

Q And then you placed the defendant under arrest?

A Yes, sir.

Q Does he speak English? A Yes, sir.

Q And what did he say, when Weinberg said he was one of the men? A He said that he didn't do it.

Q And did you take him to the station house? A Yes.

Q And was Mrs. Weinberg brought to the station house or court, next morning? A She came to the station house also.

Q Now was the defendant confronted with Mrs. Weinberg in the station house? A Yes, sir.

Q And did she there tell what happened? A Yes.

Q In the presence of the defendant? A Yes.

Q Was there any other officer with you? A Yes, sir.

Q What's the name? A Officer Coster.

CROSS EXAMINATION: None.

RE-DIRECT EXAMINATION BY MR. O'CONNOR:

Q Did you make a search of him at the time? A Yes.

Q Did you find anything on him? A No, sir.

Q Oh, Officer, what time did you make this arrest?

A Ten minutes after twelve, in the night time.

Q Had you just come out on post? A No, sir. It was just before I went in. I was just waiting for my relief.

CASE # 630

H E N R Y C. C O S T E R, a witness called on behalf of the People, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. O'CONNOR:

Q You are an officer of the Police Department of the City of New York and attached to what precinct? A 29th.

Q Where was your post on the night of December 6th, 1906?

A From 96th to 101st Streets and Second Avenue.

Q Did you go to the premises 2091 Second avenue, on that night or early morning? A Yes, sir.

Q How did you come to go there? A I was walking in from my relieving point, and I met Officer Flanagan, and went up to 106th Street and Second avenue; and we were talking **together**, and we heard the report of four shots fired from a pistol, as I believed; and we went up there to investigate, and we were informed--

Q Never mind what you were informed, Officer. Now 2091 was a candy store; wasn't it? A Yes.

Q And did you see the complaining witness, Weinberg, there? A Yes.

Q And did you have any talk with him? A No, sir, I didn't.

Q Officer Flanagan had the complainant with him?

CASE # 630

A Yes, sir.

Q And did you go into the store? A No, sir; I stood on the outside.

Q And did you look in the window, the store window?

A Yes.

Q And what was the condition? A Broken.

Q And did you then go with Officer Flanagan in the place? A Yes.

Q Where did you go to? A We went into the undertaker's establishment, next door.

Q Did Mr. Weinberg go with you two officers? A Yes, sir.

Q And you saw the defendant in the rear of the store?

A Yes, sir.

Q And you arrested him? A Yes, sir.

Q And took them all to the station house? A Yes, sir.

Q And have you any idea of the name of the undertaker?

A John Rumore.

Q And between what streets is that place? A Between 107th and 108th Streets.

CROSS EXAMINATION BY MR. LeBARBIER:

Q Well, you found him with a number of other people, in the back of the undertaking establishment? A Yes, sir;

CASE # 630

him and two others.

Q Sitting down? A Well, the defendant was lying down on the floor, and O'Brien was standing up, and the other young man there was standing up.

Q In the back of the undertaker's establishment?

A Yes, sir.

RE-DIRECT EXAMINATION BY MR. O'CONNOR:

Q How was he dressed, Officer? A He had on a blue sweater and his trousers off and his coat off.

Q And in your presence, **what** did Weinberg say? A H e said, "Here is a man back here that left my place just now; that shoot in my store."

MR. O'CONNOR: The People rest ,if your Honor please.

MR. LeBARBIER: I respectfully move, if your Honor please, to withdraw the charge of **assault** in the first degree.

THE COURT: Motion denied.

MR. LeBARBIER: Exception. On the ground that there is no evidence to substantiate the charge of assault in the first degree.

THE COURT: Motion denied.

CASE # 630

MR. LeBARBIER: Exception. And I make the same motion as to assault in the second degree.

MR. O'CONNOR: There is only one count in the indictment.

THE COURT: There is only one count in the indictment.

MR. LeBARBIER: Then I ask your Honor to advise the jury to acquit, on the ground that no facts have been adduced here sufficient to establish any crime, as laid in the indictment.

THE COURT: Motion denied.

MR. LeBARBIER: Exception.

CASE # 630

THE DEFENSE.

J O S E P H R O S S E L L, a witness called on behalf
of the defense, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. LeBARBIER:

Q On the 6th day of December, 1906 -- A I can't talk
English.

Q Oh, I guess you can get along. How old are you?

A 37 years.

Q Where do you live? A 109th street.

Q What's your business? A Driver.

Q Do you know Gabriele Maggiore? A Yes.

Q How long have you known him? A Three or four years.

Q Do you know other people that know him? A Yes.

Q Do you know what his reputation is? Is he a good
or man bad?

THE COURT: Reputation for what?

MR. LeBARBIER: For peace and quiet.

BY MR. LeBARBIER:

Q Do you know what his reputation is for peace and
quiet? A I don't understand.

CASE # 630

Q Were you with Maggiore on the 6th of December?

A I don't understand.

MR. O'CONNOR: I think you had better wait for the interpreter. He has been sent for.

MR. LeBARBIER: Very well. At this stage, if your Honor please, I offer in evidence the conviction of the co-defendant, O'Brien.

MR. O'CONNOR: Objected to.

THE COURT: Objection sustained.

MR. LeBARBIER: Exception.

(John E. Guidetti is sworn to act as interpreter, by consent.)

BY MR. LeBARBIER:

Q Now do you remember the night the defendant, Maggiore, was arrested? A Yes, sir.

Q Will you kindly state to the court and jury what you observed, on that night, December 6th, 1906? A I was passing through Second avenue, about five minutes after twelve, midnight. There was a crowd of people in front of the cigar store, on Second avenue. I stopped there, and tried to find out what was the trouble, and I didn't understand what they were talking about, because they were speaking English. Then I went away.

CASE # 630

Q Did you see Maggiore there, that night?

MR. O'CONNOR: I object. The question was this,
if your Honor please --

THE COURT: Do you object to it, as leading?

MR. O'CONNOR: Yes.

THE COURT: Objection sustained. Ask the
witness whom he saw there, that night.

MR. LeBARBIER: An exception.

Q Whom did you see there that night? A I didn't see
any Italian men there, at all.

Q Were there a number of English speaking people in
front of the complainant's store? A Yes; they were all
speaking English.

Q Did you see anything happen to a window there?
A No, sir.

Q Did you see any firing done, that night? A No, sir.

Q Where were you when the defendant, Maggiore, was
arrested? Question withdrawn. I want to shorten this,
and get through this quickly. Where were you when the
defendant was arrested? A I wasn't there.

Q Do you know anything about what happened there, that
night? A No, no.

CROSS EXAMINATION: None.

CASE # 630

Q Did you see Maggiore there, that night?

MR. O'CONNOR: I object. The question was this,
if your Honor please --

THE COURT: Do you object to it, as leading?

MR. O'CONNOR: Yes.

THE COURT: Objection sustained. Ask the
witness whom he saw there, that night.

MR. LeBARBIER: An exception.

Q Whom did you see there that night? A I didn't see
any Italian men there, at all.

Q Were there a number of English speaking people in
front of the complainant's store? A Yes; they were all
speaking English.

Q Did you see anything happen to a window there?
A No, sir.

Q Did you see any firing done, that night? A No, sir.

Q Where were you when the defendant, Maggiore, was
arrested? Question withdrawn. I want to shorten this,
and get through this quickly. Where were you when the
defendant was arrested? A I wasn't there.

Q Do you know anything about what happened there, that
night? A No, no.

CROSS EXAMINATION: None.

CASE # 630

MR. O'CONNOR: I will move to strike out the witness's entire testimony. It has nothing to do with the case.

MR. LeBARBIER: No; I will ask him whether he knows his reputation for peace and quiet. He says that he knows him, and if he says he knows others who know him, I will ask him if he knows his reputation for peace and quiet.

BY MR. LeBARBIER:

Q Now, on the question of peace and quiet, what is the defendant's reputation? A He always was a good man.

MR. LeBARBIER: Now I consent that the balance of his testimony be stricken out, all his testimony except as to character, Mr. O'Connor.

MR. O'CONNOR: Yes; very well.

G I A C O M O L E O N E, a witness called on behalf of the defense, being duly sworn, and examined through the same interpreter, testified as follows:

DIRECT EXAMINATION BY MR. LeBARBIER:

Q Do you remember the night when the defendant was arrested? A Yes, sir.

CASE # 630

Q Were you also arrested? A Yes; I was arrested, too.

Q Did Weinberg say that you were one of the men, too?

A Yes, sir.

Q Now, you were taken to the police court, the next morning; were you not? A Yes, sir.

Q And you were discharged; were you? A Yes.

Q Kindly state to the court and jury what you saw, that night. Did you see any firing, or windows broken, or what? A The night of the firing, Gabriele Maggiore and myself were asleep in bed, and the policemen come up, and knocked at the door, and then the policemen broke into the door, and they told us to get up, and they locked us up.

Q Were you with the defendant, that evening? A We were sleeping together.

Q Well, were you with him at ten o'clock, say? A Yes.

Q Did you go into Weinberg's place of business, a little candy shop, with the defendant, that evening? A On that night, I went into Mr. Weinberg's place, and bought a pack of cigarettes, and paid for it, and walked out.

Q Did the defendant go in with you? A Yes.

Q While he was in there, did he say at any time, "You God damn Sheeney, I must kill you, to-night", or words to that effect? A No, sir.

CASE # 630

Q Did he insult either Mr. or Mrs. Weinberg? A No, sir.

Q When you left that candy shop, at about ten o'clock, as you say, where did you and the defendant go? A We went over to have a drink on the corner, and then we went home to sleep.

Q Did the defendant leave you between that hour, and, say, a quarter after twelve, or five minutes after twelve, midnight? A No, sir.

Q Did he have a revolver in his pocket, that night and discharge it? A No, sir.

Q Were you with the defendant, that night, outside of the store of Weinberg, and did he fire four shots in through the window? A No, sir; he didn't fire any shots at all. We were in bed and we heard four shots fired, and the policemen came up, and broke open the door.

Q Now isn't this the same story that you told in the Police Court? A Yes.

Q Was Mr. Weinberg in the Police Court? A Yes.

Q And he said you were one of the threemen? A He said I didn't do anything, and that's why he had me discharged.

CROSS EXAMINATION: None.

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

CASE # 630

AFTER RECESS.

J O H N R U M O R E, a witness called on behalf of the defense, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. LeBARBIER:

Q Do you speak English? A Yes, sir.

Q What is your business, Mr. Rumore? A My business is an undertaker.

Q Undertaker? A Yes, sir.

Q Where? A 2089 Second avenue.

Q Do you know Gabriele Maggiore? A Yes.

Q Do you know other people that know him? A Yes, sir.

Q Do you know what his reputation is for peace and quiet? Good or bad? A Good.

Q Is your undertaking establishment at that place?

A Yes, sir.

Q 91st Street and Second avenue? A Yes, sir.

Q Do you know what the defendant worked at? A

Q (Question repeated.) A Yes; he worked.

Q Who did he work for? A He worked for me.

CASE # 630

Q In the undertaking business? A Yes, sir.

Q Who stayed in that undertaking business, at night ?

A Him and the other fellow.

Q What other fellow? A Giacomo Leone.

Q The last witness? A Yes; in the night time.

CROSS EXAMINATION BY MR. O'CONNOR:

Q Your undertaking establishment is right alongside of Mrs. Weinberg's candy store, right next door to it? A Yes.

Q And Maggiore is a driver? A Yes; and an officer; he attends to the office too.

Q Well, if he is out driving funerals, he doesn't attend to the office? A Then I attend to the office.

Q Where does he sleep? On the floor? A In a bed, in the back.

Q He sleeps on the floor? A No; he sleeps on a bed, in the back.

Q Well, the police officer says he found him sleeping on the floor? A I don't know that.

Q You were not there? A No, sir. He got a bed.

RE-DIRECT EXAMINATION BY MR. LeBARBIER:

Q Well, he don't drive funerals at night; does he?

A No.

CASE # 630

ANTONIO FRISCIA, a witness called on behalf of the defense, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. LeBARBIER:

Q What is your business? A Undertaker.

Q Where? A 126 Elizabeth Street.

Q Do you know the defendant Gabriele Maggiore? A Gabriele Maggiore I know.

Q Yes, Gabriele Maggiore; how long have you known him?

A Oh, several years.

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

Q Do you know what his reputation is for peace and quiet? A Yes; keeps good all the time.

CROSS EXAMINATION: None.

GABRIELE MAGGIORE, the defendant, being duly sworn and examined through the same interpreter, testified as follows:

DIRECT EXAMINATION BY MR. LeBARBIER:

Q What is your name? A Gabriele Maggiore.

Q How old are you? A 25.

Q How long have you been in this country? A Six years and a half.

CASE # 630

Q And do you know Mr. Rumore, who has testified here?

A Yes.

Q What were you working at in December, 1906? A In the day time, I used to drive, and, in the night I used to sleep in the undertaking of Mr. Rumore.

Q Well drive where? A Drive in a carriage for Mr. Rumore.

Q For what? Funerals? A Yes; funerals.

Q Now, on the 6th of December -- do you know one Leone? A Yes.

Q On December 6th, 1906, were you in the undertaking establishment? A Yes, sir.

Q Did you and Leone go out together? A Yes, sir.

Q Had you ever been arrested before? A No, sir.

Q Did you go into Weinberg's place? A Yes, sir.

Q Did you go in there to buy a package of cigarettes, and wouldn't pay for it? A No, sir.

Q Well did you pay for it or not pay for it? A Yes; I paid for it.

Q Did you say to Mrs. Weinberg a whole lot of insulting things? A No, sir.

Q Did you have a revolver, that night, or any knife?

A I never brought in my pocket anything.

CASE # 630

Q It is charged here by one witness, at least, I think the complainant, who says that you were on the street, and, when the window was broken by the stones, you fired four shots into a soda water fountain. Is that true? A It isn't true.

Q Have you been in jail ever since December 6th?
A Yes, sir.

CROSS EXAMINATION BY MR. O'CONNOR:

Q You had some trouble with Mr. and Mrs. Weinberg?
A Never.

Q Never had any trouble with them? A Never.

Q Now, the store in which you worked is the next house to their store? A First comes the undertaker, and then a shoemaker shop, and then the store, the candy store.

Q Your undertaking establishment is at 2089 Second avenue? A Yes, sir.

Q And Weinberg's was at 2091 Second avenue? A Yes, sir.

Q Well, that's the next house? A There is two stores, the same number.

Q There are two stores between the candy store and the undertaking establishment? Is that you mean? A Only one; the shoemaker's.

CASE # 630

Q That is, between? A Yes, sir.

Q And it is the next house? A Yes, sir.

Q Now you say that you never had any trouble with Mr. or Mrs. Weinberg? A Never, never.

Q Do you know of any reason they should come here, to-day and swear against you? A I am surprised that they made such a complaint against me.

Q Now, where did you sleep, the night that you were arrested, on the 6th of December, 1906? A In the undertaking establishment.

Q In what part of the undertaking establishment?

A In back of the undertaker's.

Q On the floor? A No; in the bed.

Q The police officer swore that he found you sleeping on the floor, or, at least, lying on the floor? A It is true.

Q What time did you leave the undertaking establishment, that night, to go into Mrs. Weinberg's store?

A About ten or half past ten.

Q And you bought a package of cigarettes? A Yes, sir.

Q Now, you had a talk with Mrs. Weinberg, while you were in there? A No; there was only Mr. Weinberg in there.

Q Who sold you the cigarettes? A Mr. Weinberg.

CASE # 630

Q Now who sold the cigarettes to your friend, Giacomo Leone? A The same man.

Q Where did you go to , after you bought the cigarettes?
A We went over to have a glass of beer, on the corner, and then we went to sleep.

Q And how long did you remain in the saloon on the corner? A About fifteen or twenty minutes.

Q And who did you meet in the saloon? A There were a lot of people in the saloon. They were all Americans, and we didn't know them.

Q Now, the American fellow, who met you there was O'Brien, wasn't it? A No, sir.

Q Where did you meet O'Brien? A I didn't speak to him at all.

Q You didn't see O'Brien when the windows were broken?
A No.

Q Now, when you went into that saloon, didn't you tell O'Brien that you were after having trouble with the Jew, and asked him to come down and help you out? A No, sir.

Q And then wasn't it that O'Brien went down and broke the windows, and you pulled out your pistol, and began to shoot? A I didn't see anybody break the glass, or fire any shots.

CASE # 630

Q Well, then, explain to this Judge and the jury how O'Brien happened to be arrested with you in the undertaking establishment? A I was asleep with Leone in bed, and I don't if the door was closed or open. Then somebody -- Mr. O'Brien come into the undertaker's establishment.

Q Why, you lock the door, when you go to bed, at night, in that undertaking establishment, don't you? A Oh, I close it sometimes, and Mr. Leone closes it sometimes.

Q Well, when you went to bed, that night, who locked it, you or Leone? A I don't know. Maybe Mr. Leone must have left it open.

Q Oh, he may have left it open? A Yes.

Q And how then did O'Brien come to go into your undertaker's establishment, if you never knew him? A I didn't know Mr. O'Brien at all.

Q Well how did he know how to get into your undertaking establishment, where you were sleeping? A I don't know.

Q Well you were arrested there with O'Brien and Leone?
A Yes.

Q Now Leone wasn't -- Leone was dressed, wasn't he, with his clothes on? A Yes.

Q Well, then, Leone was sleeping in bed with you, at the time? A No, sir.

CASE # 630

Q And then it isn't true that Leone --

MR. LeBARBIER: Let him finish the answer.

MR. O'CONNOR: I think he had.

BY MR. O'CONNOR:

Q Go on and finish your answer. A Leone slept in the other room, on the floor, on top of blankets.

Q And then you and Leone didn't go to bed together, that night? A Not in the same bed; at the same time, but not in the same bed;

Q And, if you went out of that place, that night, you didn't tell Leone you were going out; did you?

MR. LeBARBIER: Objected to, as assuming a state of facts not in existence here.

MR. O'CONNOR: Question withdrawn.

BY MR. O'CONNOR:

Q Were you sleeping on a blanket also? A No, sir.

Q Did you have your shoes on? A Nothing on; only the undershirt and underdrawers.

Q Didn't you have a sweater on, a blue sweater?

A (No answer.)

Q Do you know what I mean? A sweater, an overshirt?

A Only an undershirt on.

Q And O'Brien was dressed, wasn't he? A Yes.

CASE # 630

Q Had you ever seen O'Brien before that night in your undertaking establishment? A No, sir.

Q Now, when you work up, or were taken by the police officers, did you say anything about O'Brien being there?

A They didn't take me from off the floor, but I was in bed, and they woke me up.

Q Well, the police officer says he found you on the floor, and took you off the floor, where you were lying on a blanket? A No; I was sleeping in the bed, and Leone was lying on a blanket on the floor.

Q Well, the officer says that you were sleeping or lying on a blanket on the floor, and the other two men, Leone and O'Brien were standing up? A No, sir; it isn't true.

Q How long did it take you to go from your undertaking establishment to Weinberg's store, to walk there? A About two minutes.

Q Two minutes? A Yes, sir.

Q And you had been in Mrs. Weinberg's store several times, during the three months before December, 1906?

A Two or three times a day, to buy cigarettes.

Q So that Mr. and Mrs. Weinberg knew you very well?

A They know me because I was working in the undertaker's

CASE # 630

establishment.

Q Yes. Seeing you two or three times a day, for a period of three months? A Since they had their business there, they used to see me two or three times a day.

Q How did the police officers get into your store?

A I don't know.

MR. LeBARBIER: The defendant rests.

BY THE COURT:

Q One moment. Did you ever have any trouble with Mr. and Mrs. Weinberg? A No, sir.

Q Do you know James O'Brien? A Sometimes I used to see him pass up and down by the store, but I don't him to speak to.

Q Did you ever speak to him? A No, sir.

Q Or he to you? A Never.

Q What time did you go to bed, that night? A About a quarter of eleven, or eleven o'clock.

Q What time did the policemen come into the establishment? A It was about a quarter after twelve, or twenty minutes after twelve.

Q And in what condition did the policemen find you?

A I was sleeping in bed. I had only on my undershirt and underdrawers.

CASE # 630

Q And did the policemen wake you up? A The policemen said, "Get up, get up."

Q Did you hear the firing of any revolver, that night?

A Yes.

Q Where were you when you heard the report of the pistol? A Sleeping.

Q Did the firing of the pistol awaken you? A Yes.

Q What did you do, after being awakened? A I still was sleeping.

Q But you said that the pistol shots woke you. Where did you go then? A I stayed in the bed.

Q What time was that? A It must have been twelve, or a quarter past twelve, or half past twelve.

Q How soon after you heard the firing of a revolver, did the policemen come into your place? A About five minutes.

Q Well, you said that you were asleep at the time? A I woke up as soon as I heard the shots.

Q Now, when the policemen came into the place, were you asleep at that time, or were you awake? A I was getting up as soon as I seen him coming in.

Q Saw who? A The policeman.

Q Now, at that time, was anybody in your room, besides the police? A O'Brien, Leone and myself.

CASE # 630

Q Was O'Brien in the room? A Yes, sir.

Q In your room? A Yes; in my room.

Q Was O'Brien asleep, or was he awake? A O'Brien was standing up.

Q Now then you and Leone and O'Brien were arrested?

A Yes, sir.

Q Did the officers take you into Weinberg's place of business? A No, sir.

Q Did you see the condition of the pane of glass?

A No, sir.

Q You say you ~~had~~ been a customer of Weinberg's for two or three months? A Since they ~~had~~ the business, two or three times a day, I used to buy cigarettes.

Q And you went into that place, that night? A Yes.

Q And you paid for your cigarettes? A Yes.

Q Now, when you heard the report of the pistol shots, were you not eager to go and make inquiry as to what had happened? A No; because the policeman come right in my place.

MR. LeBARBIER: The defendants rest, if your Honor please. I move, your Honor, that the charge of assault in the first degree be withdrawn from the consideration of the jury, on the ground that

CASE # 630

no facts sufficient to substantiate the crime charged have been adduced on the trial.

THE COURT: Motion denied.

MR. LeBARBIER: Exception. I respectfully move that the charge of assault in any degree be withdrawn from the consideration of the jury, on the same ground.

THE COURT: Motion denied.

MR. LeBARBIER: Exception. I respectfully move that your Honor advise the jury to acquit, on the ground that the people have not proven the facts by evidence sufficient to establish a crime under the indictment.

THE COURT: Motion denied.

MR. LeBARBIER: Exception.

CASE # 630

THE COURT'S CHARGE.

Gentlemen of the Jury:

In every country where true civilization reigns supreme, justice must prevail. This is a government of law, and law can be enforced and order maintained only where the rights of the individuals are safeguarded and protected. The rights guaranteed by the law are of a dual character, the rights of the accused and the rights of the People.

The law does not seek a victim; the law is blind to the individual. The greatest benefactor of the community, or its lowest inhabitant, when arraigned at the Bar of Justice, is entitled to the benefit of a fair and impartial consideration of the case.

I assume, gentlemen, that we live in a country where racial prejudice is not tolerated or sanctioned. In view of the statements made by the learned counsel for the defense, I deem it my duty to specifically call your attention to the fact that the defendant is entitled to the benefit of a fair and impartial consideration of

CASE # 630

this case, and that you must not permit sympathy or prejudice to swerve you from a fair, honest and impartial consideration of this case. I hope that we have been emancipated from the blindness of bigotry, and the cruelties of intolerance; so that, when an individual is arraigned at the Bar of Criminal Justice, in this great Metropolitan City of New York, jurors will determine the guilt or innocence of the accused simply upon the legal evidence in the case.

On the other hand, a Judge would be unfit to sit upon the bench, and would soil the judicial ermine, if he failed to impress upon a jury that they must not permit racial feelings to interfere in the slightest degree with the determination of the question of the guilt or innocence of a defendant. Justice is cold and impartial; justice is blindfolded. Justice, in its cold and dispassionate administration of the law, should look neither at the race, nor the color, nor the creed of the defendant on trial. And the moment that a Judge does not sacredly follow, and carefully impress upon a jury, the principles upon which government exists, and order is maintained, he is unfit to be trusted with the administration of the business of a

CASE # 630

criminal court in a great city like New York.

So, in this case, I charge you that you must not permit anything extraneous to the evidence to withdraw your attention from a fair and honest and impartial consideration of the testimony in the case.

You, gentlemen, have an important function to perform. By authority of law, you are compelled, having certain qualifications, to serve as jurors. When you are taken into the jury-box, and the oath is administered to you, you become a part of the machinery for the administration of criminal justice. Your power is tremendous, and it should be jealously guarded, and exercised with great discrimination. You have a duty to perform under your oath, and, after you have performed that function, your duty ceases, in a particular case.

In the exercise of that function, you are the sole, absolute and exclusive judges of all questions of fact. Even if the Judge holds or entertains unintentionally any impression of the evidence, and, in this case, I can say to you that the Court holds no opinion or impression whatever, one way or the other, as to the evidence in the case, it is your sworn duty to utterly disregard any such impression that you may believe

CASE # 630

that the Court may entertain.

As exclusive judges of all questions of fact, you are to determine upon the state of facts presented here, in accordance with the law as the Court will charge you, whether or not the People have established the charge contained in the indictment against the defendant, beyond a reasonable doubt; or whether, the People, having failed to establish their case against the defendant, he is entitled to an acquittal.

The magnitude of the offence charged here must not be underestimated by you. The defendant is charged with the crime of assault in the first degree, and it is for you, upon the evidence presented on both sides, to determine the guilt or innocence of the defendant of that charge.

The People claim that, on December 6th, 1906, in the Borough of Manhattan, County of New York, as charged in the indictment, this defendant did wilfully, feloniously and wrongfully make an assault upon one Abraham Weinberg with a certain pistol, which was then loaded as **alleged** with gun powder and leaden bullets; and that that pistol was discharged by this defendant, aimed, as it is claimed by the People, at the person of

CASE # 630

the complaining witness, Mr. Weinberg, with intent to take his life, in violation of law.

The defendant denies that he discharged a pistol at the person of the complaining witness; he denies that he did this act.

Therefore, the question of fact arises for your determination: Did he do it? And if he did, and the People have satisfied you, beyond a reasonable doubt, as to his guilt, it is your duty to render a verdict accordingly; and otherwise to acquit.

I shall not refer further to the facts in the case, since the testimony in the case has been carefully discussed before you by the learned counsel on both sides.

Statements made by counsel on either side, not borne out by the evidence, should be disregarded by you. The testimony being fresh in your recollection, and since you are the exclusive judges of the facts, it lies with you, and it is your duty to give such interpretation to the facts of the case as your best judgment and conscience dictate.

" A person who, with intent to kill a human being, assaults another with a loaded firearm, or any

CASE # 630

other deadly weapon, or by any other means or force likely to produce death, is guilty of assault in the first degree."

"A person who, under circumstances not amounting to the crime specified in the last section," which is assault in the first degree, "wilfully and wrongfully wounds or inflicts grievous bodily harm upon another, either with or without a weapon; or, wilfully and wrongfully assaults another by the use of a weapon, or other instrument or thing likely to produce grievous bodily harm, is guilty of assault in the second degree."

"A person who commits an assault, or an assault and battery, not such as is specified in the foregoing section of this chapter, is guilty of assault in the second degree."

The law requires a Judge to charge every grade of the offence laid in the indictment. But a jury must not capriciously find a verdict of a lower degree of the crime charged, but should find a verdict consistent with the evidence in the case. But it is within your power, if you believe the defendant is guilty of any offence whatever, to find him guilty of any one of the degrees

CASE # 630

of crime embraced in the crime charged in the indictment.

But, as I have said, a jury should find, under their oath, a verdict that is consistent with the evidence.

The defendant has taken the witness-stand in his own behalf. The law, at one time, inhibited a person charged with crime from taking the witness-stand. But the Legislature removed this inhibition; and so, to-day, a person charged with crime may **take** the witness-stand in his own behalf; and, when he does so, he subjects himself to every test ~~that~~ any other witness does who is called by either side. What faith should be given to the testimony of the defendant or any other witness in the case rests entirely with you, gentlemen.

If you believe that any witness has wilfully testified falsely as to any material fact, you are authorized, but not bound to disregard all or any part of that testimony.

The defendant is presumed to be innocent, until the contrary is established by your verdict. The burden is upon the People to prove the defendant's guilt, beyond a reasonable doubt.

A **reasonable** doubt is such a doubt as reasonable men may entertain, after a careful and honest review

CASE # 630

of the testimony. But it is not a speculative doubt, nor is it a whim, nor a guess, nor a surmise. It is, as the words themselves imply, a reasonable doubt, for which a reason may be given.

The defendant in this case has testified that he knows of no reason why the complainant, Mr. Weinberg, should accuse him of being the person who discharged this loaded firearm. It is for you to determine in this case who is telling the truth; who has a greater interest in the outcome of the case; who is to be benefited by the disposition of the case, one way or the other.

The defendant testified that he was surprised that this charge should be lodged against him by the Weinbergs, husband and wife. Both of the Weinbergs, testified that they knew this defendant for some time before the night in question, and that he had been a frequenter of their store.

What object, you may ask yourselves have the Weinbergs, or Mr. or Mrs. Weinberg, to testify that he discharged a loaded firearm.

The law says that every sane person is responsible for the consequences of his own acts.

Now, what was the intention of the defendant,

CASE # 630

if you believe that the defendant did fire off this loaded firearm? Do you believe that the defendant merely discharged a loaded firearm at the soda water fountain, and did not intend to take the life of the complaining witness? If you so find on the evidence, of course, the case of the People must fail, because you must find from the evidence that the defendant did intend to take a human life, the life of the complaining witness in the case, Mr. Weinberg, before you can convict the defendant.

The complaining witness testified that he had a small store on the avenue, and that he was in his store on the evening in question; and that, in the early part of that evening, the defendant made a statement, "I will kill you, to night," or words to that effect; and that, about an hour thereafter, the defendant discharged a loaded firearm into the store, at or near where the complaining witness was standing.

Now, was it the intention of this defendant merely to shoot at the soda water fountain, or did he intend to take human life? It is for you to determine upon the evidence.

It is difficult to ascertain the intention of a human being. The intention of an individual may be

CASE # 630

known only to himself; it is the silent, secret operation of his mind. But often the intention of the individual is disclosed by his act. If a person takes a firearm, loaded with gunpowder and leaden bullets, and, aiming the revolver, discharges the bullet at a human being, what is the reasonable and natural inference to be drawn as to the intent of that person? If a bullet from the pistol which the defendant is alleged to have discharged had penetrated into the body of the complaining witness, it is for you to say whether or not the defendant's intent was to destroy human life. What was the intent of this defendant? You are to ascertain from all the evidence in this case.

The distinction between assault in the first degree and assault in the second degree is that, in assault in the first degree, there must be an intention to take human life; while, in assault in the second degree, the intention to take human life is not an element of the crime. If a person assaults another with a weapon or thing likely to produce grievously bodily harm, or wilfully and wrongfully wounds or inflicts grievously bodily harm upon another, either with or without a weapon, he is guilty of assault in the second degree.

CASE # 630

The defendant has offered some evidence of good character. Good character is ~~absolutely~~ no justification or excuse for the commission of crime, but the law says that good character should be considered by a jury as any other probative fact in the case. Good character will, of itself, create a reasonable doubt where, without it, none would exist; and so you should carefully consider the evidence presented by the defendant, and give it such weight as you think it is entitled to.

As I have said, the law does not seek a victim; and it is your bounden duty, under your oath, to determine this case solely on the evidence, and in accordance with your own common sense and judgment.

In this case, therefore, your verdict will be, guilty of assault in the first degree, or assault in the second degree, or assault in the third degree, or not guilty.

MR. LE BARBIER: I respectfully ask your Honor to charge the jury that, if the jury is satisfied that the loaded firearm was not pointed and discharged at the complainant, the defendant must be acquitted.

THE COURT: I have so said in my charge, Mr. Le Barbier; and I so charge again. That is the law.

MR. LE BARBIER: All right, sir. That's satisfactory.

CASE # 630

THE COURT: The case is with you, gentlemen.

(The jury found the defendant guilty of assault in the second degree.)

127

CASE # 630

THE SENTENCE.

New York, February 25th, 1907.

OFFICER JOHN FLANAGAN, being duly and sworn and examined by the Court, testified as follows:

BY THE COURT:

Q Are you a member of the Municipal Police Force of the City of New York? A Yes, sir.

Q And how long have you been such? A Since April 5th, 1905.

Q What precinct are you attached to? A Twenty-ninth.

Q How long have you been attached to that precinct?

A Since the 14th of October of last year.

Q Do you know this defendant? A No, sir.

Q Where was your post? A From 101 to 106th street and Second avenue.

Q Where did the defendant work at the time you arrested him? A He worked for the undertaker, the man that kept the undertaking shop, where I made the arrest.

CASE # 630

Q Where? A 2089 Second avenue.

Q Between what streets? A Between 107th and 108th Streets.

Q Was that on your post? A No, sir.

Q Did you go off post to make this arrest? A Yes, sir.

Q Do you do any citizen's clothes duty in that precinct?
A No, sir.

Q The complaining witness said that this defendant had been arrested five times, for fighting? A Well, I don't know one thing about it, your Honor.

Q Is it not your duty to make an investigation of the record of this man, or any other man that is arrested for a criminal offence? A Well, I don't know anything about it.

Q Well, do you know whether he has been arrested five times for assaulting people, in that neighborhood? A No, sir.

Q And your post has been continually there, between 101st and 106th streets? A No, sir.

Q Have you ever had the post where this defendant was working? A Well, yes, sir; possibly twenty or thirty times.

Q Did you ever see the defendant, on any of those occasions? A No, sir; I never knew the man before.

CASE # 630

Q Do you pass by this undertaker's shop? A Yes, sir.

Q Ever stop in there? A No, sir.

Q Did you ever pass by the candy store? A Yes, sir.

Q Did you ever stop in there? A No, sir.

Q Did you ever know the complainant before? A No,
sir.

Q Or the defendant before? A No, sir.

Q Is your precinct detective here in court? A No,
sir.

Q Anybody from the 29th Precinct that ever did
detective duty there? A Not that I know of; no, sir.

OFFICER HENRY C. COSTER, being
duly sworn and examined by the Court, testified as
follows:

BY THE COURT:

Q Did you ever do detective duty in that precinct?

A No, sir.

Q You are one of the officers who made the arrest in
this case? A Yes, sir.

Q You never knew him, the defendant, before? A No,
sir.

Q Or the complaining witness? A No, sir.

CASE # 630

THE COURT: The complaining witness says that this defendant has been arrested several times for fighting and assaulting people in the neighborhood.

MR. LE BARBIER: In this case, may it please your Honor, the defendant respectfully moves for a new trial, on the ground that the verdict was against the evidence and against the weight of evidence, and against the law; and for errors made by the learned Court throughout the trial, to which objection was made and exception was taken.

And the defendant moves further upon all the grounds in the Code of Criminal Procedure.

THE COURT: Motion denied.

MR. LE BARBIER: Exception. The defendant moves in arrest of judgment, on the ground that no crime has been made out; particularly on the ground that no facts, as produced on the part of the Prosecution, substantiated in any way, and made out the crime as charged in the indictment of assault in the first degree, or assault in the second degree, or assault and battery.

On the further ground that, by reason of the absence of the facts in such respect, the Court became ousted of jurisdiction.

CASE # 630

THE COURT: Motion denied.

MR. LE BARBIER: Exception. We have nothing to say, your Honor.

THE COURT: Swear the defendant.

(The defendant is sworn.)

BY THE COURT:

Q Have you ever been arrested and charged with fighting, or assault?

MR. LE BARBIER: May it please the Court, we respectfully object to any question addressed by the Court to the prisoner, on the ground that it is incompetent, immaterial and irrelevant, and in no way the duty of the Court, as against the objection of the defendant, to in any wise request information that may be granted by the defendant by answering.

THE COURT: The law distinctly provides that the Court, on the question of sentence, may interrogate the defendant, and may administer an oath. There is an express provision of the statute, a recent enactment.

MR. LE BARBIER: But not if the defendant has nothing to say.

THE COURT: Does the defendant refuse to make the statement by advice of counsel?

CASE # 630

MR. LE BARBIER: The defendant declines to make any statement.

THE COURT: In view of the enormity of this man's act, the Court believes that severe punishment should be administered to this defendant. In a great city like New York, there is no necessity for a citizen to go about armed with a deadly weapon, and ready to use it unlawfully at a moment's notice.

In this case, this defendant enters this complaining witness' store, and purchases cigarettes, and has some trouble with the wife of the complaining witness about payment for the cigarettes; and, in leaving the place, made a threat to kill; and then, later that night, went back, and discharged a loaded firearm, aiming it at the person or persons in the store. His motive was certainly to do violence or serious harm, or to take human life; and the courts should not encourage men who will use deadly weapons, and aim them at persons, with a view of destroying human life. In all probability, if a bullet from that pistol had found lodgement in any person's body, a jury would unhesitatingly have convicted ^{of} murder in the first degree.

There was no reason for the act, and no extenuating circumstance was shown, except the bare

1279

CASE # 630

denial of the defendant. He was found by the police under circumstances which indicated that he was the individual who committed the crime.

The complaining witness in this case exonerated one of the persons arrested for this crime, and a co-defendant pleaded guilty, and was sentenced to a nominal punishment, due to the fact that the Judge who presided in that part of the court where he was sentenced was not familiar with the facts of the case.

This case was presented before me in Part IV, last term, and I discovered that the case was not properly prepared; and I directed a juror be withdrawn, and that there should be proper preparation made, and another trial had.

MR. LE BARBIER: Not with the present counsel, your Honor.

THE COURT: No; you were not the defendant's counsel then.

I sentence you, Maggiore, to State Prison for not less than three years and six months, and not more than four years and six months.

CASE # 630