks at 53rd street for a Sixth avenue train and the signals properly displayed for the Sixth avenue train, was there any reason why a Ninth avenue train following should get into trouble?

Objected to. Sustained. Exception.

Q What is the duty of a motorman passing a yellow signal at No.1?

Objected to.

Q With reference to -- I will try to frame the question--

THE COURT: Haven't we all the necessary proof on this point?

MR. NAYLOR: I have not the proof which I want on the subject of speed, in the form that I want it, and I ask this man who knows and runs this railroad.

THE COURT: The question is proper but at the same time it calls for cumulative testimony. I will allow it if you will feel it is not sufficient.

Question repeated.

BY MR. NAYLOR:

Q With reference to speed?

Objected to. Objection overruled.

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THE WITNESS: He must reduce his speed so that his speed limit is entirely within the safety and control governing the distance he has to travel from that point to a point where he is expected to stop dead before proceeding.

Q Within what distance should this motorman stop his train?

MR. TRAIN: It does not appear from the answer of the witness that it is directed to the present condition of the company, and the rules, which I understand are somewhat different than they were on the 11th of September.

THE COURT: I think, being cumulative, we need not worry about that part of it. I think we all understand.

MR. TRAIN: Something was said by the witness with regard to stopping dead and we have nothing of that sort.

THE WITNESS: Full stop would have sounded better to a layman.

BY MR. NAYLOR:

Q That would be down at what switch?

Objected to. Sustained. Exception.

Q Finding the cautionary signal of yellow, the home signal of green and the pot switch at yellow, at what point should the motorman have stopped?

Objected to. Objection overruled.

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A Before he reached the point of the switch.

Q Never should have gone onto the curve?

Objected to.

Q Should he have gone on to the curve at all?

Objected to.

MR. TRAIN: If he should have stopped, that answers the question.

BY MR. NAYLOR:

Q Did you visit the scene of the accident? A Yes, sir.

Q Immediately after? A Yes.

Q Did you find Mr. Jackson there? A No, sir, he had been relieved.

MR. TRAIN: I object to any hearsay evidence of that sort. He did not find him there and I move that the answer be stricken out.

THE COURT: Strike out all except that he did not find him there.

MR. NAYLOR: I except.

BY MR. NAYLOR:

Q Did you see Jackson later that day? A Yes.

Q Did you talk with him? A Yes.

Q Did he tell you as to how the accident occurred?

A Yes, sir.

Q Did he say anything about being sick at the time?

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A Yes, sir.

Q Did he tell you he had the gripes and had to leave on that account? A Yes, sir, I sent for him.

Q Did you see motorman Kelly at that time? A No.

Objected to as immaterial.

BY MR. NAYLOR:

Q Have you seen him since?

THE COURT: Wait -- you have a lot of evidence here that this man Kelly was not to be found. There is no dispute about it at all. It is proven and proven and proven.

BY MR. NAYLOR:

Q You have known Mr. Jackson since he was employed by the company? A Yes, sir.

Q You frequently visit 53, the section where he works?

Objected to. Sustained.

Q You are familiar with the operation of the Elevated Railroad at all points? A Yes, sir.

Q You know people who know Jackson? A Yes.

Q Do you know his immediate officers? A Yes.

Q You have talked with people who know him? A Yes.

Q Do you know his reputation? A Yes.

Q Is it good or bad? A First class.

Q Particularly with reference to his performance of duties

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and attention to his duties, what is his reputation?

A Perfectly clear up to that date.

Q Never had any record made against him? A No.

Q He had your full confidence?

Objected to. Sustained.

CROSS EXAMINATION:

Q What is the total amount of the damage suits against your company as a result of this accident?

Objected to as incompetent, irrelevant and immaterial.

MR. TRAIN: I want to show bias on the part of this witness.

Objected to. Sustained.

MR. TRAIN: I want to show it is the object of the company to exonerate this particular defendant if it can.

THE COURT: There is nothing in that.

MR. NAYLOR: I move that the remark of the District Attorney be stricken out.

THE COURT: That would affect the stockholders rather than the officers.

MR. TRAIN: The officers are the servants of the stockholders and are elected by the stockholders.

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Objection sustained.

BY MR. TRAIN:

Q Is it not a fact that a large number of damage suits have been brought against your company, charging the negligence of the company as a basis for damages?

Objected to. Objection sustained.

Q Supposing that the entire structure of the elevated railroad south of the home signal on Ninth Avenue had fallen to the ground prior to the arrival of the Ninth Avenue train, would that have been a signal for the Ninth avenue train to stop? A I do not think I understand that question.

Q Suppose an accident occurred to the structure, whereby the structure south of the tower had fallen to the ground, so there was nothing for the train to run on, that the structure had stopped at 53rd street entirely, would that have been a signal to the motorman on the Ninth avenue train to stop?

MR. NAYLOR: I object as altogether hypothetical and out of the range of the facts involved here on the question of negligence.

THE COURT: It is cross-examination and for that reason it may be received.

Exception.

BY MR. TRAIN:

Q Would that have been a signal to stop? A Certainly.

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BY MR. NAYLOR:

Q Is it not a fact that you yourself and the company generally recognize that Kelly is the person who is responsible for this accident?

Objected to. Sustained. Exception.

Q Is it not a fact that you were subpoenaed to this court by the District Attorney?

Objected to. Objection sustained.

PETER VANDERBILT, called as a witness on behalf of the defendant, duly sworn and examined, testified as follows:

DIRECT EXAMINATION BY MR. NAYLOR:

Q You are train master? A Yes, sir, night train master.

Q Located at Harlem? A Yes.

Q At what street? A Well, I am stationed over the Western Division. I go over the whole division, Sixth and Ninth Avenues.

Q Your home office? A Is 155th street.

Q In that capacity, you as train master are acquainted with the operation of the trains and towers along the road?

A Yes.

Q Do you know Mr. Jackson, the defendant on trial?

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A Yes.

Q You have known him some time? A Yes.

Q How long? A Well, eight or nine years.

Q Have you known people who know him? A Yes.

Q You have talked with people who knew him? A Yes.

Q Do you know his reputation? A Yes.

Q And what is his reputation for duty and attention to his business?

MR. TRAIN: For carefulness?

THE COURT: What is his reputation for carefulness?

A Good.

BY MR. NAYLOR:

Q Has he ever been reported to you for any dereliction of duty?

Objected to.

(No answer.)

G E O R G E F O R D, called as a witness on behalf of the defense, duly sworn and examined, testified as follows:

DIRECT EXAMINATION BY MR. NAYLOR:

Q You are a motorman on the Ninth avenue line? A Yes.

Q And are running a train down Ninth avenue? A Yes.

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Q Each day at the present time? A Yes, sir.

Q Do you know where the pot signal is at the junction of 53rd street and Ninth avenue? A Yes.

Q Tell this jury from what point north of that you can see that pot signal?

MR. TRAIN: I object as purely cumulative. We have had several witnesses who testified as to that.

Objection sustained.

Q Have you ever failed to see that signal as you passed 58th Street?

Objected to. Sustained. Exception.

Q Is it not a fact that in the practice of the operation of the Ninth avenue trains down Ninth avenue, as you approach 53rd street curve that you come to that point after passing the cautionary signal, with your train under control?

Objected to. Sustained.

Q If you should find a yellow at the cautionary signal, green at the home and yellow at the pot signal, what would you do?

Objected to. Sustained. Exception.

CROSS-EXAMINATION BY MR. TRAIN:

Q Is the home signal at that point erected there for

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the assistance and guidance of motormen? A Yes.

BY MR. NAYLOR:

Q For the purpose of showing whether there is a clear track beyond, is it not? A Yes.

Q It does not indicate the route at all? A No, sir.

Q You have to look at the pot signal for that? A Yes.

C H A R L E S H . P A L M E R, called as a witness on behalf of the defense, duly sworn and examined, testified as follows:

DIRECT EXAMINATION BY MR. NAYLOR:

Q You are a motorman on the Ninth avenue line?

A Yes.

Q Are you familiar with the operation of trains down Ninth avenue, in the vicinity of 53rd street turnout? A Yes.

Q Do you know where the pot signal is at the switches at 53rd street? A Yes.

Q How far north from there can you see it?

Objected to. Sustained. Exception.

Q The home signal at that point is for the purpose of showing whether there is a clear track ahead?

Objected to as leading. Sustained.

Q What is the purpose of the home signal?

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Objected to as cumulative.

Q Do you move your trains according to the signals that are displayed along the line, or on what other basis?

Objected to as immaterial. Sustained. Exception.

Q Is it not the common practice for all motormen to obey the signals as they are set up along the line?

Objected to. Sustained.

CROSS-EXAMINATION:

Q What is your name? A Charles H. Palmer.

Q How long have you been in the service of the company?

A Ever since they took control of the elevated line.

Q Did you run the engine, steam engine?

Objected to as not cross-examination.

THE COURT: I think that is right, but Mr. Train wants to take the witness. Of course he makes him his own witness.

MR. TRAIN: Certainly.

BY MR. TRAIN:

Q You have had experience both as engineman and motorman?

A Yes.

Q Now, at the point of the intersection of the switch at 53rd street with Ninth Avenue elevated, there is some grade, is there not? A Yes.

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Q How long have you been running one of these electric cars? A Ever since they installed electricity.

Q How long is that, when did they install it? A I don't know the exact date of the installation.

Q Do these motors ever get out of order?

Objected to as immaterial. Sustained.

Q How many men are stationed on the front platform or how many motormen are there to operate one of these trains?

Objected to as incompetent, irrelevant and immaterial.

THE COURT: The question here of course is whether or not the defendant was guilty of culpable negligence under the law. That is all. I do not think the fact that there was a number of them stationed there is important.

MR. TRAIN: He says he runs the car, and the other gentlemen have testified that they were motormen and were allowed to testify to various things. I want to find out whether two or more motormen run each car, so that if one should be stricken with paralysis for example, what would happen to the car, unless the signals were properly set.

THE COURT: I do not know as that would affect the guilt or innocence of this defendant. I sustain the

objection.

BY MR. NAYLOR:

Q As you come down from the cautionary signal towards the home signal, and opposite 55th street, is there a sign there? A Yes, sir.

Q What does that sign read?

Objected to. Sustained. Exception.

MR. NAYLOR: This is a sign which stands at the side of the structure and is just as much for the guidance of those who operate the trains as the signals themselves.

MR. TRAIN: As to that particular question I will withdraw my objection.

THE COURT: Then it may be answered.

BY MR. TRAIN:

Q What does that sign say? A Caution, reduce speed for curve.

BY MR. NAYLOR:

Q Does that apply to a Ninth avenue train as much as to a Sixth avenue train?

MR. TRAIN: I object. There is no pretense that a Ninth avenue train takes the curve.

MR. NAYLOR: But it approaches the curve.

THE COURT: I will let it be answered.

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THE WITNESS: Yes.

CROSS EXAMINATION BY MR. TRAIN:

Q Did you understand that question? A Yes.

Q Do you understand the sign? A I understand the sign.

Q What do you understand the sign to mean, the word, that part of it which says reduce speed for curve? A The caution sign would govern the Ninth avenue; reduce speed for curve would govern Sixth avenue.

Q Reduce speed for curve governs the Sixth avenue train? A Yes, sir, and caution for the Ninth avenue.

Q I direct your attention to your answer to Mr. Naylor's question as to whether the words reduce speed for curve refer just as much to a Ninth avenue train as a Sixth avenue train, what did you answer to that? A Yes.

Q You said yes, is that correct? A Yes.

Q Haven't you just said it referred to a Sixth avenue train and that the word caution referred to a Ninth avenue train? A It is one sign only.

Q To whom do the words reduce speed for curve refer?
A Any train passing.

Q You just said that they refer to a Sixth avenue train and not to a Ninth avenue train?

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MR. NAYLOR: I object. He has not said that.

MR. TRAIN: I claim that he did.

BY MR. TRAIN:

Q Is that answer true? A In a measure, yes.

Q It is your own answer, is it not? A Yes.

Q Do you stand by it? A Yes.

BY MR. NAYLOR:

Q As I understand it, that sign governs both trains?

Objected to. Overruled.

A Yes.

E N O S V. D U T C H E R, recalled by the defense.

BY MR. NAYLOR:

Q In your capacity as instructor, did you not actually and in fact ride down with Motorman Kelly on a Ninth avenue and give him instructions how to pass the junction at 53rd street and Ninth avenue?

Objected to. Sustained. Exception.

Q Did you not instruct him that as he approached that point he must have his train under control?

Objected to. Sustained. Exception.

Q Did you not instruct him that whenever he approached a situation where cautions would be set, or yellow, green

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at the home signal, and the pot signal yellow, that he should stop? A Yes, sir.

CROSS EXAMINATION:

Q You are pretty familiar with the running of these motors? A Yes, sir.

Q It is conceivable that they should get out of order, is it not? A Yes.

Q How many motormen operate them?

Objected to. Objection overruled. Exception.

Q How many motormen operate each train? A One.
One motorman to a train.

Objected to. Overruled. Exception.

Q If there is a Ninth avenue train coming down Ninth avenue following a Sixth avenue train, and the rules of the company are as stated by the defendant, and are followed, namely, that the train track is straightened out for the Ninth avenue train, after the Sixth avenue train, and the Ninth avenue track is cleared, and the Ninth avenue train which is coming down becomes unmanageable, and shoots ahead at a great rate of speed, is there anything to prevent it going down Ninth avenue past the switch safely?

Objected to. Objection sustained.

Q Assuming that the rules of the company in regard to

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immediately straightening up the track, after a Sixth avenue train, are followed; assuming they had been followed in the case at bar, is there any reason for you to believe that this accident would have happened?

Objected to. Objection sustained.

BY THE COURT:

Q I understood you to say that the reason the cars in question left the track was that they attempted to go around the curve at too great a speed, is that a fact? A I did not answer that question. It might have been stated though.

Q Can you of your own knowledge say whether or not that is the fact? A That is what I should consider the cause.

BY MR. TRAIN:

Q Assuming that the track had been straightened up after the Sixth avenue train had passed, in accordance with the rules of the company as stated by the defendant, would the accident in your opinion have happened, or would the Ninth avenue train have proceeded down Ninth avenue?

Objected to. Sustained.

THE COURT: I think the jury can answer that question themselves.

The defense rests.

Prosecution rests.

TESTIMONY CLOSED.

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MR. NAYLOR: I move to dismiss the indictment upon the ground that the evidence does not sustain the indictment and that the testimony adduced is not sufficient to constitute a crime, and that the Prosecution has failed to prove their allegation in the complaint that the motor-man Kelly was then and there induced to believe and then and there did believe that the said switch was then and there so set as to allow the said train to proceed in a southerly direction, beyond 53rd street and along the Ninth avenue.

THE COURT: I will deny your motion.

Exception.

The Court admonished the jury in accordance with Section 415 of the Code of Criminal Procedure and takes an adjournment until Monday morning next, February 18, 1907, at 10.30.

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THE COURT'S CHARGE.

Gentlemen of the Jury: Your long labors are nearly finished. You have heard the evidence in this case. It is now my duty to charge you, that is to say, to instruct you in the law that applies to the case against the defendant. You must accept what I declare to be the law and permit your minds to be guided and controlled by the law as I declare it unto you, disregarding your own ideas of what the law is or what the law ought to be. If I err, there is opportunity to review and correct the wrong that I do, but if you in the hidden recesses of your minds should entertain an idea of what the law is or what the law ought to be, and should apply it to the facts in this case, there is no way of determining whether your idea of the law is right or not, and so you must disregard your own ideas of the law entirely and be guided solely by the law that the Court charges you. I shall be very brief indeed in my charge as I have found in times past that a voluminous and lengthy charge could not be carried by the jury in their minds and serves but to becloud and befog their minds and for that reason I shall be brief and exceedingly brief in charging you, and I hope that every word I say of the law you will remember and correctly apply to the facts of the case.

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With the facts of the case the Judge presiding has nothing to do. The jury in criminal actions are the sole judges of the facts. It rests with you, therefore, to say whether you will believe or not believe any of the witnesses in the case. You have heard them testify. You have heard them examined and cross-examined, and have, I doubt not, a clear idea of what manner of man each witness is -- whether his interest in the case, his demenaor on the stand, is likely to make him tell the truth and to give reliable, believable testimony.

Whether the defendant is guilty or innocent is not a matter that the Judge presiding has to do with at all. That is left entirely to the jury.

This is a case of homicide.

Homicide is the killing of one human being by the act, procurement, or commission of another.

Homicide is divided into two general classes, first murder, second manslaughter.

With murder you have nothing to do, for that contemplates a deliberate design to effect the death of the person killed, and it is not contended that any such design existed here. Therefore, you come to manslaughter.

Manslaughter again is divided into two degrees.

The first degree of manslaughter may exist when a

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person is committing a crime affecting the person or property of the person killed, or of another, and at that time, or in that manner killed, or when in the heat of passion, with a dangerous weapon, or in a cruel and unusual manner the defendant killed, there is manslaughter in its first degree.

Now, this is not a case of manslaughter in its first degree.

Whether or not it is a case of manslaughter in the second degree is for you to determine. I have brought to your attention these very brief definitions of murder and manslaughter, so that you could understand the more fully the legal definition of manslaughter in the second degree under which this prosecution is brought.

Homicide is manslaughter in the second degree when committed without a design to effect death, by any act, procurement, or culpable negligence of any person, which does not amount to murder or manslaughter in its first degree.

The facts in the case, I take it, are substantially conceded. It is conceded, and if I am wrong, I ask counsel to correct me -- that the defendant was a tower switchman employed upon the Elevated Railroad in this City, in its

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tower, at or near the junction and controlling the switch which leaves the Ninth Avenue Elevated structure and passes into 53rd Street.

It is contended that at the time and place referred to in the indictment his conduct amounted to such culpable negligence as to be manslaughter under the law, in that through his culpable negligence the train intended for the Ninth Avenue Road was misdirected into the 53rd Street branch, and left the track, causing the loss of life of some of the passengers therein.

The defendant does not concede that it was his culpable negligence that caused the loss of life, but does admit that he was the switchman and that this was the time and place of the alleged killing.

It is conceded, I take it, that owing to the train leaving the track at that time and place, human life was lost.

So, there remains for you to consider the question as to whether or not this defendant's conduct, under the circumstances, amounted under the law to culpable negligence, and whether or not under the law it amounted to manslaughter in the second degree. That is about all there is in this case for you to determine.

Words in law and in a Court of justice are used in

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their ordinary acceptation in common language, and none of these words have a different meaning from that in which we receive them in the world outside.

The definition of manslaughter in the second degree is so simple, so free from technical expression, that I will read it again and ask that you let it sink into your memory, so that you may correctly determine whether or not this defendant is guilty of that crime.

Homicide is manslaughter in the second degree when committed without a design to effect death, by any act, procurement or culpable negligence of any person, which does not constitute the crime of murder, nor manslaughter in the first degree.

In other words, did this defendant by his culpable negligence, resulting in the death of the persons charged, commit the crime of manslaughter in the second degree. If so, convict him. If not, acquit him.

The facts are peculiarly for you, as I said before, to use your own good sense upon. It is for you to determine whether or not the conduct of which it is complained he is guilty, amounts to such culpable negligence as to be manslaughter in its second degree.

The law presumes the defendant innocent, and requires the People to prove his guilt, and to satisfy your minds

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of his guilt beyond any reasonable doubt. If you entertain any reasonable doubt about his guilt, give him the benefit of it, and if upon any question of fact arising, you find your minds in that state that the law declares to be reasonable doubt, give the defendant the benefit of it always.

The law is not here to revenge or avenge the death of those unfortunates whose lives were lost owing to this happening. With that you have nothing to do. Nor, are you in any respect concerned with what may happen hereafter to this defendant. You are here to simply answer the question whether under the law the defendant is guilty of manslaughter in the second degree. Nothing more than that. With no other consideration are you concerned at all.

The defendant has offered evidence tending to explain why he left his post of duty. You will consider that evidence, as you will consider all the other evidence, and weighing it all and applying your own good common sense, you are to determine whether by the defendant's culpable negligence a human life has been lost.

The defendant claims also that up to this time he has borne a spotless character, and it is right and proper that you should consider the evidence touching his good character. Sometimes evidence of good character will create

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a reasonable doubt when without it there would be no such doubt. But, good character does not excuse the commission of crime. If one whose character has been free from stain, commits crime and violates the penal code, he is as guilty as though he has been ten times previously convicted, and in determining whether or not he did violate the law, whether or not he is guilty of crime, consider the evidence of his good character, and attach the weight you think it ought to have.

Culpable negligence is the term of the law -- negligence of such a sort as to be culpable, blameworthy, criticisable. I take it the terms couched as they are in every day simple English, need no further illustration at my hands.

It is for you, applying your good sense, and the law to which I have called your attention so briefly, to the facts of this case, to determine whether or not the defendant is guilty, and if so, whether of manslaughter in the second degree.

MR. NAYLOR: I ask your Honor to charge that the caution which the law requires is not the utmost degree which can possibly be used, but such reasonable care as is used in like cases, and has been found by long experience to answer the end.

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THE COURT: I have already covered that. You know the duty of the defendant. The testimony is before you gentlemen. If he performed it in such a culpable, negligent way as to amount to manslaughter in the second degree, then convict him.

MR. NAYLOR: I also ask your Honor to charge the jury if the defendant did not so set the signals as to induce the motorman to believe the tracks were set for Ninth avenue, as charged in the indictment, the jury must acquit.

MR. TRAIN: I object to singling out parts of the evidence.

THE COURT: Yes, it is for the jury to take the entire evidence into consideration.

MR. NAYLOR: I except.

MR. NAYLOR: I also ask your Honor to charge that under the indictment the homicide alleged is not one resulting from acts or omissions inherently criminal, and not made so by law because of their moral turpitude. Setting home signal green was not an act in itself dangerous.

THE COURT: If no loss of life had followed here, there would have been no criminal prosecution. There is

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no law against the defendant turning the signal in any way he pleases, except as the loss of life may have made it criminal, and if by his setting the signal, life was lost, and it amounts to a crime under the law which I have brought to your attention, the defendant is guilty, and otherwise not guilty.

MR. NAYLOR: I also ask your Honor to charge that criminal negligence may in general be defined as a dereliction of duty under circumstances showing an actual intent to injure, or such a sensorious breach of duty as to warrant an implication that the injuries were intended.

THE COURT: I presume that as an abstract proposition, that is quite correct. I think I have called the jury's attention to the precise and concrete law which applies to the case at bar.

MR. NAYLOR: I also ask your Honor to charge the jury that the law regards carelessness as being less intensely criminal than an absolute intention to commit a crime.

THE COURT: I think I have already charged that -- bringing to the attention of the jury the law which applies to the particular facts proven here.

MR. NAYLOR: I except.

MR. NAYLOR: I also ask your Honor to charge the jury

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that carelessness to be a crime must be such as to supply the place of an affirmative criminal intent.

THE COURT: I decline except as already charged.

MR. NAYLOR: I also ask your Honor to charge the jury that the motive from which an action springs ought never to be overlooked, and it would be against natural justice to condemn a man to punishment for what is owing rather to his misfortune than his fault.

THE COURT: Declined, except as already charged.

Exception.

MR. NAYLOR: I also ask your Honor to charge the jury that if Jackson at the time of the accident was intending to do his duty, but in a moment of physical suffering and distress omitted something which any other person exercising reasonable care would be likely to omit, then Jackson is not guilty, and should be acquitted.

THE COURT: I decline, except as I have already charged. The facts are for the jury to consider-- his defense, as well as the charge against him.

Exception.

MR. NAYLOR: I also ask your Honor to charge that an omission caused by or occurring from sickness cannot be chargeable to criminal negligence.

THE COURT: That is for the jury. The jury may or may

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not believe the witnesses in the case. Those are all facts for the jury to pass upon.

Exception.

MR. NAYLOR: I also ask your Honor to charge the jury that if Jackson set the signals, and switch for Sixth Avenue trains, and it was the only train in sight, he set the signals for safety.

THE COURT: I decline to charge on the facts. The jury have heard the evidence, and they must determine.

MR. NAYLOR: I also ask your Honor to charge that upon the motorman, and not upon the towerman rests the duties relating to the safe and proper movement of trains.

THE COURT: I decline to charge, as matter of law, except as I have already charged.

Exception.

MR. NAYLOR: I also ask your Honor to charge the jury that the District Attorney must prove that Jackson's omission to set the home signal red must have been the immediate and proximate cause of Neugass' death, if Jackson is to be convicted.

THE COURT: I decline to charge except as I have already charged touching that matter.

Exception.

MR. NAYLOR: I also ask your Honor to charge that if

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there were two sets of signals which equally mean stop, it was not criminal neglect to display one of these two sets of signals instead of the other.

THE COURT: I leave it to the jury. I decline to charge touching that, except as I have already charged.

Exception.

MR. NAYLOR: I also ask your Honor to charge the jury that the kind of neglect to sustain a conviction would be an intentional and inexcusable neglect of a great duty under such circumstances as to be defined fairly criminal neglect.

THE COURT: I think that is true. I will charge that.

MR. NAYLOR: I also ask your Honor to charge that the indictment does not contain a charge that Jackson left his post.

THE COURT: I have submitted to the jury the precise charge which they are to pass upon, and the rulings as to the indictment have already been made, and therefore, it is unnecessary to further charge. I decline to charge except as I have charged.

Exception.

MR. NAYLOR: I also ask your Honor to charge the jury that if any of the rules of the Company are not capable of

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exact fulfillment at all times, or are not enforced or carried out by the Company, that circumstances is to be considered in determining the question of negligence.

THE COURT: Surely. They must determine whether there has been negligence, taking into consideration whatever rules are before them.

MR. NAYLOR: I also ask your Honor to charge the jury that if any of the rules are unreasonable in their demands upon the powers and the senses of careful tower-men, that circumstance should be taken into consideration in determining the question of negligence.

THE COURT: I decline to charge except as I have already charged.

Exception.

MR. NAYLOR: I also ask your Honor to charge the jury that it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact of guilt to a reasonable certainty, a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it.

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THE COURT: I have already charged the jury touching reasonable doubt, and I think that is all you mean by that, though you frame it differently.

MR. NAYLOR: I also ask your Honor to charge the jury that the jury must not only find the evidence establishes the presence of the mere ordinary negligence on the part of the defendant, but they must find it in such extreme degree as the use of the term gross neglect imports.

THE COURT: As the use of the term culpable neglect imports, that I will charge.

MR. NAYLOR: I also ask your Honor to charge that if the evidence leaves the jury in doubt as to whether such a degree of negligence exists as the Statute contemplates, they must find its presence not proved and acquit the defendant; that is, if they entertain a fair and reasonable doubt as to the establishment of such a degree of negligence as the Statute contemplates by the use of the word gross.

THE COURT: I have already charged that in substance.

The jury ask that they be given the exhibits to take into the jury room.

THE COURT: Is it consented that the jury may take the

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exhibits?

MR. NAYLOR: I have no objection.

MR. TRAIN: I have no objection.

THE COURT: Very well. By consent the jurors may have whatever exhibits they want.

The jury retire.

Later. The jury render a verdict of manslaughter in the second degree, with the recommendation of extreme clemency of the Court.

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COURT OF GENERAL SESSIONS OF THE PEACE
IN AND FOR THE COUNTY OF NEW YORK.

-----X
THE PEOPLE OF THE STATE OF NEW YORK, :
Plaintiff, :

Before:

-against-

: HON. WARREN W. FOSTER,

CORNELIUS A. JACKSON, :
Defendant. :

J.

-----X
New York, February 28, 1907.

Defendant's Motions for a New Trial.

For the People, ASSISTANT DISTRICT ATTORNEY VANDIVER.

For the Defendant, L. W. NAYLOR, ESQ.

MR. NAYLOR: I desire to move for a new trial upon
the following grounds: First because the verdict is
clearly against the evidence.

Second, because the verdict is against the weight of
the evidence,

Third, because the verdict is contrary to the law.

Fourth, because the Court erred in denying the defen-
dant's motion to dismiss the indictment and to discharge
the defendant from custody.

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Fifth because the Court erred in denying the defendant's motion to advise the jury acquit.

Sixth, because the Court at the trial admitted illegal and improper evidence against defendant's objection and excluded legal evidence offered by him and the defendant at the trial duly excepted to each admission and exclusion.

THE COURT: So far as your formal motions are concerned I will deny them, but if there is any particular matter which you wish to have me hear, call my attention to it particularly.

MR. NAYLOR: I also move for a new trial upon the ground that the Court at the trial instructed the jury in matters of law and refused to instruct them as requested by the defendant and that the defendant at the trial duly excepted to such misdirection and refusal.

Denied an exception.

MR. NAYLOR: I also move for a new trial on the ground that the jury has received evidence out of the court other than that resulting from a view inabody duly ordered by the Court pursuant to Section 411 of the Code of Criminal Procedure, in that two jurors separated and personally visited and examined the scene of the accident

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pending the trial and that one of them so announced to his fellow jurors in the jury room pending the consideration of their verdict.

THE COURT: What proof have you of that?

MR. NAYLOR: I submit my own affidavit. The affidavit of Mr. S. Scuttenburg, my associate and the affidavit of Mr. Bryan.

THE COURT: What does Mr. Bryan know about it?

MR. NAYLOR: He was sitting here in the courtroom at the time. I will read the affidavit.

State of New York,)
 ss:
County of New York.)

LEVI W. NAYLOR, being duly sworn deposes and says that he was counsel for the defendant upon the trial of the defendant above named; that the trial began on Wednesday, February 13th, and the taking of testimony continued until about noon Friday, the 15th inst., that at that time the case was adjourned for summing up until the morning of Monday, February 18th. The deponent has personally interviewed since the return of the verdict each and every of the twelve jurors sitting in the case, and in deponent's presence eleven of said jurors signed a petition to the Court asking for clemency in behalf of the defendant.

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That two of the said jurors, to wit, Ernst A. Pfeiffer and Charles S. Boyd, have stated to deponent that during the trial they personally and separately visited and examined the scene of the accident on the Elevated Railroad at and near the tower house at the junction of Ninth Avenue and 53rd Street, upon which the indictment of the defendant was found. Moreover, juror Pfeiffer has stated to deponent that himself with his son, visited and viewed the said signals, switch-tower and structure on Sunday, the 17th inst., same being the Sunday intervening between the Friday when testimony was closed and Monday when the case was summed up.

To the other jurors in the jury room during the discussion of the evidence and the finding of the verdict deponent is informed said juror Pfeiffer announced that he had visited the scene of the accident and knew all about it. Deponent, therefore, respectfully requests that the Court compel the personal attendance before the Court of the said jurors for the purpose of personal examination under oath as to the facts relating to their separately viewing the scene of the accident pending the trial without the order of the Court. And that their testimony so given be deemed a part of the basis of this motion.

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Herewith submitted is the affidavit of William F. Reeves, an assistant engineer of the Elevated Railroad, to the effect that there has been a change in the signals and conditions at that point since the accident on September 11, 1905, and prior to Sunday February 17th, 1907, and that on said Sunday in question the situation was entirely different from what it was at the time of the accident.

Deponent demands in behalf of the defendant a new trial on the aforesaid ground, and on the further ground, that certain events that occurred during the progress of the trial deprived the defendant of a fair and impartial trial, to wit, that on Saturday, February 16th, the derailment occurred of an electric train on the New York Central Railroad, within the boundary of New York City, resulting in the death and injury of a large number of persons, and the public prints of the City contained full accounts of the same. On Monday morning before the jury herein were called to the jury box to listen to the summing up of the Jackson case deponent saw in the hands of at least three jurors New York City newspapers containing Central accounts of the said New York A derailment, which the jurors were then and there reading, and it is the

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belief of deponent that said New York Central derailment strongly impressed itself upon the minds of the said jurors to the prejudice of the defendant, who was at that time before them on trial for the derailment of an electric train on the elevated railroad.

Furthermore, in the summing up by the District Attorney he referred in specific words to the fact that it was within the province of the Court to suspend sentence upon the defendant, Jackson, and deponent has been informed by several of the jurors, to wit, Foreman Jandorf, Jacoby, Phelps and Isaacs, that relying upon the District Attorney's said remark, it was their understanding when they found the verdict of guilty that nothing more than a reprimand and a suspension of sentence would be imposed on the said defendant.

Wherefore deponent upon the grounds above stated and upon the motion herein made for a new trial respectfully moves the Court for a new trial and an arrest of judgment. *

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State of New York,)
 :
 County of New York.)

Arthur T. Stoutenburgh, being duly sworn deposes and says that he is an attorney at law and was associated with Levi W. Naylor, counsel for the defendant in the trial of Cornelius A. Jackson in Part 11, General Sessions, February 13th to 18th, 1907.

That after the close of the trial and after the jury had given its verdict, deponent in the corridor of the Criminal Court House met Ernst A. Pfeiffer, one of the jurors in said trial. In the course of conversation said juror stated to deponent that on the previous day Sunday, February 17th, said juror had given up his Sunday afternoon at home and had gone down from the Bronx to 53rd Street and Ninth Avenue to examine the structure of the elevated railroad at that point, that he had examined the switches, tower and signals, and had become convinced that it was the most dangerous point on the line."

State of New York)
 : ss:
 County of New York.)

Edward P. Bryan, Jr., being duly sworn deposes and

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says: That on the morning of February 21, 1907, while he was sitting in the court room, Part 11, General Sessions, in company with Mr. L. W. Naylor, attorney for the above defendant, Cornelius A. Jackson, Mr. Ernst A. Pfeiffer, one of the jury who brought in a verdict of guilty against the defendant Jackson, approached Mr. Naylor and entered into conversation with him, That during said conversation Mr. Pfeiffer stated that on Sunday afternoon, February 17th, in company with his son, he had visited the vicinity of Ninth Avenue and 53rd Street, where the killing with which Jackson was charged occurred, in order that he might thoroughly understand all about the accident. "

State of New York,)
 : ss:
 County of New York.

W. F. Reeves, being duly sworn deposes and says that he is an assistant engineer of the Interborough Rapid Transit Company operating the elevated railroad on Ninth Avenue at the corner of 53rd Street, New York City, and has been such engineer and acquainted with the structure, tracks, switches, signals and other features of said railroad at that point for upwards of fifteen

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years.

That deponent was acquainted with the signals and switches and other features of the structure at that point on September 11th, 1905, the time of the accident. That the signals on the south bound tracks at the point were changed on June 27th, 1906, and that the conditions are not the same as to the signals at the present time as they were in the month of September, 1905. There is now no pot signal at the point of the switch, and at home signal there is a semaphore instead of the original signal that was in use at that point at the time of the accident in September, 1905.

THE COURT: The jury were sworn a true verdict to find in accordance with the evidence, and that was not in evidence.

MR. NAYLOR: That is the point I make, the fact it was not in evidence.

THE COURT: I cannot consider that.

MR. NAYLOR: I pass to the further point that in the summing up by the District-Attorney he referred in specific words to the fact that it was within the province of the Court to suspend sentence upon Jackson and that deponent has been informed by several of the jurors that

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relying upon the District-Attorney's remarks it was their understanding that when they found a verdict of guilty no more than a reprimand and suspension of sentence would be imposed upon said defendant.

THE COURT: It was clearly improper in the strict legal aspect of the case for the District-Attorney to tell the jury anything about the law, but, counsel has the habit, all counsel tell the jury something about the law, and if they are reprimanded for it, they say the Court will charge you thus and so. They do not confine themselves to the evidence in summing up as they ought to do, but I am bound to hold that that suggestion was innocuous and could not have prejudiced you in any way. The jury were instructed that they had nothing to do with the punishment of the defendant. That they were here simply and solely to determine a question of fact, whether or not he was guilty under the law.

MR. NAYLOR: I recognize that as being the rule.

THE COURT: If my attention had been brought to it at the time I should have reprimanded the District-Attorney so the jury could disregard it. If it appeared objectionable it should have been brought to the attention of the Court. Not having been done so, it will be

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be disregarded. Have you any other point. You made three points and I have overruled two of them.

MR. NAYLOR: I refer to one which your Honor has not ruled upon, the one with reference to the visits.

THE COURT: I will come to that in a moment. Have you any other matter?

MR. NAYLOR: No, that is all outside of the formal motion.

THE COURT: Now with respect to the first point, do you desire to be heard?

MR. VANDEVEER: Which do you designate as the first?

THE COURT: The first in order of time, that the jury by inspecting the locus in quo have vitiated their own verdict.

MR. VANDEVEER: The District-Attorney as far as I am aware has not been served with a copy of Mr. Naylor's motion papers, and therefore at this time I am not in a position to answer it. I should like to ask Mr. Naylor if his conversation with the jurors was prior to the rendition of a verdict.

MR. NAYLOR: It was not. It was afterwards.

THE COURT: The affidavit states that fact, as I

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understood it, that it was after the rendition of the verdict.

MR. VANDEVIER: I understood the affidavit to read that on the 18th --

MR. NAYLOR: It was after the verdict, after the close of the trial and after the jury had given its verdict.

THE COURT: That was my understanding. Mr. District-Attorney, you ought, of course to have these papers before you and the opportunity of replying. The matter is one of very great importance. Only a few days ago a like motion was before me. The case was one of alleged robbery happening in a saloon in the upper part of the city and one of the jurors took it upon himself to visit the scene of the alleged crime and to communicate the results of his visit to his fellow jurors, thereby giving them evidence not upon the record, not received in court, evidence obtained without the sanction of an oath, and I felt it my duty to set aside that particular verdict. I will ask you gentlemen to examine the case of the People vs. O'Donovan Rossa, reported I think in the matter of Munsell. The facts were briefly as follows. O'Donovan Rossa was attacked by a young English woman in his office at 25 Chambers Street. It was not a case against O'Donovan Rossa. The young woman was

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subsequently tried for her crime of assault before Judge Van Brunt. One of the jurors, Mr. Munsell visited the scene of the crime, 25 Chambers Street and it is my recollection that the verdict was set aside. Subsequently the matter was brought to the attention of the Court of Appeals and they reversed in part the judgment of Judge Van Brunt. I have not the facts clearly in mind and therefore I shall ask you gentlemen to examine that and bring to my attention the law as you respectively claim it to be; its application to the facts in this case. The matter is one of importance and not to be treated or disposed of lightly. I will adjourn this motion and you Mr. Naylor will give the District Attorney a copy of your papers and renew the motion on the adjourned day.

The motion is adjourned until next Monday.

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