

Court of Errors and Appeals.

THE STATE, Defendants in Error,	}	In Error.
<i>vs.</i>		
BENJAMIN CLARK, Plaintiff in Error.		

PLAINTIFF'S BRIEF.

The plaintiff in error was convicted at the Hudson Quarter Sessions of assault and battery in stabbing one Henry Cosio.

The plaintiff in error by his writ of error has brought up the transcript of the entire proceedings at his trial.

He complains of certain instructions in the charge of the court upon his trial.

FIRST.

The Court instructed the jury that it had nothing to do with the fact that the complaining witness was endeavoring to strengthen a civil suit for damages by a criminal prosecution. (P. C. p. 26 I. 8.)

This instruction deprived the jury of the right to test the credibility of the complaining witness by his interest in a civil suit which he intended to bring.

The jury was the sole judge of the credibility of witnesses, and it had a right to weigh the motive of the witness if the witness was

endeavoring to extort money from the defendant by a civil suit, and was trying to effect this to obtain a criminal conviction. This was a matter the jury might take into consideration in weighing the testimony of the complaining witness. This instruction of the court therefore virtually deprived the jury of its right to scrutinize the complaining witness in testifying and worked an injury to the defendant.

SECOND.

The Court by its instruction that the jury must determine who inflicted the wound upon the complaining witness, if the defendant did not (P. C. p. 27 L.20), placed upon the defendant the burden of proving how the complaining witness received the wound. This was not the legal burden of the defendant, it was his burden to refute the cause making his guilt. Defendant was presumed innocent, yet this instruction destroyed the presumption.

He was not bound to prove, nor was the jury bound to find how the wound was received by the complaining witness. The jury had a right to acquit the defendant, if they believed from the evidence that he did not inflict the wound, or if they had reasonable doubt how the wound was received.

The court instructed them that they must find who did inflict the wound if the defendant did not. If, therefore, they had reasonable doubt if the defendant inflicted the wound, but were not reasonably sure how the wound was inflicted, they would be compelled to convict under this instruction.

This left it to the jury to say if it could not

be decided how the complaining witness received the wound then it could not render a judgment of acquittal, and this was error (State v. Lax, 42 Vr. 386, 12 Cyc., p. 622, title "b").

THIRD.

As to the instruction of the court that the very point in the case was how did the fight begin (P. C. p. 27 1, 367). The defendant submits that it was for the jury to say what was the point in the case.

In the States case there was no fight. The defendant committed an unprovoked assault upon the plaintiff (page 2, printed case). Upon the defendant's case he was assaulted by the complaining witness (page 14, printed case)

The court practically charged the jury that the evidence of Joseph Tracey was valueless, as he did not testify as to the point in the case.

Whereas, the truth is that Tracey's testimony, if true, showed that the wound was not inflicted by defendant upon the complaining witness, in the way the complaining witness testifies, therefore, to instruct the jury that Tracey did not testify as to the point in the case, when if Tracey's testimony was true the defendant was entitled to an acquittal misdirected the attention of the jury and was error. Baker v. State, 24 Vr., 45.

Respectfully submitted,

ALEX. SIMPSON,

of Counsel and Plaintiff in Error.

1871
The first of the year
was a very dry one
and the crops were
very poor.

The second of the year
was a very wet one
and the crops were
very good.

The third of the year
was a very dry one
and the crops were
very poor.

The fourth of the year
was a very wet one
and the crops were
very good.

The fifth of the year
was a very dry one
and the crops were
very poor.

The sixth of the year
was a very wet one
and the crops were
very good.

The seventh of the year
was a very dry one
and the crops were
very poor.

The eighth of the year
was a very wet one
and the crops were
very good.

New Jersey Court of Errors & Appeals

THE STATE OF NEW
JERSEY,

Defendant in Error,

vs.

BENJAMIN CLARK,

Plaintiff in Error.

On Writ
of Error.

BRIEF OF WILLIAM H. SPEER, PROSE-
CUTOR OF THE PLEAS, OF HUDSON
COUNTY, FOR THE STATE OF NEW
JERSEY, DEFENDANT IN ERROR.

The writ of error from this Court to the Supreme Court is so clearly frivolous that I content myself with submitting to this Court the brief which was submitted by me to the Supreme Court. All the points assigned for error here were thoroughly discussed in that brief, and no other argument than it and the opinion of the Supreme Court seems to be required here.

The plaintiff in error, who was the defendant below, was indicted, tried and convicted for the crime of assault and battery. The certiorari part of his writ of error commands the trial court to "send under its seal the record and proceedings aforesaid, with all things touching and concerning the same, and also a transcript of all proceedings had and taken in the said cause up to the present time." The answer of the Judge to said writ was that he sent, &c., "the record and proceedings of the plaint whereof mention is within made, with all things touching the same." It is manifest that the plaintiff in error by commanding the trial court to send "a transcript of all proceedings had and taken in the said cause up to the present time," designed thereby to secure a return of the minute entries and other proceedings in the cause which are no part of the record proper and which preceded the trial of the cause.

It would seem to be perfectly clear (1) that such proceeding is without warrant or authority of law, and (2) that no return of the matters thus irregularly sought to be brought up was made by the trial judge. If the writ had commanded only the record and proceedings to be sent up it would have brought up the record proper. If it was sought to take advantage of the 136th and 137th sections of the Criminal Procedure Act, the writ should have prayed the return of "the entire record of the proceedings had upon the trial, &c." This would NOT have brought up the minute entries. It would, therefore, appear that there is nothing legally before the court but the record

proper. This preliminary discussion is introductory to the discussion of the "so-called specifications of the causes relied upon for reversal," which will be found on pp. 36 and 37 of the printed case. It would seem from the designations given to this document that plaintiff in error deemed himself to be proceeding under Section 136 and 137 *supra*, but, if, so, there is neither a proper command in the writ of error for a return "of the entire record of proceedings had upon the trial," nor is there a return of such entire record by the trial judge, nor is there anywhere in the "state of the case" a certificate of the trial judge that such state of the case is the "entire record of the proceedings had upon the trial." There is, therefore, nothing legally and properly before this court upon which the specifications of causes for reversal can operate. There is no assignment of errors in the cause. It would seem, therefore, that either the writ of error should be dismissed or that the judgment should be affirmed upon this ground alone.

The first specification of cause relied upon for reversal is "that the record shows that the indictment herein was found in the Court of Oyer and Terminer, and that the trial thereof was held in Quarter Sessions, and that no order was entered in said cause handing down said indictment into said court of Quarter Sessions." The question sought to be raised by this specification is not properly before this court. It cannot be decided on this writ of error. If it be allowed that "the entire record of the proceedings had upon the trial" is here, still the specification does not relate to any proceeding

had upon the trial, and, inasmuch as the specification must be based upon such proceeding and is not, and inasmuch as there is no assignment of error directed to this point, it cannot be considered.

Again, the plaintiff in error is precluded from raising this point at this time because no objection was made thereto prior to the swearing of the jury. *Engeman v. State*, 25 Vroom, 253.

But even if the point were properly before the court, the plaintiff in error could not prevail, for there are several answers to it on the merits. A glance at the record discloses the following among other facts: The caption which concludes by stating "it is presented in manner and form following, that is to say, that the bills following are true bills." Then follows the indictment upon which this conviction rests. The record also shows, p. 31, that this indictment and the others coming under said caption were "presented May 15, 1905, and handed down to the Court of Quarter Sessions, for trial, &c., John Rotherham, Clerk, and that said "presentment was filed May 15, 1905." It also appears by the record, p. 33, ll. 21st fol., that this indictment was "presented May 15, 1905, and handed down to the Court of Quarter Sessions." This state of the record would seem to answer the objection raised completely. Section 8 of the *Crim. Proc. Act. Revision of 1898*, provides, "When any indictment or presentment, which the Court of Quarter Sessions of the county is competent to try and determine, shall be found in the Court of Oyer and Terminer in and for such county, it shall be lawful for such court

at any time during their session if they think proper, to order the said indictment or presentment to be delivered to the clerk of the said Court of Quarter Sessions, who is hereby directed to file the same, and also to make entry thereof in the minutes at the then or subsequent session ; and after such affiling, the said Court of Quarter Sessions shall have authority to issue process and proceed upon, and to hear and determine such indictment or presentment, in like manner as if the same had been originally found in the said Court of Quarter Sessions." Many of the points which suggest themselves to the mind in considering this question have received consideration and been decided in *Engeman v. State*, 25 Vroom, 247. It is there determined that such an objection as this must be raised by demurrer or motion to quash before the jury is sworn and not after. That if after, the objection comes too late, and now it will be presumed that all things were rightly done and that amendment would have been made, if any had been necessary, if the objection had been interposed before the trial court; that the phrases "handed down" and "orded to be delivered" are convertible terms and that either form is sufficient to show that the trial has been committed to the inferior court. That the Sessions is not an inferior court in the sense that it must in all respects show its jurisdiction. And, again, in *State v. Passaic County Agricultural Society*, 25 Vroom, 260, it was held that "it need not appear in the record that the trial court ordered the clerk to enter an appearance and endorse the plea of not guilty. It will be presumed that it was done." This

record returned into this court by the plaintiff in error speaks absolute verity. It says the indictment in this case was "handed down," i. e. ordered to be delivered" to the Quarter Sessions for trial, and was filed on May 15, 1905. It was "presented AND handed down to the Quarter Sessions for trial" on May 15, 1905. The writ of error found the indictment filed in the Quarter Sessions Court and the Judge has so returned. If there were any kind of doubt as to what court said indictment had been filed in it would be resolved in favor of the Quarter Sessions. *Omne rite esse acta praesamintur*. If the indictment was filed in the Quarter Sessions Court then that court had jurisdiction to try and determine it. No more was necessary, for the act says "and after such affiling the said court shall have authority to hear and determine such indictment." There is no complaint in this case that NO ORDER WAS MADE handing down the case to the Sessions for trial. The record shows that SUCH ORDER WAS MADE. *Holt v. State*, 29 Vr., 11, is therefore inapplicable.

The whole complaint seems to be that THE CLERK DID NOT ENTER THE ORDER ON THE MINUTES. Whether he did or not we cannot know in the present state of the record and, if he did not, it would not vitiate the judgment of conviction or be ground of error. The minutes are not part of the record. The provision of the statute with respect to the entry by the clerk on the minutes of the court is merely directory and not mandatory, and the entry on the minutes is not jurisdictional, for the statute says, "and after such affiling"

said Court of Quarter Sessions shall have authority to hear and determine. The filing is, therefore, jurisdictional, but the entry on the minutes is not so. Inasmuch, therefore, as the complaint of the plaintiff in error is "that no order was entered in said cause handing down said indictment, &c.," his contention must fail. Furthermore, the order could be entered NOW, for the statute says it may be "entered at the then or subsequent session." This ground is, therefore, without merit.

But this whole matter is conclusively set at rest by the decision of our Court of Errors and Appeals in *Winters vs. State*, 32 Vroom, 613, where the court held that "Where an indictment that is within the competence of a Court of Quarter Sessions to try is received in that court and tried therein without an order of the Oyer and Terminer, and also without objection by the defendant, the irregularity, if such it be, is one of those imperfections not affecting the merits of the defense for which a judgment given upon an indictment may not be reversed." This indictment was within the competence of the Quarter Sessions to try and was tried there without objection.

The remaining three specifications all relate to the charge of the trial judge to the jury. The same observations with respect to the "entire record of the proceedings had on the trial" not having been commanded by the writ of error, or returned or certified by the trial judge, apply as well to these three specifications as to the first one. There is no "entire record" properly returned to this court and, therefore, there is nothing upon which said specifications can be based.

If, however, the court should desire to consider them, it will be found that none of them has any substance.

The second specification challenges the remark of the court, "There has been some suggestion by the counsel for the defendant that this prosecution is laying the foundation for a civil suit. This is a matter you have nothing to do with; it has no place in this case at all." This criticized language is immediately followed by the following observation, see page 26: "Your simple duty is to determine whether upon the testimony produced before you in this hearing, this defendant is guilty as charged, and if you are satisfied from such testimony that he is guilty, then it is your duty to say so. Otherwise you should acquit him."

This specification is so manifestly baseless that it hardly warrants discussion. There was not one shred of testimony in the case upon which the defendant's counsel could have suggested such a thing to the jury. The warning given by the court to the jury that they must decide the case on the testimony and not on the suggestions of counsel as to matters not in evidence was so manifestly proper and timely that it seems strange anyone could complain of it.

The last two specifications relate to comments made by the trial judge as to matters of evidence. That the court has the right to make such comments to the jury admits of no doubt in this State. The cases recognizing this right are very numerous and I shall content myself with reference to but a few of them. In *State v. Block*, 41 Vroom, 402, the

court said: "There were assignments of error upon exceptions taken to parts of the charge wherein the judge discussed to some extent the facts and their relative weight, but this has been so often held to be within the province of the judge that further comment is unnecessary." In *State v. Valentina*, 42 Vroom, 557, Dixon, J., said: "The remaining assignments which are sufficiently specific to warrant notice are directed to the comments and suggestions concerning the evidence made by the presiding justice in his charge to the jury. Said Chief Justice Beasley, in *Smith v. State*, 12 Vroom, 374: "That a judge has a right to give his own views to the jury with respect to the value of the testimony or upon the merits of the case, is, and always has been, the law of this State." See also *Engle v. State*, 21 Vr., 272; *Foley v. Loughran*, 31 id., 464.

The remarks made and challenged seem to have been not only just and fair, but necessary for the proper guidance of the jury.

The conviction in this case was clearly sustained by the evidence. The plaintiff in error has not pointed out anything from which he suffered manifest wrong or injury and the judgment should, therefore, be affirmed.

Respectfully submitted,

WILLIAM H. SPEER,

Prosecutor of the Pleas.

INDEX.

TESTIMONY.

STATE.

Henry Cosio	Page 1
William Cosio	8
Anniello Neone	10
Maggie Smith	10
William U. Varick	11

DEFENCE.

John Quinn	12
Benjamin C. Clark	13
Joseph Tracy	16
Charles Hamblen	21
Amelia Romanto	22
Charge	25
Writ	29
Return	30
Specification of Errors	36

COURT OF ERRORS AND APPEALS.

NEW JERSEY, SS.:

The State of New Jersey to the Chief
 [L. s.] Justice and other Justices of our Supreme Court of Judicature.

10

GREETING:

Because in the record and proceedings, and also in the giving of judgment in a certain cause which was in our Supreme Court before you wherein Benjamin Clark was plaintiff and the State was defendant in error, upon a certain indictment of atrocious assault and battery, manifest error hath intervened to the great damage of the said Benjamin Clark, as by his complaint we are informed.

We being willing that such error, if any there be, 20 should in due manner be corrected and full and speedy justice be done to the parties aforesaid in this behalf do command you that if judgment thereon be given then you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching and concerning the same, to our Judges of our Court of Errors and Appeals, in the last resort in all causes, at Trenton, on the fifth day of December next, together with this writ, so that the record and proceedings aforesaid, being inspected, we 30 may cause to be done what of right and according to the law and custom of the State of New Jersey ought to be done.

Witness, his Honor, William J. Magie, our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton, aforesaid, the sixteenth day of November, nineteen hundred and six.

S. D. DICKINSON,

Clerk.

ALEX. SIMPSON,
 Att'y of Pl'ff.

40

The answer of the Justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State, in a certain schedule to this writ annexed, as
 10 within we are commanded.

WM. S. GUMMERE. [Seal.]

C. J.

Filed Nov. 23rd, 1906.

S. D. DICKINSON,
 Clerk.

NEW JERSEY, ss.:

20 The State of New Jersey to the Chief
 Justice and other Justices of our Supreme Court of Judicature.

GREETING:

Whereas a certain writ of error was by us issued, directed to the Supreme Court, you, the Justices aforesaid, returnable in the Court of Errors and Appeals on the fifth day of December, nineteen hundred and six, directing you to certify and send to said court
 30 the record of a certain judgment given on a certain writ of error before you pending wherein Benjamin Clark was plaintiff in error and the State of New Jersey was defendant in error, to remove an indictment and judgment of conviction in the Court of Quarter Sessions of Hudson County; and whereas it appears that the writ of error and return in the Supreme Court, the supplemental return of John A. Blair, Esquire, Judge of the said Court of Quarter Sessions the specifications of causes relied on for
 40 reversal, and other papers in relation to the judgment and record aforesaid are not certified and returned

with the writ of error. Now, therefore, we do command you that you send under your seal to our Judges of our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the thirteenth day of February next, the said writ of error and return in the Supreme Court, the said supplemental return of John A. Blair, Esquire, Judge of the said Court of Quarter Sessions, the specifications of causes relied on for reversal and the additional specifications of causes relied on for reversal, and the said other papers in relation to the judgment and the record aforesaid, with all things touching the same, together with this writ. 10

Witness our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the twenty-third day of January, in the year of our Lord, one thousand nine hundred and seven. 20

ALEX. SIMPSON,
Attorney.

S. D. DICKINSON,
Clerk.

I do herewith, and to the Court of Errors and Appeals of the state of New Jersey,
[SEAL.] the proceedings, as within I am commanded, under the seal of the Supreme Court and my hand. 30

Dated Feb. 1st, 1907.

WM. RIKER, JR.,
Clerk.

NEW JERSEY SUPREME COURT.

10	THE STATE, vs. BENJAMIN CLARK.	}
----	--	---

Submitted July 5, 1906. Decided November 12, 1906.

On Error to the Hudson Sessions.

Before Gummere, Chief Justice, and Justices Garrison and Swayze.

For the Plaintiff in Error, Alexander Simpson.

20 For the State, William H. Speer.

The opinion of the Court was delivered by Garretson, J.

30 The plaintiff in error, having been convicted in the Hudson Sessions of atrocious assault, brings this writ of error to review that judgment. The first assignment of error is directed at the following language of the charge: "There has been some suggestion by counsel for the defendant that this prosecution is laying the foundation for a civil suit. That is a matter you have nothing to do with. It has no place in this case at all. Your simple duty is to determine whether upon the testimony produced before you in this hearing this defendant is guilty as charged, and if you are satisfied from such testimony that he is guilty then it is your duty to say so, otherwise you should acquit him." This assignment requires no discussion. It is not pretended that counsel did not make the suggestion ascribed to him in the charge, and if he did there can be no difference of opinion as to the entire propriety of the Judge's reference to it.

40

The remaining assignments discussed in the brief of counsel relate to comments contained in the charge that are not subjects of reversal upon error. The charge as a whole clearly informed the jury as to their right and duty in dealing with disputed questions of fact.

Bruce v. Carter, 3 Vroom, 554.	10
Castner v. Sliker, 4 Vroom, 507.	
Smith v. Bennett, 12 Vroom, p. 370.	
State v. Engle, 21 Vroom, p. 272.	

The judgment of the Hudson Quarter Sessions is affirmed.

A true copy.

WM. RIKER, Jr.,	
Clerk.	20

30

40

NEW JERSEY SUPREME COURT.

10	THE STATE OF NEW JERSEY, Def't. in Error, vs. BENJAMIN CLARK, Pl'ff. in Error.	} In Error. Affirmance and Remittitur.
----	--	---

The Court having heard the argument of counsel, and inspected the judgment and proceedings removed by the writ in this cause, and duly considered the causes assigned for error;

20 It is ordered that the said judgment be in all things affirmed, with costs, and that the record be remitted to the Hudson County Court of Quarter Sessions to be proceeded in according to law.

Entered November 19, 1906.

On motion of

WM. H. SPEER,
Att'y.

30 I, WILLIAM RIKER, JR., Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of a rule made by said Court in the above stated cause and entered in the minutes thereof.

In testimony whereof I set my hand and the seal of said Court at Trenton, this twenty-first day of November, A. D. nineteen hundred and six.

(Seal)

HUDSON COUNTY COURT OF QUARTER
SESSIONS.

September Term, 1905.

THE STATE,	Sur	Indictment	
vs.	14, April Term,	1905.	10
BENJAMIN CLARK.	For atrocious as-	sault and Bat-	tery.

Monday, October 30th, 1905.

This cause come on to be tried on this 30th day of
October, 1905, before Hon. John A. Bliar, Judge and a
Jury.

Mr. William H. Speer appeared for the State. 20

Mr. Robert Carey appeared for the defendant.

Mr. Speer, on behalf of the State, moved the trial
of the case.

A jury was drawn, selected and sworn.

Mr. Speer opened the case for the State.

HARRY COSIO, called by the State and sworn, testi-
fied as follows:

Direct Examination by Mr. Speer.

Q. What is your name? 30

A. Harry Cosio.

Q. Where do you live?

A. 236 Second Street, Jersey City.

Q. Do you know the defendant Benjamin Clark?

A. Yes.

Q. Do you see him here?

A. Yes: he is sitting right there alongside of the
table.

Q. Sitting alongside of Mr. Carey?

A. Yes.

40

Q. How long have you known Mr. Clark?

A. Ever since he came over from the other side.

Q. How old are you?

A. Twenty-two, going on 23.

Q. On the twentieth of January of this year what, if anything, took place between you and Clark?

10 A. Yes: I was going to work that morning, and it was around half-past seven, and I met then Benny Clark, and this fellow hit my brother in the face a week before that, and I asked him "Benny, you ought to be ashamed of yourself to hit my brother," and he says "I don't care for you or your brother," and he pulled out a razor and slashed me right on the arm, right here across the arm. (Witness indicates.)

Q. Where did you get the razor from?

A. Yessir.

A. From his coat pocket.

20 Q. Is that the mark on your arm from that cut?

Mr. Speer: Show it to the jury.

(Witness does so.)

Q. Before he struck you with the razor had you offered or attempted to strike him?

A. No sir.

Q. After he had cut your left wrist there as you have shown us, what did you do?

A. I did not do anything: I took out my handkerchief and put around my arm.

30 Q. Where did you go?

A. From Railroad Avenue to Newark Avenue, up to Grove Street, and when I walked up there the cop had my brother and Benny Clark, and I walked to the station house then: from there I was sent to the Jersey City Hospital; Dr. Varick attended me there; I was there two days, and then I went home and was cared for at home a couple of months.

Cross Examination by Mr. Carey.

Q. What is your business?

40 A. Waiter.

Q. Where?

A. Nat Foster, 11 Exchange Place.

Q. This young man was employed at the same time?

A. No sir; next door.

Q. And you knew each other pretty well?

A. Yes.

Q. How long had he been employed there before 10
this time?

A. I don't know exactly; I think more than a year.

Q. You were trying to get your brother the job he had there?

A. No sir.

Q. Are you sure about that?

A. Yes sir.

Q. What job did he have there?

A. Lunch man.

Q. The same as you had in your place? 20

A. I was waiter there, and I was working there days and cleaning up the hall and things.

Q. What time did you meet him on this January 20th?

A. About half-past seven or a quarter to eight, I don't remember exactly the time.

Q. Where were you going?

A. I was going to the restaurant for a cup of coffee, I think they call it Krims'.

Q. How far is that from your house? 30

A. About a block.

Q. How did you come to meet him?

A. He was passing at the same time.

Q. Were you friendly before that?

A. Yes.

Q. When had you seen him before?

A. About a week; I think a little more than that,
—8 or 9 days.

Q. He and your brother had some trouble?

A. Yes.

Q. And this was the first time you saw him after that trouble with your brother?

A. Yes.

Q. Where was he when you saw him?

A. I was going into the restaurant and he was crossing and I met him; he was going down and I was coming up and we met face to face.

10

A. No sir: next door.

Q. And the first thing you said was "What did you hit my brother for?"

A. Yes.

Q. What did he say?

A. He says "I don't care for you and your brother," and he pulled out the razor and slashed me.

Q. Which hand did he have the razor in?

A. The right hand.

Q. Which pocket did he take it out of?

20

A. The right, and I pulled my hand up and he slashed me.

Q. What kind of razor was it?

A. I did not see it.

Q. You did not see any razor?

A. I saw the razor but I don't know what kind of a razor it was.

Q. What kind of a handle was it?

A. I don't know.

Q. Was it a steel blade?

A. Yes.

30

Q. How is it he did not slash you in the face?

A. Because, I put my hand up and got it in my arm.

Q. You stood right quietly by and did not run away?

A. No sir.

Q. He was the only one did running?

A. Yes.

Q. Who was there?

A. My father was close by behind me.

40

Q. Were there not four in your party?

A. No sir; my father was five or six feet away from me.

Q. Who was with you besides your father?

A. Nobody.

Q. Who was with your father besides you?

A. Nobody.

Q. What did your father say?

A. He did not say nothing to me but he was the 10
only one that run after me.

Q. Was there anybody else around?

A. I was excited and did not look whether other people are around.

Q. Did you not go into a store right there?

A. No sir.

Q. There is a fish and clam store there?

A. Yes, but I did not go in there.

Q. Did he go in there?

A. No, sir.

20

Q. Did he come out of that fish store?

A. No sir.

Q. And did not then the fight take place?

A. No sir, I did not see him come out of the fish store; he was walking when I seen him.

Q. Did he have a basket?

A. No sir; he had both hands in his pocket.

Q. Do you know Tony Sherer?

A. Yes, he was not there.

Q. You were arrested that morning?

A. I went to the station house, yes.

30

Q. Were you not arrested by Officer Quin?

A. He had my father and brother and Mr. Benjamin, and there was four men with him, and they took them to the station house and I followed them up.

Q. Your brother was there also?

A. No, sir, he was a block away and when he came up he asked me who cut me, and I said "Benjamin Clark," and then he ran after them.

Q. And then your brother was arrested?

A. Yes.

40

Re-direct Examination by Mr. Speer.

Q. You played in a band before that assault?

A. Yes.

Q. And that has destroyed your ability to do that?

A. Yes.

10 Q. You can't play music any more.

A. Yes, I can't play any more.

Re-cross.

Q. When did you leave your house that morning to go to work.

A. About half-past seven or quarter to eight o'clock.

FRANK COSIO, called by the State and sworn, testified as follows:

20

(Interpreted by Italian interpreter, Gentily.)

Direct Examination by Mr. Speer.

Q. Are you any relation of this last witness?

A. No sir.

Q. Are you the father of the last witness?

A. Yes.

Q. Do you remember the morning of the 20th of January, 1905?

30 A. Yes sir.

Q. Did you go any where with your son who has just left the witness stand here on that day?

A. Yes. I went out shopping, my wife was sick; I got as far as Newark Avenue and Henderson Street and I saw Benjamin Clark five or six feet away, he came along with a razor and pulled the razor out of his pocket and cut the hand of Donato.

Q. Who is Donato?

A. My son.

40 Q. Which son?

A. Donato Cosia.

Q. Is his name Thomas or William or what?

A. I don't know how pronounce it in English.

The interpreter: Donato is Daniel.

Q. Is it the man who just left the witness stand?

A. Yes.

Q. Then you mean Harry?

A. Yes.

10

Q. What did he do to Benjamin Clark before Clark cut him with the razor?

A. Nothing.

Q. Where did Clark cut your son—what part of his body?

A. On the hand this way (Illustrates across the wrist).

Q. How near by were you when Clark cut him?

A. Five or six feet.

Q. When you saw your son getting cut what did you do? 20

A. I jumped in to grab hold of him, and he cut me ten times with the razor.

(Witness shows slits in overcoat and under coat.)

Q. It went through both coats?

A. Yes.

Q. What did you do then?

A. I ran after him, and Vito Cosia has hold of him, and then the Police Officer came along and arrested him.

30

Q. Who is Vito?

A. My son Willie.

Q. What was done after that?

A. He grabbed hold of him and the Police Officer came along and arrested Clark.

Cross Examination by Mr. Carey.

Q. Then as I understand that you and your two sons were at this place at the same time? Is that right?

A. No sir.

40

Q. How many sons of yours were there when this thing happened?

A. There was nobody there but Harry; I was five or six feet away.

Q. Where was Willie when this happened?

A. I did not see him; I only saw him when Willie had hold of him.

10 Q. How long after the slashing took place was it your son Willie had hold of him?

A. I ran after him and he had hold of me; it was four or five minutes between the time.

Q. Is it not a fact that you and Willie and Harry all left your house together that morning?

A. No sir.

Q. Where did you get your breakfast that morning?

20 A. I was going out to buy stuff; my wife was sick.

Q. What was Willie doing: was he going for breakfast or did he have breakfast with him?

A. He was going and then he was going to work; he is a tailor; he was going to work at his business of tailor.

WILLIAM COSIA called by the State and sworn, testified as follows:

Direct Examination by Mr. Speer.

30

Q. Where do you live?

A. I use to live 333 Henderson Street.

Q. You are the son of the last witness and a brother of the witness before him?

A. Yes.

Q. On the morning of the 20th of January, of this year, did you leave home that morning with your father and brother or without them?

A. He went about six or seven minutes before.

40 Q. Who did?

A. My father and brother.

Q. After you left the house where did you go?

A. To work, 17 Montgomery Street.

Q. When you got around near Railroad Avenue and Grove Street did anything attract your attention?

A. No.

Q. Did you see anything going on?

A. I seen lots of people and they said there was a fight and I saw all the people run and holler "Fight, fight," and I saw my brother with his arm bleeding, and I asked him what was the matter, and he said "Benny Clark cut me, and there he is"; and I ran after him and caught him, and he cut me in the coat too, and then the cop came and got hold of him, and then we all went to the Station House together. 10

Cross Examination by Mr. Carey.

Q. This was about eight months ago,—last January? 20

A. Yes.

Q. You had a fight with Benny a few days before this?

A. Yes. A week or more before; he hit me right here for nothing, here on the ear.

Q. And you hit him?

A. No; I did not do anything.

Q. After this fight you had was this first time you saw him this morning? 30

A. No; I see him every morning.

Q. He did not see you?

A. No sir: I was afraid of him and I went across the street every time I see him.

Q. You left your house five or six times after your father?

A. Yes, five or six times.

Q. And your father and brother went out to get a cup of coffee and then go to the store because my mother was sick. 40

Q And you caught up to them at that place?

A. No: I saw a lot of people hollering "Fight," and I ran and I saw my brother cut in his hand, and I says "Who hit you," and he says "Benny Clark," and I ran after him and got hold of Benny and he cut at me too.

10

Re-direct by Mr. Speer.

Q. Show where he cut at you?

A. Right here. (Indicates.)

Q. Cut through your coat, did he?

A. Yes.

ANNIELLO NEONE, called by the State and sworn, testified as follows:

Direct Examination by Mr. Speer.

20

Q. Where did you live in the month of January, 1905?

A. 161 Henderson Street.

Q. Do you know the members of the Cosio family?

A. Yes, I do about eight years.

Q. Did you see them start from the house the morning of the 20th of January, the day of this assault?

A. I was in about half-past seven, and Mr. Joseph say "Come up, a friend of your has a fight, bail
30 him out,"—because I have a little property.

Q. Did you see them leave home?

A. No.

MAGGIE SMITH, called by the State and sworn, testified as follows:

Direct Examination by Mr. Speer.

Q. Where did you live 20th of January of this year?

40

A. 333 Henderson Street.

Q. Did you know the Cosios at that time?

A. Yes.

Q. Did you see them leave that morning?

A. Yes; I saw the father and Harry go out together.

Q. That is the boy who was cut and the old gentleman?

A. Yes.

10

Q. Did you see the other boy go out too?

A. No sir.

Q. Was any one with them?

A. No sir: only those two together.

WILLIAM U. VARICK, called by the State and sworn, testified as follows:

Cross Examination by Mr. Speer.

Q. You are a practicing physician in this State?

20

A. Yes.

Q. How long have you been practicing?

A. Thirty years.

Q. You are a graduate of a medical institution and college?

A. Yes.

Q. Did you hold any hospital position about the twentieth of January of this year?

A. Yes. Surgeon of the City Hospital.

Q. While you were there in that capacity did you see Harry Cosia the complaining witness?

30

A. Yes.

Q. What time of the day?

A. Along 9 to 10 o'clock.

Q. Did you make an examination of him?
Yes.

Q. What did you discover?

A. I found all the tendons on the back of the wrist of the left hand severed down into the joint so that the hand doubled up on the fore-arm and I had to

40

suture it with about twenty stitches,—that is adjust the tendons together with silver wire.

Q. Is the injury cured?

A. That is only temporary. Those stiches make the work through, and possibly he may lose his hand. He is now deprived of some of its uses.

10 Q. Could the wound you found there be inflicted with slight force?

A. No; with very great force.

Q. How long did you attend him for that cut?

A. Nearly two months.

THE STATE RESTS.

Mr. Carey: I thought you were going to call the
20 Policeman, Quinn?

Mr. Speer: No; at any rate not at the present time.

Mr. Carey: You subpoenaed him, and if you don't call him we will.

Mr. Speer: The State has rested.

JOHN QUINN, called by the defense and sworn, testified as follows:

Direct Examination by Mr. Carey.

30 Q. Are you a member of the Police Department of Jersey City?

A. Yes.

Q. How long have you been on the force?

A. About eighteen years.

Q. You were subpoenaed here this morning by the State?

A. I couldn't say who I was subpoenaed by: I gave my subpoena to that man at the desk.

Q. You don't know that you were subpoenaed
40 here by the defendant?

A. No sir.

Q. Do you remember the 20th day of January?

A. Yes.

Q. What occurred that day?

A. I left the house about 6:15 and about 20 minutes to seven on Newark Avenue I saw four men running after the man, and he ran from the south side of Newark Avenue opposite 101 to the north side, and they kept beating him and he kept dodging, and I hollered at them all I could and ran after them, and I thought it was a street fight and I went there and placed them all under arrest, and then after I had them in the Station House this other man came in and accused him of cutting him. 10

Q. Whom did you arrest?

A. Four; Clark and that young stout fellow with the heavy black moustache that was on the stand and his two sons; there was five in it altogether, and this man came in the Station afterwards and accused Clark of cutting him. 20

Q. Was Clark cut at the time?

A. His collar was pulled off his shirt, and he was bleeding here and over the right eye. (Indicates.)

Q. You found no razor?

A. No sir.

Q. Did you search this man?

A. I did.

Q. Did you find any razor on him?

A. No sir. I did not find any razor on any of them. 30

Q. Where was he when you arrested him?

A. In the rear of his house 321 Grove Street.

Q. Was anybody with him?

A. He was up against a fence and the other three were trying to assault him. There was a large crowd there.

BENJAMIN CLARK, called by the defense and sworn, testified as follows:

Direct Examination by Mr. Carey.

Q. Do you understand English well enough to talk?

A. Not very well.

Q. Where do you live?

A. Railroad Avenue, 100.

10 Q. How long have you lived there?

A. Last year.

Q. How old are you?

A. Eighteen.

Q. What is your business?

A. Lunchman before in Exchange Place, No. 9, Jersey City.

Q. Next to this place where this other fellow worked?

A. Exchange Place number 9.

20 Q. Do you know Cosio brothers?

A. Yes, I know them all the time.

Q. Twentieth of January what time did you leave home?

A. Quarter after seven.

Q. Where were you going?

A. Going up in the fish store to get clams to make Chowder Friday morning.

Q. Who were you going to make chowder for?

A. Peoples who come in for drink.

Q. Where was it to be used?

30 A. Down in the store. I said to the fish store "Give me some clams, hurry up I got to do work," and he said "All right, the boy will bring them down." I go.

Q. Whose store did you go to?

A. Newark Avenue, I don't know the name, next to Clements.

Q. For whom were you getting the clams?

A. For the boss of my store.

Q. When you got in what happened? When the boy——

40 (Witness speaks Italian and interpreter translates.)

A. The boy was going down to get the clams and told me to wait for him; I think his boss went to call him, I did not see them any more; I was going along there and it was very cold, and I buttoned up my coat and said to myself "where could he go?" I was going along and the whole three of them came out, the father and sons, and they threw me down on the ground.

10

Q. Where did you see the three first?

A. I seen them when they struck me, they all came out together.

Q. Where did they come from?

A. They hid themselves on Railroad Avenue and Newark Avenue. They threw me on the ground and hit me with a knife on the head and hit me with a stick and club.

Q. Was your hand hurt at all?

A. All my hand, and hit me on the head and 20
back and in the front on my forehead, and all my face.

Q. Is there any mark on the hand where you were cut?

A. Yes.

Mr. Carey: Show the mark to the jury.

(Witness shows it on the inside of the hand.)

Q. What did you do then?

A. I hollered for mercy and I told them to let go, that I wanted to go to work. And the father said "You will not see to work, I have been looking for you for two weeks, and this morning you will get it all." 30

Q. Who said that?

A. The father.

Q. What did you do?

A. I had a fight with the son: he called me a liar, son of a bitch,—and I said I am no liar and not a son of a bitch either.

Q. What did you do that morning?

A. I started to holler, and I went to turn around and they threw me down again, six times. 40

Q. Then what happened?

A. While I was running, in front of my door I fainted; That is where they had struck me——

(Witness shows on the left temple.)

Q. Were you arrested?

A. Yes.

Q. Were they all arrested?

10 A. Yes sir.

Q. Who arrested you?

A. Cop.

Q. Where did they take you to?

A. Station House.

Q. Were you bleeding at that time?

A. Yes, my hand, my forehead and face and back of my neck.

Q. Did you go to see a doctor?

A. Yes.

20 Q. What doctor did you see?

A. Bezza.

Q. Where is his place?

A. The man that bailed me out brought me to this doctor.

Q. Did you have a knife that day?

A. No sir.

Q. A razor?

A. No sir.

Q. Do you shave?

A. Every month I shave me, the barber: I can't
30 shave me.

Q. You had no razor?

A. No sir.

Q. Did you have a razor in your pocket that morning?
ing?

A. No.

Q. Did you have a knife that morning?

A. No, sir.

JOSEPH TRACY, called by the defense and sworn.
40 testified as follows:

Direct Examination by Mr. Carey.

Q. What is your business?

A. Newspaper business corner of Grove and Newark Avenue.

Q. Were you in business there this 20th day of January last?

A. Yes.

10

Q. Do you know this boy Clark?

A. Not until this morning.

Q. Did you see the other fellows that were on the witness stand?

A. Only from seeing them that morning.

Q. What did you see them do?

A. I saw the smooth-faced brother stand on the corner about an hour before that thing happened, watching for somebody.

Q. Did you see the father there?

20

A. I did not see the father while the fight was going on.

Q. Did you see the other sons there?

A. Yes, I saw them in the fight; they were all three in the fight.

Q. What attracted your attention?

A. I was attracted by seeing the fight about three or four hundred feet down the street from my stand, and this fellow was trying to get away and the other young fellow headed him off and gave him the foot and tripped him, and then they jumped on to him, and then he got away again, and he got up against the fence in Grove Street when the officer came along and arrested them while they were all against him: this fellow was covered with blood.

30

Cross Examination by Mr. Speer.

Q. How did the fight start?

A. I don't know how it started. I did not see it start.

Q. Do you know where the fight started?

40

A. I don't know where it started from.

Q. You don't know where it started?

A. No sir.

Q. Did you see the first blow struck?

A. The first blow I see struck I see them three people get on this man.

10 Q. Which three people?

A. The father with the heavy moustache on and the young man that was standing at my corner about an hour, and the third man: I don't know their names.

Q. This man who had his hand nearly cut off, did you see him striking any body.

A. I seen him join in the chase. This young man was hit and the others were trying to get up to him.

Q. Of those who were chasing this young man who was hit?

A. They was the father and the two sons, as I
20 found out afterwards.

Q. How did you find that out?

A. I was told so. When the officer arrested them the officer told me they were two sons and the father.

Q. The officer told you that?

A. No sir.

Q. How did you find out?

A. I inquired.

Q. Of whom.

A. I don't know his name: I went to the Station
30 House.

Q. What for?

A. I wanted to find out who this young man was standing on the corner because he was standing there about an hour.

Q. There are lots of fellows standing there for hours each day?

A. No sir.

Q. Don't you know that they will stand on Sandy Clements' corner by the hour right where your stand is?

A. No sir; that is on the other side. I see this
40 young man mixed up in the fight and I thought he was

laying for somebody and I wanted to find out who he was.

Q. Why did you leave your paper stand and take such particular pains to find out who he was?

A. I did not go to the station house; I saw them right by my stand.

Q. You said you went to the station house?

A. I was off after that.

10

Q. Whom did you find it out from?

A. From the interpreter down there. I don't know who he was.

Q. What did you say to the interpreter?

A. I found out they were two sons and father

Q. What did you say to the interpreter?

A. I asked who they were and he said they were two sons and father.

Q. What were their names?

A. I don't know.

20

Q. What question did you ask the interpreter?

A. I wanted to find out who the man was that stood at my corner that morning for an hour.

Q. The interpreter did not see him standing there?

A. No sir.

Q. How did you point him out?

A. I found out there was two brothers and father, and I did not want to know any more.

Q. Give us the question you asked the interpreter?

A. Who the people was that was in trouble and got locked up that morning.

30

Q. Give us his own answer?

A. The answer was that they were two sons and father.

Q. Is that all he said to you?

A. Yes.

Q. Don't you know as a matter of fact that this other man was locked up too?

A. Yes.

A. And did he not say anything about him?

40

A. I knew he was locked up, but the father and sons did all the fighting on to him.

Q. How long had you known this defendant?

A. I had known him to work for Johnnie Smith's.

Q. How long?

A. About five minutes before that day.

10 Q. How do you know he worked for Johnnie Smith's?

A. I found out he had gone to Hamblen's fish store for some clams that morning.

Q. When did you find that out?

A. I found it out in Johnnie Smith's saloon that morning.

Q. Did that interest you?

A. No sir, but I found this man was imposed on by the others; I went in to find out; I seen this young man sitting outside of the door before that day.

20 Q. You said you had not known him until five minutes before that day?

A. I have seen him before that day and I recognized him as being in that fight that day, and I asked Johnnie Smith if he was an employee there, and I wanted to find out whether the young fellow was in trouble.

Q. You saw the young fellow sitting in front of the door; why did you not speak to him then?

30 A. I seen him that morning. I seen him in the condition he was in that morning.

Q. You wanted to help him out?

A. Yes. I happened to drop in there and I spoke to Johnnie Smith about it; I did not go in for that purpose; I went in to leave papers and to collect.

Q. Did you collect that day?

A. Yes.

Q. Saturday?

A. I couldn't tell you what day it was.

Q. When they were chasing this young man where was the man whose hand was cut?

40 A. I found out afterwards. (Question repeated).

A. He was corner of Railroad Avenue where the other brother and father was; he was standing there and he was doing the best he could; they had this fellow up against the fence in back of the saloon on Railroad Avenue.

Q. You said they had him against the fence when the fight was all over?

A. Yes: the officer got hold of the brothers and 10
the father.

Q. Where was the man that was cut and bleeding?

A. I don't know.

Q. You said he was fighting?

A. He was fighting all the way; the two, the three sons and the father, were chasing this man, and the little fellow right at Krim's saloon gave him the foot and he got up again and managed to run and he cut up Railroad Avenue to Grove Street, and these three men, the father and the two sons, caught up to him and 20
had him at the fence.

Q. Have you not heard the officer testify that he arrested the father and the two sons and the other son walked afterwards into the Station House?

A. He might have walked there afterwards: he might have gave himself up; I know the father was pounding this man on the head, and the other short fellow was punching him.

Q. What was this man who had his hand nearly cut off doing in the fight?

A. I don't know; I seen him running after him 30
but I did not see anything else he did.

CHARLES E. HAMBLIN, called by the defense and sworn, testified as follows:

Direct Examination by Mr. Carey.

Q. What is your business?

A. Fish and oyster business on Newark Avenue.

Q. Do you remember this 20th of January?

A. I do on account of this trouble. 40

Q. Was this young in your place that day?

A. Yes.

Q. State as near as you can what happened at that time?

A. Smith has been trading with me, and generally his man at the counter comes in almost every morning to take a package down to his place of business.

10

(Answer objected to.)

Q. Did this young man come in?

A. Yes, for stock.

Q. What happened?

A. As far as I know nothing. All I can say about the affair is that the party came in and took a package out of my place, as was his custom somewheres before seven o'clock in the morning, and went out. I heard a rumpus on the street and did not pay any attention until half an hour later when my man in the store told me.

20

Q. He came out of your store?

A. Yes.

Q. And a moment after he came out of your store you heard that rumpus?

A. Yes.

AMELIA ROMANTO, called by the defense and sworn,
testified as follows: (Translated.)

Direct Examination by Mr. Carey.

30

Q. Where do you live?

A. Brunswick Street.

Q. Do you know this defendant?

A. Yes, I seen him at the time of the fight.

Q. Do you remember the 20th of January?

A. Yes.

Q. Where did you see this boy, the defendant, on that day?

A. Between Newark Avenue and Grove Street.

40

Q. What time did you see him?

A. About a quarter after seven.

Q. Who else did you see there that morning?

A. I have seen that tall man and the other two young men.

Q. You mean by the tall man and the other two young men the father and the two sons?

A. Yes.

Q. Was the tall man that you saw, the father that was on the witness stand? 10

A. Yes.

Q. And the two young men were they the sons of the father?

A. Yes.

Q. What time in the morning did you first see them that morning?

A. That morning it was seven or quarter after seven, and I had to be to work, at half-past seven that morning. 20

Q. Where did you see him?

A. In Railroad Avenue in the middle of the block between Newark Avenue and Grove Street.

Q. What were they doing?

A. They were all gathered together the young man was on the ground and the others were on top of him; the young man got out of them and ran away and the old man ran after him.

Cross Examination by Mr. Speer:

Q. These three men, the father and two sons, were standing together, were they? 30

A. Yes sir, they were right on top of this man; the young man he got away from them and he run away and the old man ran after him.

Q. Mr. Tracey says the young man was away up on the corner and gave the fellow the foot when he went by. You did not see anything like that, did you?

A. No sir. The young man was running ahead and the old man was running after him and he had something in his hands. 40

Q. Where were the two sons?

A. When the young man was running ahead and the old man was following the young man turned around to see who was after him, and the old man struck him on the face and he fell on the ground, and then they all gathered together on him.

10 Q. Where was the young man when the old man ran after him?

A. They ran after him also, and then the young man got away and he ran down Railroad Avenue and I went away about my business.

Q. Did you see the fight commence?

A. They had him on the ground when I reached that corner of Newark Avenue and Grove Street.

Q. Then you did not see the beginning of it at all?

A. They had him on the ground: I did see them.

Q. But you did not see the whole thing start?

20 A. I don't know: they had him on the ground; I couldn't say when it started.

Q. Did you see one of the sons have his hand nearly cut off?

A. No sir.

Q. You saw both sons did you not?

A. Sure, yes.

Q. And when you were there neither of them was cut, was he?

A. No sir: I did not see anybody cut.

30 Q. Was the father's coat all cut when he was running after this young man?

A. I did not see it.

Q. How long have you known Benny Clark?

A. I don't know any of them.

Q. When did you tell him what you had seen?

A. I went to work that morning and I met a lady, a God lady of mine, and I told her I seen some loafers fighting on Newark Avenue.

Q. What is her name?

A. The first name is Josephina.

40 Q. What is her last name?

A. I don't know her second name.

Q. Where does she live?

A. I know where she lives but I don't know the street.

Q. Did you tell any one else what you had seen?

A. No sir. I told only to the God-lady.

Q. Did you tell the God-lady whose name is Josephina and whose residence you don't know what the names of the father and sons were? 10

A. Her name is Josephina Joseph.

Q. Did you tell her what the names of the fighters were?

A. I told her I don't know the names.

TESTIMONY CLOSED.

Summing up by Counsel.

20

CHARGE.

Gentlemen of the Jury:—The charge against this defendant is that of having committed atrocious assault and battery on the complainant, and it is charged to be atrocious because of the character of the wound inflicted and because of the character of the weapon with which the wound was made.

From the character of the wound that was inflicted, and which has been described to you by the doctor here, you will be quite justified in determining the crime is that of atrocious assault, if there was a crime. Before, however, you convict the defendant the law requires that you should be satisfied beyond a reasonable doubt that the defendant is guilty, and that he did this thing as it is charged against him in this indictment. If on the consideration of the whole testimony you have any reasonable doubt about that, then this defendant should be acquitted. 30

40

If, however, the testimony produces on your mind a conviction of his guilt to such an extent that there is reasonable doubt about it, then it is your duty to convict him as charged.

10 (1). There has been some suggestion by counsel for the defendant that this prosecution is laying the foundation for a civil suit. That is a matter you have nothing to do with; it has no place in this case at all. Your simple duty is to determine whether upon the testimony produced before you in this hearing, this defendant is guilty as charged, and if you are satisfied from such testimony that he is guilty, then it is your duty to say so. Otherwise you should acquit him.

20 It is not for you to take into consideration the punishment that may be inflicted on this man if you find him guilty. If you find him guilty or acquit him, that ends your duty: and if you find him guilty it is the duty of the Court to inflict such punishment upon him as the Court thinks should be inflicted: but you have nothing to do with that. Now, whether you find him guilty or not guilty will depend much on what took place when these people first came together. The story of the complainant is that he was on the street and met this defendant there on this 20th of January, and he said to the defendant that he, the defendant, ought to be ashamed of himself for having whipped the complainant's young brother a few days before that,

30 or having had some difficulty with him; and that the defendant then said he did not care for his brother or for him (the complaining witness), and immediately whipped out his razor and slashed the complaining witness, as he described to you here, and that his father was five or six feet away, and a brother was at some distance further, and that his father and brother ran after the defendant and overtook him. The father testifies that he was some five or six feet distant from the assault, and engaged in the pursuit of the defendant after the assault occurred.

40 If all that is true then this defendant is guilty

under this indictment; and under these circumstances there was no provocation for the assault, and that assault was of such a vicious character, as the doctor has described to you, that there should be no hesitation on your part in finding the defendant guilty, if you believe that story true.

The defendant's story is entirely different from the complaining witness' story. He says he appeared at the store of Mr. Hamblen for the purpose of getting some clams, and after he had procured what he wanted as he was going out he was attacked by these three persons, the father and two sons, the complainant and his younger brother, and they assaulted him most brutally; and he says, as I remember, that he did not defend himself but ran away, was pursued and assaulted again and was thrown down and escaped again. 10

(2.) He says he had no razor or knife and used none on his pursuers or the complainant. If that is true you must determine how this complainant, this complaining witness, received this terrible wound, how the coat of the father was cut as he showed you it was cut, and how it occurred, unless it was done by the defendant, and either the defendant must have done it or else the father and two sons. The complaining witness' younger brother also says he was cut in the coat by the defendant. If that is true then the defendant's story that he had no razor, knife, or similar weapon, must be untrue. Somewhere there is untruth: some one is telling a story that is not true, because the stories are absolutely contradictory. Out of this conflicting testimony you must determine where the truth is. 20 30

(3.) Mr. Tracey, a witness for the defendant, saw the fight apparently only after the pursuit and did not see the beginning of the fight. But the very point in the case is, how did the fight begin, and not what occurred afterwards: and I think there is no one who saw the beginning of the fight except the defendant and the complaining witness and his father: and it is for you 40

to determine how it begun and by whom, and where the truth as to that lies. The testimony of Mr. Tracey, and of the Officer Mr. Quinn, has no bearing on the beginning of the fight.

END.

10 If the defendant had cut the complaining witness and then the father chased the defendant up the street and Mr. Tracey and the Officer saw him and the other son then beating the defendant, that throws but little light upon this assault which took place before these witnesses became cognizant of the matter.

If it is true as the complaining witness says, that he was cut as he described to you by the defendant, then you must convict the defendant.

20 But if you determine that the truth is that the father and the complaining witness, or those two and other son of the father, attacked this defendant as he says, then you must acquit him, because he had a right to defend himself against assault.

You will take the indictment with you and determine where the truth lies, and bring in your verdict accordingly.

THE JURY THEN RETIRED.

30 Mr. Sarey: I ask an exception to the charge.

(The said exception is allowed and signed and sealed accordingly.)

Mr. Carey: I except also to the charge as to what took place after the first meeting of the two parties, particularly where the Court referred to what took place in the street thereafter, and what took place as testified by the police officer, and that that had nothing to do with the indictment and should not be taken into consideration by the jury.

40 (The said exception is allowed and signed and sealed accordingly.)

NEW JERSEY, SS:

(L.S.) The State of New Jersey to the
 Court of Quarter Sessions of the
 Peace in and for Hudson County.

GREETING:

Because in the record and proceedings and also in 10
 the giving of judgment in a certain indictment pending
 in the Court of Quarter Sessions for the Peace in and
 for the County of Hudson, in which said indictment
 Benjamin Clark was defendant, and in which said in-
 dictment he was accused of atrocious assault and bat-
 tery, manifested error has intervened, to the great
 damage of the said Benjamin Clark, as by his complaint
 we are informed, we being willing that speedy justice
 should be done in his behalf, do command you dis-
 tinctly and openly to send under your seal the record 20
 and proceedings aforesaid, with all things touching
 and concerning the same, and also a transcript of all
 proceedings had and taken in the said cause up to the
 present time, to our Justices of our Supreme Court of
 the State of New Jersey on the second day of January,
 next, together with this writ, that the record and pro-
 ceedings aforesaid be inspected, we may further cause
 to be done thereupon what of right and according to
 the law ought to be done.

WITNESS, William S. Gummere, Esq., our 30
 Chief Justice, at Trenton aforesaid,
 the seventh day of December, in the
 year nineteen hundred and five.

ALEX SIMPSON, Att'y.

WILLIAM RIKER, Jr., Clerk.

The answer of John A. Blair, Esquire, Judge of the
 Court of Quarter Sessions, holden in and for the County
 of Hudson, and within named, the record and pro-
 ceedings of the plaint whereof mention is within made. 40

with all things touching and concerning the same, I send to the Justices of our Supreme Court of Judicature, at Trenton, at the day and year, within contained in the schedule to this writ annexed, as within I am commanded.

JOHN A. BLAIR,
Judge.

10

STATE OF NEW JERSEY, HUDSON COUNTY,
to wit:

BE IT REMEMBERED, that at a Court of Oyer and Terminer holden at Jersey City, in and for the said County of Hudson, on the first Tuesday of April in the year of our Lord, one thousand nine hundred and five before the Honorable Jonathan Dixon, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, and Hon. John A. Blair, President Judge of the Court of Common Pleas in and for the said County of Hudson, according to the form of the Statute in such case made and provided, by the oaths of:

20

30

40

1. A. J. Walscheid, Foreman, and
2. Chas. Bollinger
3. John Campbell
4. Adolph Carstens
5. James E. Connolly
6. Thos. Corydon
7. Danl. Donovan
8. James A. Fagan
9. Wm. J. Forsyth
10. Julius Franklin
11. Herman Garfunkel
12. Thos. E. Gleason
13. Abraham Goldstein
14. Chas. Holland
15. Joseph Igoe
16. Frank Kimmerly
17. John Knoeller

18. Kilian V. Lutz
19. Newton M. Lawrence
20. Peter Mc Cree
21. Fred'k W. Ripper
22. Wm. M. Schultz
23. Robt. Weir.

good and lawful men of said County, sworn and
 charged to inquire for said state in and for the body of 10
 the said County of Hudson, it is presented in manner
 and form following, that is to say, that the bills follow-
 ing are true bills.

A. J. WALSCHEID,
 Foreman.

HUDSON OYER AND TERMINER.

April Term, A. D. 1905.

20

CAPTION TO INDICTMENTS.

FIRST PRESENTMENT,

Filed May 15, 1905.

JOHN ROTHERAM,

Clerk.

30

PRESENTED

May 15, 1905,

and handed down to the Court
 of Quarter Sessions, for
 trial, &c.,

JOHN ROTHERAM,

Clerk.

Indictments

Nos. 1 to 43

Inclusive.

40

ENDORSED
FILED
CLERK'S OFFICE
May 15, 1905.
HUDSON COUNTY, N. J.
John Rotheram,
Clerk.

10

HUDSON OYER AND TERMINER

April Term, A. D., 1905.

HUDSON COUNTY, to wit:—The Grand Inquest
of the State of New Jersey, in and for the body of the
County of Hudson, upon their respective oath Present,
that Benjamin Clark, late of the City of Jersey City,
in the said County of Hudson, on the twentieth day of
January, in the year of our Lord, one thousand nine
hundred and five, with force and arms, at the city
20 aforesaid, in the county aforesaid, and within the juris-
diction of this Court, in and upon one Harry Coreia, in
the peace of God and of this state then and there being,
an assault did make, and him the said Benjamin in his
his hands then and there had and held, in and upon
the body, arms and hands of him the said Harry did
then and there wilfully, unlawfully and atrociously
stab, cut, penetrate, lacerate and wound and other
wrongs and injuries to him the said Harry then and
there did to the great damage of the said Harry, con-
30 trary to the form of the Statute in such case made and
provided, and against the peace of this State, the gov-
ernment and dignity of the same.

And the Grand Inquest aforesaid, upon their oath
aforesaid, do further Present, That the said Benjamin
Clark, on the twentieth day of January, in the year of
our Lord one thousand nine hundred and five, at the
city of Jersey City aforesaid, in the county of Hudson
aforesaid, and within the jurisdiction of this Court, in
and upon one Harry Coreia in the peace of God and of
40 this state, then and there being and assault did make,

and him, the said Harry then and there did beat, wound and ill treat and other wrongs, to the said Harry then and there did, to the great damage of the said Harry

contrary to the form of the statute in such case made and provided, and against the peace of this state, the government and dignity of the same.

WILLIAM H. SPEER,

Prosecutor of Pleas.

10

HUDSON OYER AND TERMINER

April Term, 1905.

THE STATE vs. Benjamin Clark.

Indictment for Atrocious A. & B.

WILLIAM H. SPEER,

Prosecutor of Pleas.

A True Bill

A. J. Walscheid,

Foreman.

20

PRESENTED

MAY 15, 1905

AND HANDED DOWN TO THE
COURT OF QUARTER SESSIONS

John Rotheram,

Clerk.

And afterwards to wit, on the twenty-first day of September, in the year of our Lord one thousand nine hundred and five, at a Session of the Court of General Quarter Sessions of the Peace of the County of Hudson aforesaid, being as yet of the Term of afore-
said, before the Honorable John A. Blair, Judge of said Court, at Jersey City aforesaid, in the County of Hudson aforesaid, here cometh the said Benjamin Clark, under the custody of John Zeller, Esquire, Sheriff of the County of Hudson aforesaid, in whose custody he had been before committed for the cause aforesaid, being brought to the Bar here in his proper person by the Sheriff aforesaid, to whom he is also here committed, and having heard the indictment read and forthwith

30

40

being commanded of and concerning the premises in the said indictment above specified and charged upon him, how he will acquit himself thereof, he saith Not Guilty thereof and therefore for good and evil he puts himself upon the Country, and William H. Speer, Esquire, Prosecutor of the Pleas for said County of Hudson, who prosecutes for the State of New Jersey in this behalf, doth the like.

Therefore let the said Indictment be continued until, and a Jury come here before the said Honorable John A. Blair, Judge as aforesaid, at Jersey City in the County of Hudson aforesaid, on the thirtieth day of October, in the year of our Lord one thousand nine hundred and five, being of the term of September, in the year of our Lord one thousand nine hundred and five of twelve good and lawful men of this State and resident within the County of Hudson aforesaid, above the age of twenty-one years and under the age of sixty-five years, by whom the truth of the matter may be better known and who are not of kin to the said Benjamin Clark, to recognize upon their oaths whether the said Benjamin Clark be guilty of the Atrocious Assault and Battery or not guilty, because as well the said William H. Speer, Esquire, Prosecutor of the Pleas, for the County of Hudson aforesaid, who prosecutes for the State of New Jersey aforesaid, in this behalf as the said Benjamin Clark have put themselves upon the said jury and the same day is given to the parties aforesaid at the same place. At which time, that is to say on the said thirtieth day of October in the year of our Lord one thousand nine hundred and five, being as yet of the term of September, in the year of our Lord one thousand nine hundred and five, at Jersey City aforesaid, in the County of Hudson aforesaid, before the said Judges of the Court as aforesaid, here cometh as well the said William H. Speer, Esquire, Prosecutor of the Pleas aforesaid, who prosecutes as aforesaid as the said Benjamin Clark, under the custody of the Sheriff as afore-

said, being brought to the bar here in his proper person by the said Sheriff, and the Jurors of the Jury by the said Sheriff of the County of Hudson aforesaid for this purpose empanelled and returned, to wit:

1. William Stahl
2. Edward Goldman
3. William Anderson
4. Patrick Donovan
5. August Frank
6. Hugh Degnan
7. Nicholis Wurther
8. Adam Hilreg
9. Richard Barry
10. Syemour Fead
11. Antonio Ferricci
12. Bernard Mc Aniny.

10

being called, come, who being chosen, tried and sworn to speak the truth of and concerning the premises, 20
and thereupon the trial of the said issue commenced before the said Court and Jury and was continued before the said Court and Jury until the said thirtieth day of October, in the year of our Lord one thousand nine hundred and five, at which last mentioned day the said issue, after a charge from the Court, was submitted to the said Jury, and the said Jury in charge of the officers of said Court, duly sworn for that purpose, were taken to a private room to consider of their verdict. And afterwards, to wit, on the day last aforesaid at the city of Jersey City aforesaid, the said Jury re- 30
turn into Court in charge of said officers, sworn as aforesaid to keep them in charge, and then and there in the presence of the said William H. Speer, Esquire, Prosecutor of the Pleas aforesaid, and of the said Benjamin Clark, do say that he, the said Benjamin Clark, is guilty in manner and form as in the aforesaid indictment is charged against him, and thereupon the said Benjamin Clark is committed to the custody of the said Sheriff, there to remain until the second day of November, in the year of our Lord one thousand nine 40

hundred and five, at which said last mentioned day the said Benjamin Clark being produced in and before the said Court at the city of Jersey City aforesaid, by the said Sheriff, and being in his custody.

Whereupon all and singular the premises being seen and by the Court here fully understood, IT IS
 10 CONSIDERED AND ADJUDGED that the said Benjamin Clark be and is sentenced to be confined in the jail at the county Farm for the period of one (1) year and thence until the costs of the prosecution are paid.

Judgment signed this November 2nd, 1905.

JOHN A. BLAIR,

Judge.

NEW JERSEY SUPREME COURT.

20

THE STATE,
 Def't. in Error,

vs.

BENJAMIN CLARK.
 Pl'ff. in Error.

In Error.
 Specification.

To Hon. William H. Speer,
 Prosecutor of Pleas.

30 The following is a specification of the causes relied upon by the plaintiff in error above named for a reversal of the judgment of conviction in this cause.

FIRST: The record shows that the indictment herein was found in the court of Oyer and Terminer and that the trial thereof was held in Quarter Sessions, and that no order was entered in said cause handing down said indictment into said court of Quarter Sessions.

SECOND. The Court upon the trial of the indictment charged the jury as follows:

40 "There has been some suggestion by counsel for

the defendant that this prosecution is laying the foundation for a civil suit. That is a matter you have nothing to do with; it has no place in this case at all."

THIRD: That the Court charged the jury upon the trial of said indictment as follows:

"He says he had no razor or knife and used none on his pursuers or the complainant. If that is true you must determine how this complainant, this complaining witness, received this terrible wound, how the coat of the father was cut as he showed you it was cut, and how it occurred, unless it was done by the defendant." 10

FOURTH: That the Court at the trial of the said indictment charged the jury as follows:

"Mr. Tracey, a witness for the defendant, saw the fight apparently only after the pursuit and did not see the beginning of the fight. But the very point in the case is, how did the fight begin, and not what occurred afterwards: and I think there is no one who saw the beginning of the fight except the defendant and the complaining witness and his father: and it is for you to determine how it begun and by whom, and where the truth as to that lies." 20

"The testimony of Mr. Tracey, and of the Officer Mr. Quinn, has no bearing on the beginning of the fight."

Dated this first day of April, 1906.

Yours truly,

ALEX. SIMPSON,
Atty. of Pl't'ff in Error.

30

COURT OF ERRORS AND APPEALS.

10	THE STATE, Defendant in Error, vs. BENJAMIN CLARK, Plaintiff in Error.	} In Error. } Causes for Rever- sal.
----	--	--

First—Because the Supreme Court failed to reverse the judgment of the Court of Quarter Sessions of the Peace, whereas the said judgment should have been reversed, because the Judge in the said Court of
 20 Quarter Sessions at the trial of the cause instructed the jury that the jury had nothing to do with the question as to whether the complainant in the criminal cause was attempting to lay a foundation for a civil suit.

Second—Because the Supreme Court refused to reverse the judgment of the said Court of Quarter Sessions when it should have reversed the judgment, because the said Judge of the Court of Quarter Sessions instructed the jury as follows: “He said he had
 30 no razor or knife and used none on his pursuers or the complainant. If that is true you must determine how this complainant, this complainant witness, received this terrible wound, how the coat of the father was cut as he showed you it was cut, and how it occurred, unless it was done by the defendant.”

Third—Because the Supreme Court refused to reverse the judgment of the said Court of Quarter Sessions when it should have so reversed the judgment, because the said Judge of the Court of Quarter Sessions instructed the jury as follows: “Mr. Tracey, a
 40 witness for the defendant, saw the fight apparently only after the pursuit and did not see the beginning

of the fight. But the very point in the case is, how did the fight begin, and not what occurred afterwards; and I think there is no one who saw the beginning of the fight except the defendant and the complainant witness and his father; and it is for you to determine how it begun and by whom, and where the truth as to that lies."

The testimony of Mr. Tracey, and of the officer Mr. Quinn, has no bearing on the beginning of the fight." 10

Yours truly,

ALEX. SIMPSON,

Att'y of Pl'ff in Error.

To

Hon. WILLIAM H. SPEER,

Att'y. of Def't in Error.

20

30

40

THE JOURNAL OF THE

AMERICAN

OF THE

OF THE

OF THE

OF THE

OF THE

OF THE

THE JOURNAL OF THE

AMERICAN

OF THE

OF THE

OF THE

OF THE

OF THE

OF THE

OF THE

OF THE

OF THE

OF THE

