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Certificate of the Chancellor.

In Chancery of New Jersey

State of New Jersey, Defendant-in-Error, *vs.* Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe alias Brasch, Plaintiffs-in-Error.	Certificate of the Chancellor.

On indictment and conviction in the Hudson County Court of Oyer and Terminer of the above Frank Donato and Vincent O'Keefe alies Brasch of the crime of murder in the second degree, and of the above George Ormsby and Frank McNally of the crime of manslaughter.

This is to certify that application has been made to me for the allowance of a writ of error to be issued out of the New Jersey Supreme Court for the review of the judgment of the Hudson County Court of Oyer and Terminer, convicting the said Frank Donato and Vincent O'Keefe alias Brasch of the crime of murder in the second degree, and for a review of the judgment of the Hudson County Court of Oyer and Terminer, convicting the said George Ormsby and Frank McNally of the crime of manslaughter; and that I have refused to order a writ of error out of the New Jersey Supreme Court for the review of said judgments. Dated at Trenton, this 9th day of July, 1929.

Edwin R. Walker,
Chancellor.

Writ of Error.

NEW JERSEY, SS.:

[L. S.]

THE STATE OF NEW JERSEY, to Samuel Kalisch, Esquire, one of the Justices of the Supreme Court of the State of New Jersey, and to the Judges of the Court of Common Pleas of Hudson County, constituting the Court of Oyer and Terminer, Holden at Jersey City, in and for the County of Hudson, of the term of April, 1929, GREETING:

Because in the record and proceedings and also in giving judgment upon a certain indictment in our said Court of Oyer and Terminer against Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe alias Brasch, late of the City of Jersey City, in the County of Hudson aforesaid:

"For that the said Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe alias Brasch, on the sixth day of November, in the year of our Lord one thousand nine hundred and twenty-eight, did wilfully, feloniously and of malice aforethought, kill and murder Catherine McGee 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"; and

"For that the said Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe alias Brasch, on the sixth day of November in the year of our Lord one thousand nine hundred and twenty-eight, did feloniously kill and slay one Catherine McGee 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''; and

''For that the said Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe alias Brasch, on the sixth day of November in the year of our Lord one thousand nine hundred and twenty-eight, an assault did make on her the said Catherine McGee, and then and there did beat, wound and illtreat, and other wrongs to the said Catherine McGee then and there did, to the great damage of the said Catherine McGee, 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.''

Pro ut the said indictment and the several counts therein, whereof, before you, they have been indicted, and are thereof convicted by certain pleas of not guilty, by a certain jury of the County, taken between The State of New Jersey and the said Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe alias Brasch, as it is said, manifest error hath intervened to the great damage of the said Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe alias Brasch, as from their complaint we hath received information, we being willing, in their behalf to correct the error in due manner, if any there shall be, and that speedy justice be done to them, the said Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe alias Brasch, command, if judgment be thereon given, then that you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same, and the entire record of the proceedings had upon the trial, to our Court of Errors and Appeals in the last resort in all causes as heretofore, to be held

at Trenton, on the 29th day of July, 1929, and this writ, that the record and proceedings as aforesaid being inspected, we may further cause to be done thereupon for correcting that error, what of right and according to the laws and customs of New Jersey ought to be done.

WITNESS, EDWIN ROBERT WALKER, Esquire, our Chancellor and the President Judge of our said Court of Errors and Appeals, at Trenton, New Jersey, this 9th day of July, 1929.

JOSEPH F. S. FITZPATRICK,
Clerk.

WILLIAM A. KAVANAGH,
Attorney for Defendants, Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe alias Brasch.

A True Copy,
JOSEPH F. S. FITZPATRICK,
Clerk.

Indictment.

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 Third Tuesday of September in the year of our Lord one thousand nine hundred and Twenty-eight before Honorable James F. Minturn, Justice of Supreme Court, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, and Honorable Charles M. Egan and Honorable Robert V. Kinkead, Hon. Daniel O'Regan, Judges 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

1. William J. Blacker Foreman and
2. Joseph P. Corcoran
3. Frank J. Doris
4. Max H. Doyne
5. James J. Fitzgibbons
6. James J. Gallagher
7. William A. Grady
8. George Harper Jr.
9. Stephen Karczewski
10. George L. Kenny
11. A. Lowell Miller
12. Daniel A. Mills Sr.
13. Vincent Mulvaney
14. Henry Muzzi
15. Michael L. O'Brien
16. Bernard A. O'Connor
17. Max Pinkas
18. James F. Reilly
19. Clarence J. Rieman
20. Maurice Shapiro
21. Arthur Venneri
22. Harry S. Winn
23. Anthony E. Zuccaro

good and lawful men of said County, duly empanelled, sworn and charged to inquire for the State in and for the body of the said County of Hudson, it is presented in manner and form following, that is to say, that the Bills following are true Bills.

William J. Blacker,
Foreman.

And the foregoing being presented to the said Court on Fourth day of December, in the year of

our Lord One Thousand Nine Hundred and twenty-eight with bills of Indictment Nos. 190 to 228 inclusive, it is ordered by said Court that the said Bill of Indictment so as aforesaid included as Bill Number 190 for Murder, as charged upon Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe, Alias Brasch remain in this Court of Oyer and Terminer for trial and disposal according to law, and said Bill is in words as follows:

HUDSON OYER AND TERMINER

September Term, A. D. 1928.

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 Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe, Alias Brasch, late of the City of Jersey City in the said County of Hudson, on the Sixth day of November in the year of our Lord one thousand nine hundred and twenty-eight with force and arms at the City of Jersey City aforesaid, in the County aforesaid, and within the jurisdiction of this Court, one Catherine McGee in the peace of God and of this State, then and there being, did wilfully, feloniously and of his malice aforethought, kill and murder, 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.

And the Grand Inquest aforesaid, upon their oath aforesaid do further Present, That the said Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe, Alias Brasch, on the Sixth

day of November in the year of our Lord one thousand nine hundred and twenty-eight at the City of Jersey City aforesaid, in the County of Hudson aforesaid and within the jurisdiction of this Court, did feloniously kill and slay one Catherine McGee 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.

And the Grand Inquest aforesaid, upon their oath aforesaid do further Present, That the said Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe, Alias Brasch, on the Sixth day of November in the year of our Lord one thousand nine hundred and twenty-eight at the City of Jersey City aforesaid, in the County of Hudson aforesaid, and within the jurisdiction of this Court, in and upon one Catherine McGee in the peace of God and of this State, then and there being, an assult did make, and her the said Catherine McGee then and there did beat, wound and ill-treat and other wrongs, to the said Catherine McGee then and there did, to the great damage of the said Catherine McGee 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.

EDWARD L. KATZENBACH,
Attorney General.

ALOYSIUS MCMAHON,
Acting Prosecutor of the Pleas
and Deputy Attorney General.

Endorsed Bill No. 190 Hudson Oyer and Terminer, Term of September 1928. The State *vs.*

Indictment.

Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe, Alias Brasch for Murder.

EDWARD L. KATZENBACH,
Attorney General.
ALOYSIUS MCMAHON,
Acting Prosecutor of the Pleas
and Deputy Attorney General.

A TRUE BILL.

WILLIAM J. BLACKER,
Foreman.

PRESENTED

DEC. 4, 1928 and it is thereupon Ordered that this Bill of Indictment remain in this Court of Oyer and Terminer for trial and disposal according to law.

JOHN J. MCGOVERN,
Clerk.

And afterwards, to wit: to wit on the tenth day of December in the year of our Lord One thousand nine hundred and twenty-eight at a Session of the Court of Oyer and Terminer of the County of Hudson, aforesaid being now of the Term of December, One thousand nine hundred and twenty-eight in the said year Before the Honorable Charles M. Egan, Judge of the Court of Common Pleas in and for the said County of Hudson who doth constitute and hold the Court of Oyer and Terminer, in and for the County of Hudson here cometh the said Frank Donato,

Frank McNally, George Ormsby and Vincent O'Keefe, Alias Brasch under the custody of the Sheriff of the County of Hudson in whose custody they were before committed for the cause aforesaid, who being brought herein in their proper person by the Sheriff aforesaid, to whom they had been committed and having heard the indictment read and forthwith being demanded of and concerning the premises in the said indictment above specified and charged upon them, how they will acquit themselves thereof, they say they are not guilty thereof, and therefore for good and evil they put themselves upon the country, and Aloysius McMahon, Acting Prosecutor of the Pleas and Deputy Attorney General who prosecutes for the State of New Jersey, in this behalf, doth the like.

Therefore, let said indictment be continued until June 24th, 1929, and let a jury come before the Honorable Thomas H. Brown, Judge of the Court of Common Pleas in and for the County of Hudson, constituting and holding the Court of Oyer and Terminer for said County, being now of the Term of April (1929) One thousand nine hundred and twenty-nine of twelve good and lawful men of this State and residents in the County of Hudson, over 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 defendants to recognize on their oaths whether the said Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe, Alias Brasch are guilty of Murder as in the indictment aforesaid are charged against them, or not guilty thereof, because as well John Drewen, Prosecutor of the Pleas of the County of Hudson, who prosecutes for the State of New Jersey in

this behalf, as in the said indictment have put themselves upon the same jury, and the same day is given to the parties aforesaid at the same time and place.

At which time that is to say on the 24th day of June in the year of our Lord One thousand nine hundred and twenty-nine, at Jersey City, aforesaid in the County of Hudson aforesaid, before the Honorable Thomas H. Brown, Judge as aforesaid constituting and holding the Court of Oyer and Terminer as aforesaid, here come as well the said John Drewen, Prosecutor of the Pleas aforesaid who prosecutes as aforesaid, as well the said defendants Frank McNally and George Ormsby under the custody of their bail Sun Indemnity Company, Frank Donato under the custody of his bail Catherine Tietjen and Vincent O'Keefe, Alias Brasch under the custody of his bail Sun Indemnity Company, to whose custody they had hitherto been committed and who being brought to the bar in their proper persons by their bail and the jurors of the jury by the Sheriff of the County of Hudson, aforesaid, for the purpose, chosen, empanelled and returned to wit: Frank Samuelson, Robert Talbot, Charles F. Gallagher, Alonzo V. Burke, Harold E. Bird, Kenneth B. Hickey, Charles W. Greenfield, Thomas E. Halpin, William J. Greene, Carl Meyers, Peter Levenson, Frank S. McArthur, being called, come, who being chosen, tried and sworn to speak the truth and concerning the premises, and thereupon the trial of the said issue commenced before the said Court and Jury at which days the evidence of the parties is submitted and the Attorneys were heard thereupon and the said issue after a Charge from the Court was submitted to the said jury in charge of the said Officers of the Court, being duly

sworn for that purpose, were taken to a private room to consider of their verdict, and afterwards to wit on June 27th, 1929 the last aforesaid at the City of Jersey City aforesaid, the said Jury returned to the Court in charge of said officers, sworn as aforesaid to keep them in charge and then and there in the presence of the said John Drewen Esquire, Prosecutor of the Pleas as aforesaid and Counsel for the said defendants do say that the said Defendants Frank Donato and Vincent O'Keefe, alias Brasch are guilty of Murder in the Second Degree and Defendants George Ormsby and Frank McNally Guilty of Manslaughter.

Whereupon all and singular the premises being seen and by the Court here fully understood the sentence of the law is, and it is by the Court here considered and adjudged, that the said Defendants Frank Donato and Vincent O'Keefe, alias Brasch be and are hereby sentenced to be confined in State Prison at hard labor for a period of Thirty (30) Years and thence until the costs of prosecution are paid and the Defendants Frank McNally and George Ormsby be and hereby are sentenced to be confined in State Prison at hard labor for a period of Ten (10) Years and thence until the costs of prosecution are paid.

Judgment entered and signed this First day of July, A. D. 1929.

THOMAS H. BROWN,
Judge of the Court of Oyer and Terminer, in and for the County of Hudson.

Attest:
JOHN J. McGOVERN
Clerk.

Indictment.

STATE OF NEW JERSEY } ss
COUNTY OF HUDSON }

COURT OF OYER AND TERMINER

HOLDEN IN AND FOR SAID COUNTY.

THE STATE

vs

FRANK McNALLY
FRANK DONATO
GEORGE ORMSBY
VINCENT O'KEEFE alias
BRASCH

Sur Indictment No. 190, Term of September A. D. 1928, for Murder.

Dec. 10/28. The Defendants all being charged plead not guilty and are remanded for trial.

Judge Egan

Jan. 4/29. The witness Raymond Mylatt and his bail Jas. J. McCue enter into a recognizance in the sum of One (1000) Thousand dollars each condition that witness to appear at trial.

Judge Egan

Jan. 4/29. Case off. Judge Kinkead

Jan. 21/29. Case off. Judge Kinkead

Jan. 24/29. The Defendants McNally and Ormsby and their bail Sun Indemnity Co., enter into a recognizance in the sum of Five thousand (5000) Dol-

lars each defendant conditioned that the defendants (both) appear from day to day for trial.

Judge Kinkead

Jan. 24/29. The Defendant Donato and his bail Catherine Tietjen enter into a recognizance in the sum of Five thousand (5000) Dollars each conditioned that the defendant appear from day to day for trial.

Judge Kinkead

Jan. 25/29. The Defendant O'Keefe and his bail Sun Indemnity Co., enter into a recognizance in the sum of Five thousand (5000) Dollars each conditioned that the defendant appear from day to day for trial.

Judge Kinkead

June 24/29. Trial by jury started and continued.

June 25th/29. Trial continued and adjourned to

June 26/29. Witness Daniel A. Reilly not appearing when called was held in contempt by the Court and he was committed to the County Jail for a period of eight hours and by order of the Court he was discharged.

June 26/29. Evidence closed and the jury retired to consider their verdict.

June 27/29. 1.10 A. M. The Jury finds the Defendants Frank Donato, Vincent O'Keefe, alias Brasch Guilty of Murder in the 2nd Degree. The jury finds de-

fendants George Ormsby, Frank McNally Guilty of Manslaughter, and all four defendants are remanded for sentence.

Judge Brown

June 28/29. Application made by Attorneys for the Defendants for an arrest of judgment. Denied by Court. July 1st set for sentence to be imposed.

Judge Brown

July 1/29. Application for a new trial made by Attorney for the Defendants. Denied by Court.

July 1/29. The Defendants Donato and O'Keefe, alias Brasch being placed to bar are each sentenced to be confined in State Prison at hard labor for a period of thirty (30) Years and thence until costs of prosecution are paid.

July 1/29. The Defendants McNally and Ormsby being placed to bar are each sentenced to be confined in State Prison at hard labor for a period of ten (10) years and thence until the costs of prosecution are paid.

Judge Brown

July 10/29. Writ of Error filed, Application for bail made, denied by Court.

Judge Brown

Return to Writ.

NEW JERSEY, SS.:

(SEAL)

THE STATE OF NEW JERSEY, to Samuel Kalisch, Esquire, one of the Justices of the Supreme Court of the State of New Jersey, and to the Judges of the Court of Common Pleas of Hudson County, constituting the Court of Oyer and Terminer, holden at Jersey City, in and for the County of Hudson, of the term of April, 1929, GREETING:

Because in the record and proceedings and also in giving judgment upon a certain indictment in our said Court of Oyer and Terminer against Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe alias Brasch, late of the City of Jersey City, in the County of Hudson aforesaid:

"For that the said Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe alias Brasch, on the sixth day of November, in the year of our Lord one thousand nine hundred and twenty-eight, did wilfully, feloniously and of malice aforethought, kill and murder Catherine McGee 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"; and

"For that the said Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe alias Brasch, on the sixth day of November in the year of our Lord one thousand nine hundred and twenty-eight, did feloniously kill and slay one Catherine McGee 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''; and

''For that the said Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe alias Brasch, on the sixth day of November in the year of our Lord one thousand nine hundred and twenty-eight, an assault did make on her the said Catherine McGee, and then and there did beat, wound and ill-treat, and other wrongs to the said Catherine McGee then and there did, to the great damage of the said Catherine McGee, 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.''

Pro ut the said indictment and the several counts therein, whereof, before you, they have been indicted, and are thereof convicted by certain pleas of not guilty, by a certain jury of the County, taken between The State of New Jersey and the said Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe alias Brasch, as it is said, manifest error hath intervened to the great damage of the said Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe alias Brasch, as from their complaint we hath received information, we being willing, in their behalf to correct the error in due manner, if any there shall be, and that speedy justice be done to them, the said Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe alias Brasch, command, if judgment be thereon given, then that you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same, and the entire record of the proceedings had upon the trial, to our Court of Errors and Appeals in the last resort in all causes as heretofore, to be held at Trenton, on the

29th day of July, 1929, and this writ, that the record and proceedings as aforesaid being inspected, we may further cause to be done thereupon for correcting that error, what of right and according to the laws and customs of New Jersey ought to be done.

WITNESS, EDWIN ROBERT WALKER, Esquire, our Chancellor and the President Judge of our said Court of Errors and Appeals, at Trenton, New Jersey, this 9th day of July, 1929.

JOSEPH F. S. FITZPATRICK,
Clerk.

WILLIAM A. KAVANAGH,
Attorney for Defendants, Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe alias Brasch.

Filed Clerk's Office
July 10, 1929
Hudson County, N. J.

JOHN J. McGOVERN,
Clerk.

Return to Writ.

The answer of Thomas H. Brown, one of the Judges of the Court of Common Pleas, constituting the Court of Oyer and Terminer, in the absence of one of the Justices of the Supreme Court of the State of New Jersey, holden in and for the County of Hudson and within named the record and proceedings of the plaint whereof mention is within made, with all things touching the same, I send to the Justices of our Court of Errors and Appeals in the last resort of all causes at Trenton, N. J., at the day and year within contained in a certain schedule to this writ annexed as within I am commanded.

July 18, 1929.

THOMAS H. BROWN,
Judge.

Attest:
JOHN J. McGOVERN,
County Clerk.
(SEAL)

Testimony.

HUDSON COUNTY OYER AND TERMINER.

STATE, *vs.* FRANK DONATO, FRANK MCNALLY, GEORGE ORMSBY, VINCENT O'KEEFE, alias BRASCH.	Indictment 190, September Term, 1928. Murder. Before: Hon. Thomas H. Brown, Judge.

Jersey City, N. J., May 3, 1929.

Appearances:

HARLAN BESSON, Esq. for the State.

MR. KAVANAGH and Mr. HART for the defendants.

Mr. Besson: May it please the court: In the case of the State of New Jersey *vs.* Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe, alias Brasch, the State has given notice of application to Messrs. Kavanagh and Hart, attorneys for the defendants, that on this day an application would be made for an order for a struck jury for the trial of the issue framed under the above indictment, which is indictment for murder 190 of the September Term, 1928.

The act under which this application is made is an act which was passed by the legislature and signed by the Governor I believe on Tuesday of this week. The language of the act, as I understand it, is similar to the struck jury act which

was in force in this state for many years, and which I think was the original act passed in 1910 and subsequently repealed in 1917 or 1918. I think there is a case in 67 New Jersey Law in which it has been held to be constitutional; and the reason for the application in this case is because this is a case of considerable public moment and of grave importance, and it is the belief of the Prosecutor that under the terms of this act it is a proper situation for the granting of an order for a struck jury.

Mr. Kavanagh: May it please your Honor; Mr. Edward J. Hart and myself were assigned to defend these four defendants mentioned in this indictment 190 of the September term, 1928. We are objecting very strenuously at this time to any rule being made by your Honor for a struck jury in this particular cause, and I will make known at this time the grounds of our objection.

My first reason, if your Honor pleases, is this: These four defendants, McNally and the others, were indicted by the September term grand jury, 1928, about the middle of November, 1928. Mr. Hart and I were assigned to defend them some time thereafter, within a week or two thereafter. The case was brought on for trial before his Honor Judge Kinkead and a jury under section 82 of the criminal procedure act on January 4, 1929. Mr. Hart and myself had consulted with the defendants prior to that time on several different occasions while they were incarcerated in the county jail. Three days prior to January 4 a list of 48 names was served on the four defendants under section 82 of the criminal procedure act of this state, and on January 4, the date set for the trial, the defendants appeared in court with their counsel. It was on a Monday morning, and after wait-

ing probably an hour or more, and being ready and willing to go on trial at that time, we were notified by the Prosecutor, Mr. McMahon, that the case had been adjourned. Mr. Hart and myself protested very vigorously at an adjournment being granted at the request of the prosecutor, giving as our reasons that we had entirely prepared the case and that the defendants were ready to go to trial. That jury of course was a common jury, selected under the jury act, which was in effect prior to this amendment to section 76 of the criminal procedure act that was signed by the governor on Tuesday of this week. Two weeks thereafter, some days prior to January 16, we were notified again by notice from the Prosecutor's office that the case would be tried on January 16 before his honor Judge Kinkead and a jury, a list of 48 names under section 82 of the criminal procedure act having been served on us three or four days prior to January 16, 1928. At that time again the defendants with their counsel appeared in court ready and willing to go to trial. We were there at 10 o'clock. We remained there for some considerable length of time, approximately an hour or more, having all our witnesses there, all the witnesses for the defendants, our case thoroughly prepared, ready to go on. On that morning, on that second day, when the trial was set, the Prosecutor came and told us that he was not ready to go to trial, that he wanted an adjournment of the case again, that being the second time we were ready. We protested very vigorously, saying that we desired a speedy trial in this matter and that we were ready then the second time, as we were the first time, to go to trial; to no avail whatever. The case was again adjourned and we had to dismiss our witnesses

and go home. On that second occasion, if your Honor pleases, the same procedure happened as to the first; that is, no application had been made by the prosecutor for a struck jury. If the case is important now it must have been very important at that time. We were served with a list of 48 names under section 82 of the criminal procedure act on those two different occasions.

Now, if your Honor pleases, I want to say respecting these four defendants, that we come here this morning after being served with notice by the prosecutor that he will come before your Honor and ask for a rule for a struck jury. We want to say that we very strenuously object to any rule or any order being made by your Honor in the case of these four defendants for a struck jury at this late day, on the ground that although the State *vs.* Brown in 62 N. J. Law at page 666 has declared the jury act constitutional, nevertheless inasmuch as these defendants on two different occasions, on January 4, 1929 and January 16, 1929, were brought to trial and they were ready to go to trial, were brought to trial under section 82—that is 48 names were served on them, from which the jury was to be chosen—and up to that date no application was made by the prosecutor for a struck jury, no reasons were given to any of the judges of the Court of Oyer and Terminer of this county why there should be a jury struck in the case of these four defendants and they be tried by a struck jury, I say it comes with very bad grace at this time for the Prosecutor to come in in view of that set of facts and ask for a struck jury, because the law has been changed, section 76 has been changed to some considerable extent in the matter of the procedure for the bringing together of a struck jury.

Argument.

Now I say to your Honor that under the decisions of the Supreme Court of the United States which I will read to your Honor, and under the decisions of the Court of Errors and Appeals of the State of New Jersey—although the case that I am going to quote from is the case of the State *vs.* James K. Brown, nevertheless when I do quote I will submit to your honor certain facts respecting that case which are applicable to the case of these four defendants, and will discuss it from the point of view of an opinion of several judges who voted to reverse the Brown case on the grounds that I will come to in a minute—but before coming to that I want to say to your Honor this, that under decisions in this state and under the law respecting struck juries the matter of drawing a struck jury for the trial of any defendant or defendants rest in the sound discretion of the Court. In this case the defendants had already been brought to trial on two different occasions, and the trial was never proceeded with for certain reasons best known to the Prosecutor. Now I say to your Honor, in view of those facts, in view of the fact that these defendants have been brought to trial on two different occasions under Section 82 to be tried by a common jury of this county, and no application had been made by the prosecutor of the pleas after indictment or at or prior to the time when the defendants were brought to trial on those two occasions, I say that your Honor, using sound discretion, and having in mind the granting to these four defendants of an impartial trial under the law and under the constitution of the United States and the constitution of New Jersey, should not, in view of all that has happened in this case before, in any wise exercise your discretion by granting the motion of the prosecutor for a rule for a struck jury.

Argument.

I submit to your honor that if a struck jury were granted, if a rule for a struck jury were granted by your Honor in this case, certain substantial invested rights that these defendants have acquired would be interferred with, due to what has happened before in respect to the prosecutor not demanding a struck jury prior to these two trials, and in respect to the fact that at the other two trials the state proceeded according to section 82 of the jury act, and that on those two occasions a list of 48 names from the general panel of jurors of that term was served upon these defendants, and although they were ready, able and willing to go to trial with a common jury under section 82 nevertheless for some reason on the part of the Prosecutor they are stopped, they are impeded from having a speedy trial by a fair and impartial jury selected from those 48 names under section 82 from the general panel of that term. I say to your Honor in all sincerity that the substantial rights of these defendants, in view of the fact that the prosecutor has come here to-day and asked for a struck jury, are being interfered with. I say to your honor that in view of all the facts that I have submitted, and to back up and to corroborate which I will call the Sheriff's office and the County Clerk's office, I submit to your Honor that these defendants have acquired a status to be tried by a common jury under section 82 of the criminal procedure act which cannot be taken away from them at this time by any rule that your Honor might make—and I say this very respectfully—any rule that your Honor might make to send them to trial under a struck jury.

Now, I admit that the amendment to section 76 of the struck jury law that was signed by the

Governor the other day gives to your Honor the power, when application is made by the prosecutor or by the defendants for a struck jury, the absolute right to pick a panel of 60 names from citizens who have all the qualifications of voters in this county, without going to the regular panel for the term that has been selected by the jury commissioner and the Sheriff of this county. I admit that the amendment gives to your honor the absolute power to cast aside or to reject the panel that has been selected by the jury commissioner and the Sheriff of the county under the Chancellor Jury Act; but I submit, if your Honor pleases, inasmuch as these defendants have certain substantial rights that have been acquired under the facts and circumstances that I have just quoted, and that these defendants have acquired a status under the law respecting the facts and circumstances that I have just quoted, I respectfully submit to your Honor, inasmuch as it rests in your Honor's sound discretion to order a rule for a struck jury, that in view of all the things that I have set forth your Honor ought not to exercise any discretion favorable to this application and should refuse to order a struck jury for the trial of these defendants on the ground that under all the facts and circumstances, if your Honor pleases, that I have just set forth, a law having been enacted and an amendment to that law having been signed only last Tuesday, and these men having been indicted last November, 1928, ordered to trial on two different occasions by a regular panel, by a panel under section 82—I say, if your Honor pleases, that these defendants will be prejudiced and they will not receive a fair and impartial trial.

Now, if your Honor will permit me, I shall go into matters that have been determined by the

Court of Errors and Appeals in this state in the case of Brown *vs.* The State, which is found in 62 New Jersey Law, page 666. That case, if your Honor pleases, was a case of murder. The case was tried here in the Oyer and Terminer of Hudson County, and an appeal was made to the Court of Errors and Appeals on certain facts that I will now set out respecting the matter of picking a jury and respecting the matter of trying Brown by a struck jury. The case finally went to the Supreme Court of the United States. Now, there is one thing particularly in respect to what I have just set forth which is contained in the dissenting opinion of his Honor, the late Judge Dixon, found at page 716, 62 N. J. L., in the case of Brown *vs.* the State.

Judge Dixon said:

"The plaintiff in error having been convicted of murder in the first degree, contends that his constitutional rights were infringed by trying him before a struck jury—that is, a jury drawn from among the persons named on a panel selected by a judge, from which panel the state and the prisoner had struck an equal number of names.

"The constitutional prescriptions are these: 'The right of trial by jury shall remain "inviolate", and in all criminal prosecutions the accused shall have the right to a speedy and public trial by any impartial jury.'

"I have been unable to find any reason for thinking that the procedure mentioned runs counter to these constitutional injunctions. But according to our statute, in cases tried before struck juries, accused persons are entitled to only five peremptory challenges, while at the time of the adoption of our constitution persons accused of certain

high crimes, among them murder, were entitled to twenty peremptory challenges. This feature of the statute I deem unconstitutional.

"The right of the accused to challenge peremptorily on being confronted with the proposed juror immediately before the trial, I regard as a very important means of securing to him what the constitution guarantees—an impartial jury. The accused may know of a bias, the grounds of which he cannot prove or dare not disclose, or he may create a bias by an unsuccessful attempt to support a challenge for cause, and in any of these circumstances his sole resort is to a peremptory challenge. The evident utility and importance of this right, in order to insure the attainment of the constitutional aim—trial by an impartial jury—justify the conclusion that, so far as the right existed when the constitution was framed, it is within the guaranty of that instrument. And if the right of peremptory challenge be thus guaranteed at all, the most reasonable and the safest inference is that it is guaranteed to the same extent as it then had.

"I am therefore of opinion that a person on trial for any of these high crimes is entitled to twenty peremptory challenges, to be presented when the accused and the proposed juror are brought face to face immediately before the trial."

Now, if your Honor pleases, on those two trials at which we were here ready and willing to go on, we were then, on January 4 and January 16, entitled to twenty peremptory challenges under the act. The prosecutor did not on any occasion prior to that time go before any of the judges of the Court of Oyer and Terminer of this county and state, as Mr. Besson did this morning, that there were certain specific and particular reasons for

these men being tried by a struck jury. After an interval of seven months since the defendants were indicted, within a few days after a new law, a new amendment to section 76 has been passed by the legislature and signed by the Governor, then my friend the prosecutor comes in and demands a struck jury, giving the particular specific reasons that he advanced to your Honor this morning. Well, if those reasons hold good today why didn't they hold good seven months ago when these men were indicted, and why at that time wasn't a demand made for a struck jury? And now, having had the right to a trial by a common jury on two occasions, January 4 and January 16, our clients having had the right to twenty peremptory challenges, which right I say to your Honor was acquired by their having come into court ready to go to trial, which I say to your Honor was a substantial right under the law, acquired by these defendants, which I say to your Honor was a status under the law, acquired by these defendants on those two occasions—now, after seven months when this new amendment is passed and signed, the Prosecutor asks for a struck jury, which, if the rule is granted, allows these defendants only five peremptory challenges, when before at the two trials, when they were ready to go to trial, they had the right of twenty peremptory challenges. That is why I cited for your Honor the dissenting opinion of the late Honorable Justice Dixon in the case of Brown *vs.* The State.

Now, if your Honor pleases, we were entitled to a list of 48 names under the old procedure, under the procedure that was in vogue when we were ready to go to trial on those occasions. Now, if a rule for a struck jury is entered in this case, sixty names are selected by your Honor from the

general panel of the term of this county or from any other names outside that are not on the panel, any other names of qualified voters of this county, and then under the procedure notice is given both the prosecutor and attorneys for the defendants to strike out certain names, twelve on each side; then we are left with a panal of 36 that is placed in the box at the time that these defendants go to trial. Out of that 36 the State is allowed five peremptory challenges, leaving a balance of twenty-six to choose from. Goodness knows how many challenges there might be for cause or on account of statutory prohibitions, the persons being either under the legal age of 21 or above the legal age of 65. But don't you see, your Honor, that having acquired that status and that substantial right before, we are thrown overboard by this new amendment to the act, having had the right to choose from 48 and to exercise twenty peremptory challenges and to have added to that list of 48 from the general panel any other names if the panel ran out—I mean if some of them had been excused and so on and so on—we had a right to resort to other names from the general panel in order to finally choose our jury? Can't your Honor see that in respect to those things these men are being prejudiced, their substantial legal rights and the status that they have acquired are being seriously interfered with, to the end that they cannot in view of all the facts and circumstances get a clear trial in this case?

Then again, if your Honor please, as I understand the law, when juries are selected for the trial of any case, be it a murder case or be it a simple case of assault and battery, a rule is made by his Honor or by any judge of this county to draw a jury. Now, the county clerk and the sheriff

will prove to your Honor that rules have been made by some one of the judges of quarter sessions or of oyer and terminer to choose these lists of 48 on both occasions for the past two trials of these men, and no rule was made at that time by any judge of quarter sessions or oyer and terminer to pick a struck jury for the trial of those four men. Whatever rule was made by his Honor, whoever the judge may have been who ruled that a jury be chosen and forty-eight be taken from the list of the general panel, to be served on these defendants on both occasions, that rule is still, if your Honor pleases, in full force and effect as respects these defendants. That rule that they be tried by a common jury from the 48 names from the panel is the full force and effect, and before any rule could be made by your Honor in respect to granting a struck jury in this case that rule would have to be vacated; and where a rule for a struck jury is entered it shall remain in force until the case is tried, and no common jury shall be summoned thereon, unless such a rule shall be first vacated by the court; and if a rule has been made for a struck jury and then the prosecutor attempts to try the defendant or defendants by a common jury he cannot do it because the rule for the struck jury must first be vacated by the court. And if it is so in the case of a struck jury of course it is doubly so in this case, two rules having been made prior to January 4 and prior to January 16 for these defendants to be tried by a common jury under section 82 of the jury act.

Now I refer your Honor to the case of the State *vs.* Bullock in 65 N. J. Law 557. I presume that that was the case that Mr. Besson had in mind when he made this motion. In that case Bullock

was convicted, and afterwards the conviction was reversed, not for any reasons respecting the drawing of the jury or things of that kind respecting a struck or a common jury, but it was reversed for certain errors in the admission of hearsay testimony of some witness or witnesses for the State. But in that case it was plainly and positively and absolutely held that the making of an order for a struck jury is absolutely discretionary with the court, and that the court in no case would exercise his right of discretion for the drawing of a struck jury unless certain rights, certain particular rights, certain particular reasons, certain weighty reasons, very weighty reasons respecting the matter of the trial are brought to his attention. And I say to your Honor in this case there are no reasons whatsoever, there can be no reasons in the face of what has gone on before. If there are reasons to-day those reasons were doubly strong prior to January 4 of this year and prior to January 16 of this year, and I say, with great respect, with great deference to your Honor, that in this application your Honor should exercise a very sound discretion and take into consideration with great strength, with great thought, with great feeling, I might say, the rights of these defendants to be trial by a fair and impartial jury, and not exercise any discretion in this application for a struck jury. If your Honor would exercise a discretion I respectfully say to your Honor that it seems to me, in view of what has gone on in this case, the discretion would be harsh, it would be arbitrary, it would be more or less oppressive as far as the rights of these defendants are concerned, because not long ago, seven months ago, six and a half months ago, no rule was asked, no rule for a struck jury was demanded by the prose-

cutor, and now at this late day, when the law goes into effect, giving your Honor full and absolute authority to select a panel of 60 from the general panel of the term of the county, or from other qualified citizens of the county, I do not think your Honor should exercise that discretion.

Now, if your Honor pleases, I am coming to a point that I most respectfully ask your Honor to give consideration to. I submit to your Honor that in view of what I have said, in view of the fact that these men were ready to go to trial with a common jury on two occasions, this amendment signed by the Governor the other day, an amendment to section 76 of the criminal procedure act, is absolutely and unequivocally an ex post facto law; and I will refer your Honor to a case in the Supreme Court of the United States. It is the case of Kring *vs.* Missouri, in 107 U. S. at page 221. The head note in that case is,

"The distinction between retrospective laws, which relate to the remedy or the mode of procedure, and those which operate directly on the offence, is unsound where, in the latter case, they injuriously affect any substantial right to which the accused was entitled under the law as it existed when the alleged offence was committed."

Now, if your Honor pleases, without going into detail respecting the facts in this case—because the case is a very lengthy one—I want to read to you certain excerpts from this case that I think are applicable on my argument why an order for a struck jury should not be granted.

The Court: Pardon my interruption for a moment. Have you any New Jersey cases on this question you have just raised?

Mr. Kavanagh: No; I have no New Jersey cases.

On page 227 of the case of Kring *vs.* Missouri, 107 U. S., I refer to your Honor to this part of the determination of the court:

"It will be observed that here are grouped contiguously a prohibition against three distinct classes of retrospective laws: namely, bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts. As the clause was first adopted, the words concerning contracts were not in it, because it was supposed that the phrase *ex post facto* law included laws concerning contracts as well as others. But it was ascertained before the completion of the instrument that this was a phrase which, in English jurisprudence, had acquired a signification limited to the criminal law, and the words 'or law impairing the obligation of contracts',—Vol. 2 Bancroft's History of the Constitution, p. 213.

"Sir Thomas Tomlin, in that magazine of learning, the English edition of 1835 of his Law Dictionary, says:

" '*Ex post facto* is a term used in the law, signifying something done after, or arising from or to affect another thing that was committed before.'

" 'An *ex post facto* law is one which operates upon a subject not liable to it at the time the law was made.'

The first case in which this court was called upon to construe this provision of the Constitution was that of Calder *v.* Bull, 3 Dall 386, decided in 1798. The opinion was delivered by Mr. Justice Chase, and its main purpose was to decide that the provision had no application to acts concerning civil rights. It, however, is important, as it discusses very fully the meaning of the provision in its application to criminal cases. It de-

fines four distinct classes of laws embraced by the clause. '1st, Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punished such action. 2nd, Every law that aggravates the crime or makes it greater than it was when committed. 3rd, Every law that changes the punishment and inflicts a greater punishment than was annexed to the crime when committed. 4th, Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offence in order to convict the offender.' Again he says: 'But I do not consider any law *ex post facto,* within the prohibition, that mollifies the rigor of the criminal law; but only those that create or aggravate the crime; or increase the punishment or change the rules of evidence for the purpose of conviction'.''

Mr. Kavanagh: Now I submit, if your Honor pleases, in this case that inasmuch as the amendment of section 76——

The Court: I think I get your point. Your point is if this law had been enacted at the time of the alleged commission of this crime you could not have been in a position to urge this point you are now making, but in view of the fact that this new law has been passed after that, you feel that some substantial right of your client has been impaired and that that has brought you within the inhibition.

Mr. Kavanagh: Yes. Does your Honor desire me to read further?

''An *ex post facto* law is one which, in its operation, makes that criminal which was not so at the time the action was performed; or which increases the punishment, or, in short, which, in re-

lation to the offence or its consequences, alters the situation of a party to his disadvantage.—U. S. *v.* Hall, 2 Wash. 366."

That is the point, if your Honor pleases. Certainly this law, this change, this amending of section 76, in as much as it gives the judge a right to choose sixty names from the panel, from which 24 are struck off, twelve by the prosecutor and twelve by the defendant, and if a rule was allowed for a struck jury only five challenges are allowed to the defendant—surely this law which gives the right to the judge to choose a struck jury at his discretion alters the situation of these four defendants to their disadvantage. Why? Because under the old procedure at the time when they were brought to trial on two other occasions they were entitled to twenty peremptory challenges. Now if your Honor rules that a struck jury should be allowed they are only entitled to five peremptory challenges, and as I said in quoting from Brown *vs.* The State surely that state of facts alters the situation of these four defendants absolutely and unequivocally to their decided disadvantage.

Now, if your Honor will bear with me a few minutes longer, referring to page 232 in Kring *vs.* Missouri:

"The word 'procedure' as a law term is not well understood, and is not found at all in Bouvier's Law Dictionary, the best work of the kind in this country. Fortunately a distinguished writer on Criminal Law in America has adopted it as the title to a work of two volumes. Bishop on Criminal Procedure. In his first chapter he undertakes to define what is meant by procedure. He says: 'S.2. The term "procedure" is so broad in its signification that it is seldom employed in

our books as a term of art. It includes in its meaning whatever is embraced by the three technical terms, Pleading, Evidence and Practice.' And in defining Practice, in this sense, he says: 'The word means those legal rules which direct the course of proceeding to bring parties into the Court and the course of the Court after they are brought in'; and Evidence, he says, as part of procedure, 'signifies those rules of law whereby we determine what testimony is to be admitted and what rejected in each case, and what is the weight to be given to the testimony admitted.'

"If this be a just idea of what is intended by the word 'procedure' as applied to a criminal case, it is obvious that a law which is one of procedure may be obnoxious as an *ex post facto* law, both by the decision in Calder *v.* Bull, 3 Dall, 386, and in Cummings *v.* The State of Missouri, 4 Wall. 277; for in the former case this Court held that 'any law which alters the legal rules of evidence, and receives less or different testimony than the law requires at the time of the commission of the offence, in order to convict the offender', is an *ex post facto* law; and in the latter, one of the reasons why the law was held to be *ex post facto* was that it changed the rule of evidence under which the party was punished.

"But it cannot be sustained without destroying the value of the constitutional provision, that a law, however it may invade or modify the rights of a party charged with crime, is not an *ex post facto* law, if it comes within either of these comprehensive branches of the law designated as Pleading, Practice, and Evidence.

"Can the law with regard to bail, to indictments, to grand juries, to the trial jury, all be changed to the disadvantage of the prisoner by State legislation after the offense was committed, and such

legislation not held to be *ex post facto* because it relates to procedure, as it does according to Mr. Bishop?

"And can any substantial right which the law gave the defendant at the time to which his guilt relates be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot."

And then again, if your Honor pleases, on page 234 of the above case:

"Why is not the right to life and liberty as sacred as the right growing out of a contract. Why should not the contiguous and associated words in the Constitution, relating to retroactive laws, on these two subjects, be governed by the same rule of construction? And why should a law, equally injurious to the rights of the party concerned, be under the same circumstances void in one case and not in the other?"

Now referring again to page 235:

The Court: Permit me to ask you, not with any desire to interrupt your argument, but in view of the *pronunciamento* laid down by Mr. Justice Chase in the opinion from which you have quoted, have you any case that is exactly in point, flat-footed, on the clearcit proposition that where your right of challenge has been minimized and the number decreased that that is of itself an invasion of a substantial right?

Mr. Kavanagh: I have no case. There is no case in New Jersey. I have examined the cases very, very thoroughly.

The Court: Have you examined the Federal Reports; is there a case in Massachusetts or in New York?

Mr. Kavanagh: Your Honor, in the short time I have had—I was served with the notice Wednesday afternoon about three o'clock—I have not been able to go into any other State but our own State of New Jersey, and into the United States Supreme Court. I have lacked the time in that respect. But I certainly will do it if your Honor says so. I have no case exactly in point in respect to that particular point.

The Court: After all, from your angle of the case that is really the meat of your case; that is really the big point.

Mr. Kavanagh: No question about it.

The Court: I just want to read one or two more excerpts, your Honor, and then I am finished. At page 235 in the opinion:

"We are of opinion that any law passed after the commission of an offence which, in the language of Mr. Justice Washington, in United States *v.* Hall, 'in relation to that offence, or its consequences, alters the situation of a party to his disadvantage,' as an *ex post facto* law; and in the language of Denio, J., in Hartung *v.* The People, 'No one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offence was committed, and which existed as a law at the time.' "

And then, turning to pages 249 and 250 of the opinion aforesaid:

"But in addition to these matters of procedure, which are specially protected against legislative change, either for the past or the future, there may be others, in which changes with a retrospective effect are forbidden by the prohibition against *ex post facto* laws. Such, we have already seen,

would be laws which authorize conviction upon less evidence than was required at the time of the commission of the offence, or which altered, to the disadvantage of the accused, the nature and quantity of proof at that time required to substantiate a legal defence; or which, in order words, gave to the circumstances which constituted and attended the act a legal signification more injurious to the accused than was attached to them by the law existing at the time of the transaction."

Now I quote at the end of page 250:

"But matters of possible defence, which accrue under provisions of positive law, which are arbitrary and technical, introduced for public convenience or from motives of policy, which do not affect the substance of the accusation, or defence, and form no part of the *res gestae,* are continually subject to the legislative will, unless, in the meantime, by an actual application to the particular case, the legal condition of the accused has been actually changed. His right to maintain that status, when it has become once vested, is beyond the reach of subsequent law."

And I submit to your Honor, with all sincerity, that under all the facts and circumstances that have happened in this case, the rules for a common jury having been signed on two different occasions for trial on those respective dates that I have quoted, and inasmuch as the defendants were not brought to trial on those respective dates, and inasmuch as the rules for common juries are still in full force and effect, and inasmuch as under all of my argument, and especially because of the argument I have submitted to your Honor that your exercise of this right is one of sound discretion, under all the circum-

stances submitted your Honor should not exercise any discretion whatsoever to give a rule for a struck jury in this case, because the defendants would be prejudiced to a very considerable extent, in view of what has happened before, that is in view of the prosecutor not having made application for a struck jury a long time after these men were indicted. And I say, in summing up—my argument has been rather lengthy, but I feel that we owe, Mr. Hart and myself, a very serious duty to these defendants in respect to opposing this application for a struck jury, and we feel from all the facts and circumstances in the case that your Honor should absolutely refuse to exercise his discretion in this matter to bring in a panel of sixty for a struck jury, because the rules for a common jury are still in full force and effect and no rule can be made for granting the state a panel for a struck jury until those other rules are vacated by the court.

The Court: Mr. Prosecutor, what have you to say, directing your reply first to the point that Mr. Kavanagh makes, that there are two previous orders of the court still in force and effect and not vacated; and secondly, on his proposition with regard to the *ex post facto* law?

Mr. Besson: Before I enter into a discussion of that I would like to call your Honor's attention to this fact, that this notice of motion of course is entitled in the Oyer and Terminer, and this order if made will have to be made in the Oyer and Terminer. I would like to have a rule entered on the record that your Honor in the absence of a Supreme Court justice will convene a Court of Oyer and Terminer and sit as a Court of Oyer and Terminer for the purpose of hearing this matter, and that that be entered on the minutes so

that there can be no objection to the jurisdiction of your Honor in hearing the argument on this rule.

Mr. Kavanagh: Of course, Mr. Besson's application comes rather late, but I will not object to it.

The Court: The court will convene a Court of Oyer and Terminer and sit as a Court of Oyer and Terminer.

Now, I suggest that you take up the first point.

Mr. Besson: As I understand, those orders have spent their force in the fact that the juries were drawn. They are orders which have really been accomplished. While a search is being made for the orders may I proceed on the other proposition?

The Court: Yes.

Mr. Besson: On this question of what constitutes an ex post facto law, the leading case of Calder *v.* Bull has pointed out four elements, which have been recited by Mr. Kavanagh: 1st. "Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action." Manifestly this situation cannot apply to that.

2nd. "Every law that aggravates the crime or makes its greater than it was when committed." Manifestly, I think, that has no application.

3rd. "Every law that changes the punishment and inflicts a greater punishment than was annexed to the crime when committed." Manifestly that has no application.

4th. "Every law that alters the legal status of evidence, and receives less or different testimony than the law required at the time of the commission of the offence in order to convict the of-

fender." Now, this has no relation to the kind of evidence.

Now, our statute on Statutes, in section 4 adopts a rule of statutory construction which I think is mandatory and which applies to this case, and which applies to our office in making this application and makes its necessary for us to make the application. That section provides, "That no offence committed, and no liability, penalty or forfeiture, either civil or criminal, incurred previous to the time when any statutory provision shall be repealed or altered by this act, or by any act hereafter passed, shall be discharged or affected by the repeal or alteration of any statute under such offence, liability, penalty or forfeiture was incurred, unless it be expressly declared in the act of the legislature whereby such repeal or alteration is or shall be made, that offenses, liabilities, penalties or forfeitures already committed or incurred shall be thereby released or discharged; and indictments and prosecutions for such offenses, liabilities, penalties and forfeitures shall be instituted, and be proceeded with in all respects as if such prior statute had not been repealed or altered; except that when such subsequent act of the legislature shall relate to mere matters of practice or mode of procedure, the proceedings had thereafter in the indictment or prosecution for such offenses, liabilities, penalties or forfeitures shall be in such respects, as far as is practicable, in accordance with the provisions of such subsequent act of the legislature."

Of course, in applying for a struck jury, we would be simply following a course of statutory procedure, and under the provisions of this statute we would be obliged to follow the new course of procedure rather than the old. Now, all that

the constitution of the State guarantees is a trial by a fair and impartial jury, and the manner of selecting that jury is not a vested right, and I think that there is nothing in any decision which so holds.

Now, the sufficiency of this struck jury bill has been considered by the Court of Errors and Appeals. On several occasions it has been sustained, and I see no reason why the Court in its discretion, if it feels that this situation is one which justifies a struck jury—which I submit that it is—should not grant such a rule.

The Court: Have you sent for those orders?

Mr. Hefferman: On the morning of the trial the order reverts back to the county clerk's office.

Mr. Besson: I submit that those orders have spent their force.

The Court: I would like to see what the order of the Court was, if there was an order.

(A short recess was declared.)

The Court: I understand from the deputy county clerk that he hasn't any record of any such order. If there are orders I want to look at them, because maybe there is something in your point. My offhand opinion would be that probably those orders had spent their force and effect; but they are like bail bonds sometimes, they are just for appearance, and if a man appears in court the condition of that bond is fulfilled. On the other hand, if the bail bond provides a further clause, "Until the further order of the court" or "from day to day hereafter", as you know only too well, until the case is finally closed the bond is in full force and effect, even though there might be a first trial and a disagreement of the jury.

Mr. Kavanagh: I should like to know from Mr. Landwehr how a jury is picked without a rule from the Court.

Mr. Landwehr: That is up to the sheriff.

The Court: I want to give you the full benefit, Mr. Kavanagh, of every presentation in your record of any facts, if you have any facts to submit to me, and I do not want to assume a hypothesis as a basis upon which to predicate a conclusion unless you have the facts established, and I feel in all justice to your clients you are entitled to that opportunity, and I want to afford you such opportunity if you can present such facts and proof. On the other hand, if you cannot present such facts and proof I shall have to strike your argument from my mental consideration of the case because there are no facts to support what you say.

Mr. Kavanagh: I understood that before a jury was picked to sit in any criminal case there would have to be an order filed by a judge holding the Common Pleas or the Quarter Sessions to authorize the sheriff to bring jurymen into court, from which panel a panel was to be picked. That was my understanding of the procedure. I think in view of the fact that the county clerk says that there was no rule, no order filed and made by a judge of the Common Pleas, Quarter Sessions or Oyer and Terminer for the bringing together of these 48 men from the general panel of the term to try these defendants on two occasions in January, I should like to have the sheriff elucidate to your Honor how these 48 names on both juries that were picked to try these defendants on January 4 and January 16 were brought into court—by whose order. That is my difficulty. In other words, your Honor, my reasoning was this: Be-

fore a struck jury could be allowed in this case your Honor would have to make some rule or some order permitting the State to try the defendants by a struck jury. In the other cases, how did these two particular panels of 48 come into court, on whose order, or whose ruling? Surely they did not come in haphazardly, without being ordered to appear for the trial of these cases. What I want to know, and I think what your Honor wants to know, is who made the order to bring in these two panels of 48.

The Court: If an actual order was made for January 4 and January 16 of this year?

Mr. Kavanagh: Yes.

The Court: I am waiting for proof, if Mr. Kavanagh has any proof to offer of those orders.

WILLIAM P. HEFFERMAN, sworn.

By Mr. Kavanagh:

Q. What is your name? A. William P. Hefferman.

Q. What is your occupation? A. Jury Clerk, with the sheriff.

Q. How long have you occupied that position? A. Fourteen years.

Q. Are you familiar with the procedure of the Sheriff's office in the picking of juries for the trial in criminal cases? A. I am.

Q. Will you tell his Honor in detail just how any particular jury for the trial of any criminal case is chosen?

Mr. Besson: I object to that on the ground that the act speaks best for them-

selves, that this is not a matter for expert opinion; that the statute provides the manner in which juries must be chosen.

The Court: The objection will have to be sustained because after all it is the statute which prescribes it; and much as we would like to hear Mr. Hefferman's elucidation you know as a lawyer we are bound by the statute. Furthermore, the question for determination in this case is what was done in this case, if he knows: Was there an order actually made and entered, and if so when and where, and where is it?

Q. Are you familiar with indictment 190, the case of the State *vs.* Frank McNally and others? A. Yes.

Q. Was that case for murder brought for trial at any time during the present year? A. No, sir, not to my knowledge.

Q. Was it noticed for trial? A. Yes.

Q. When was it first noticed for trial? A. On January 4.

Q. Were jury lists of 48 names submitted to the defendants under section 82?

Mr. Besson: I object to that on the ground that the records are the best evidence, and the records should be introduced, and not the statement of this witness.

Mr. Kavanagh: There are no records.

Mr. Besson: There is no evidence the record has ever been destroyed.

The Court: I would imagine that as jury clerk he could keep a record.

The Witness: I have a record.

The Court: I think we are entitled to the benefit of what that record shows.

Mr. Kavanagh: I think I misunderstood Mr. Besson.

The Court: I mean the record of the court as to what was done with relation to the selection of a special jury. As I understand, that is a procedure which takes place as a matter of course, the selection being made in certain classes of high crimes which under the criminal procedure law require that a special panel of 48 names be served on the prosecutor's office and on the defense, and that is done two days before the trial, and it follows automatically.

Mr. Kavanagh: That is what we are trying to find out—who chooses the names.

The Court: Maybe this witness does not know.

The Witness: I do. You have not given me a chance to answer. I do know.

Q. All right. Tell the court.

Mr. Besson: That I think is simply a legal discussion, and I think the criminal procedure act and the jury act and the amendments to them prescribe the manner in which the thing should be done, and I think the court should be guided by that and not the opinion of this witness, which may be wrong, with all deference to him.

What I am interested in—and you have offered to present proof—is whether an order was issued by one of the judges sitting in the Oyer in this particular case. What I want to know is, is that order in effect or has it spent itself?

Mr. Kavanagh: That is what I want to know.

The Court: Let us get the orders so that we can see what they are.

Mr. Besson: I think the mistake Mr. Kavanagh has made is in assuming that there was an order. There is nothing in the statute which prescribes the entry of any order. The sheriff has a function to perform in connection with the drawing of the list of 48 names, which function he performs as a necessary incident to his other duties; and only in a case where the court for some reason determines that a greater number than 48 shall be drawn is that course followed.

Mr. Kavanagh: If your honor pleases, I have always labored under the misapprehension that has now come out clearly to my mind that the court by direct order, either to the sheriff or to the county clerk, made an order directing the sheriff to choose a certain jury to try certain criminals. However, as long as we have the information given us by the deputy county clerk, Mr. Landwehr, and by the deputy sheriff, Mr. Hefferman that no such order was made, notwithstanding that fact, that no order was made by any of the common pleas judges, judges of the Oyer and Terminer or of the Quarter Sessions, nevertheless my point still holds, that we have acquired a legal status inasmuch as under the two proceedings before we were obliged to go to trial under a common jury, 48 names being served on us under section 82. We have acquired that legal status inasmuch as the prosecutor prior to those two occasions when we were brought to trial never made any motion, never did anything

whatsoever with respect to having a struck jury to try these defendants; and now at this late day he comes in. I say that our legal status is interfered with. Our substantial rights that we have acquired under the cases that I have set forth are interfered with, and I say that in your Honor's sound discretion no rule should be made at this late day for a struck jury to try these defendants.

The Court: Do you desire to withdraw the witness?

Mr. Kavanagh: Yes, your Honor.

The Court: Now, Mr. Prosecutor, under this act of course this struck jury may be ordered upon application of the prosecutor, or even on application of the defendant, or even by the court on its own initiative. This is a matter of public import, and the court naturally, in order to see that justice is done not only to the defendants but to the state, is very much concerned. I am going to ask the county clerk, in view of the fact that the jury commissioner in this county the other day, according to the public press, made a statement which I feel the court must take some judicial cognizance of about the character of jurors, whether any report was filed with your office.

Mr. Landwehr: No, sir.

The Court: I think we will have you sworn in order to have that on the record.

J. GEORGE LANDWEHR, sworn.

By the Court:

Q. Has any report been filed with your office as the clerk to the Oyer and Terminer and clerk of the Court of Quarter Sessions and clerk of the Court of Common Pleas, by Mr. Stewart, Jury Commissioner, in connection with the jury list or his refusal to act, within the last week or so, in the matter of the selection and picking of jurors? A. No, sir.

The Court: Mr. Prosecutor, I would therefore ask you now, before an adjournment of this matter, that we send for Mr. Stewart. I would like him requested to come here and give his reasons for making such a declaration, because this defendant is entitled to a speedy trial, as his counsel insists, and we will get the reasons from the jury commissioner for his refusal or declination at that time to proceed with the selection of a panel. We will send for Mr. Stewart as soon as he is through in Judge Kinkead's court.

By Mr. Kavanagh:

Q. Was objection made to any of the petit jurors by the jury commissioner? A. No, sir.

Q. By whom was objection made? A. I do not know of any about the petit jury. This was as to the grand jury only—only what I saw in the newspapers.

Q. You were not in court? A. No, sir.

(A short recess was declared.)

The Court: The court of its own initiative will call Mr. Stewart and have him sworn.

THOMAS J. STEWART, sworn.

By the Court:

Q. Mr. Stewart, the public press within the last two or three days carried reports that you had made certain investigations of the jury list? A. They did.

Q. Did your investigation cover the petit jury panel as well as the grand jury panel, or the grand jury panel alone? A. The grand jury panel alone.

Q. When did you go into office and assume your duties? A. About the 5th of April, if I remember correctly.

Q. Has the present panel been a panel of jurors selected by you in the performance of your duties as jury commissioner, or are the lists of jurors which you have been heir to from your predecessor? A. Yes—heir to.

Q. Just explain what you mean by that. A. When I assumed the office these names were handed to me. I understand they were made way in Sepember last.

Q. September of last year? A. Yes.

Q. So that in reality the panel that is now serving is not a panel which you have had any part in the selection of in conjunction with the sheriff? A. None whatever.

Q. I have just requested you to appear here before me, and I have been informed by one of my

officers you have been just selecting a jury before Judge Kinkead. A. Yes; a petit jury.

Q. Is that jury also being selected in the same way you have described this other jury—from a list submitted by your predecessor, Mr. Knoop? A. Yes.

Q. And not by you? A. Not by me.

Q. So this jury is none of your selection in conjunction with the sheriff? A. No.

Q. And that panel you are selecting this morning is to begin when? A. May 13, I believe.

Q. And how long service are they called for? A. That I do not know; I think about ten days.

The Clerk: Two weeks—until May 24.

By Mr. Kavanagh:

Q. In pursuance of what order, Mr. Stewart, or of whose order are you now selecting a petit jury? A. Justice Kalisch.

Q. And that order of Mr. Justice Kalisch was made when—if you know? A. For the selection of the grand jury?

Q. No; the petit jury. A. I have a slip here, handed me by the clerk.

Mr. Besson: I object to this, your Honor. I think this is objectionable because the order speaks for itself, and Mr. Stewart is trying to tell something from his own recollection, which may simply garble the record.

Mr. Kavanagh: If Mr. Stewart does not know the date that is perfectly all right. My point is, coming back to my lengthy argument of this morning, with respect to the opposal of an order to be made by your Honor in the matter of the drawing of a struck jury in the case of the State *vs.*

McNally and others, information has come to me respecting what I said before. I was laboring under the impression that for each trial in any criminal case, be it murder or otherwise, an order was made by some one of the common pleas judges, either sitting in quarter sessions or sitting in Oyer and Terminer. Information has come to me now that at the beginning of each term of this Court the Supreme Court Justice holding the circuit in Hudson County signs an order in which there are a large number of names—three or four hundred—under the statute, held to serve as petit jurors for that particular term. There was some question on the part of the prosecutor a few minutes ago respecting a denial of my statement that some order was made by some one of the judges, whether it was the former Supreme Court Justice holding the circuit, Mr. Justice Minturn, or whether it was the present Supreme Court Justice holding the circuit, or whether it was any one of the judges, including your Honor, sitting here as Common Pleas judges in this county. I have been reliably informed now that there always is an order before the beginning of the term, signed by the Supreme Court Justice holding the circuit, directed to the Sheriff and to the County Clerk, in respect to the list of names that are contained on that order signed by the Supreme Court Justice for the County Clerk and the Sheriff to bring into Court at the beginning of Court these particular names of men included in the order, who are to serve as petit jurors or grand jurors

for any particular term. So I see now that although I was laboring under a misapprehension as to the time when the order was signed, nevertheless there was, there always is an order signed, but by the Supreme Court Justice holding the circuit at the beginning of each particular term.

Mr. Besson: It is manifest that that order relates to jurors generally and not to any particular cause. Counsel was contending that there were two orders in this particular cause.

The Court: Correct.

Mr. Kavanagh: That is true, your Honor.

The Court: There is no question but that under the constitution of the State of New Jersey the right of a trial by jury shall remain inviolate. There is no doubt but that the defendants in this case are entitled to an impartial trial by a jury of their peers. But after giving the argument of counsel for the defense, as well as the argument of the prosecutor of the pleas, careful consideration,—and while at first blush, to be very frank about it, I did think there might be some weight or merit in counsel's contention on the proposition that there was an order which still remained in force and effect until superseded, however, on the proofs adduced before me there has been no evidence or no facts offered of any order having actually been made, so that the question of whether or not that order had spent its force in reality is not before me—so that point number 1 will have to be brushed aside, and I do not see anything in counsel's contention on that proposition.

Now, in regard to the second point, which is the most serious one, in which he urges that the recent act of the legislature, just passed, to wit, Senate bill 255, gives to the court of oyer and terminer upon application being made either by the prosecutor or the defendants, or on its own motion, power to select a struck jury in murder cases; an examination of the case cited by counsel—and incidentally he has no authority to support his contention, either in the State of New Jersey or any other state; and in making that statement I do not want it to be understood that I am in the slightest degree criticising him, because I realize that counsel has had comparatively little time to prepare a brief in the matter—however, the question seems to be very exhaustively dealt with in the case that counsel cites, Kring *v.* Missouri, 107 U. S. 221, in which the court in its opinion quotes the case of Calder *v.* Bull, in which the opinion was delivered by Mr. Justice Chase, and in that case the learned justice prescribes very definitely the distinct classes of law embraced by the clause relating to the passage of ex post facto laws, and he says, first, "Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action". That pronunciamento certainly does not apply to this situation.

Secondly, "Every law that aggravates the crime or makes it greater than it was when committed." That pronunciamento likewise falls, because it does not fit the case at bar.

Thirdly, "Every law that changes the punishment and inflicts a greater punishment than was annexed to the crime when committed." Manifestly that provision or pronunciamento does not apply.

Fourthly, "Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offence in order to convict the offender." The phraseology of that pronunciamento is the nearest that the court can find to anything that will in the silghtest degree uphold counsel's contention; but I feel that even that is not broad enough.

I realize that the individual rights of the defendants in this case in so far as their rights to life and liberty are concerned should be safeguarded, and they should be safeguarded against retrospective legislation; but I see nothing in the statute under which the prosecutor is moving this morning to bring the defendants within the inhibitions that have been referred to. I cannot see where any of their substantial legal rights have been infringed upon; and I want to say that nobody would be any more jealous to safeguard the rights of any free-born Americans than I would. It seems to me that the point that is made is one that is made rather to a question, and is addressed to a question of procedure and practice rather than to the question involved of it being an ex post facto law, and I will therefore sign the rule when the same is prepared by the prosecutor accordingly.

Mr. Kavanagh: I ask an exception to your Honor's ruling in this case.

The Court: I doubt whether you have an exception, it being a discretionary matter.

Mr. Kavanagh: I will ask for it anyway, your honor.

The Court: Yes.

(Exception allowed, signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

The Court: Now, Mr. Kavanagh, you have asked for a speedy trial. I am going to now request the prosecutor that he just as expeditiously as he possibly can set this case down for trial.

Mr. Kavanagh: In answer to the last statement of your Honor; I said that we were entitled to a speedy trial; I did not mention in respect to any order that might be made by your Honor in respect to the granting of a struck jury. I said that prior to the time that this application was made by the prosecutor we were entitled to a speedy trial, and a speedy trial was given us—that is, if they had gone to trial on January 4 and if they had gone to trial on January 16, we being ready; but I did not mention anything to your Honor in respect to a speedy trial if your Honor signed an order giving the prosecutor a right to try these defendants by struck jury.

HUDSON COUNTY COURT OF OYER AND TERMINER.

STATE OF NEW JERSEY, *vs.* FRANK DONATO, GEORGE ORMSBY, VINCENT O'KEEFE and FRANK McNALLY, Defendants.	Before: Hon. Thomas H. Brown, J. and a Jury.

JERSEY CITY, N. J., June 4, 1929.

Appearances:

JOHN DREWEN, Esq., Prosecutor of the Pleas, for the State.

WILLIAM A. KAVANAGH, Esq. and EDWARD J. HART, Esq., for the Defendants.

Mr. Drewen: The notice for the striking of the jury in the case of the State *v.* McNally and others on the charge of murdering one Catherine McGee is returnable this morning, and I move your Honor to resolve this court into the Hudson Oyer and Terminer.

The Court: It is so ordered.

Mr. Kavanagh: If your Honor pleases, respecting the notice served upon Mr. Hart and myself as attorneys——

The Court: Do you object to the form of the notice?

Mr. Kavanagh: No, that is not the purpose of my objection, not to the form of notice.

The Court: Neither to the form nor the sufficiency of the notice?

Mr. Kavanagh: Oh, no. On May 1st of this year we received notice notifying us that the Prosecutor of the Pleas of this County would apply for an order for a struck jury to try the defendants in the State *v.* Frank Donato, George Ormsby, Vincent OKeefe and Frank McNally. On May 3rd an argument was had by counsel for the defendant and the Prosecutor for the State. We objected very strenuously to your Honor making an order for a struck jury in that case and set forth at length our reasons why——

The Court: Do you want the advantage of your objections as previously urged at this time?

Mr. Kavanagh: Yes.

The Court: So ordered and so allowed.

Mr. Kavanagh: And in addition to the objections we raised at that time, your Honor, I desire at this time also to register some other objections respecting the list of sixty names that has been submitted by your Honor and our objections in respect to the list of sixty names from which we are going to strike twelve names and the Prosecutor twelve names—our objection is that the list of names does not truly and fairly take in all of the municipalities of this County. There are no names from some of the municipalities in this County. For instance, there are no names taken

from the voting list of the citizens of Secaucus; there are no names taken from the voting list of the citizens of North Bergen; there is only one name taken from the voting list of the City of Hoboken; there is only one name taken from the voting list of the City of Weehawken; there are no names taken from the voting list of the citizens of Guttenberg. As a matter of fact, from a town like Kearny in this County, a town of very small population, on this list of sixty names, nineteen names are taken from the citizens of that town, whereas Kearny, being one of the smallest municipalities in the county, compared with the City of Hoboken, in the township of Kearny nineteen names are taken from the voting list and the City of Hoboken only one name.

The Court: What is the point about that?

Mr. Kavanagh: The point is that I submit very respectfully to your Honor, the names in this panel, the way I look at it, should be chosen from a pro rata list as far as possible of all the municipalities within the County.

The Court: Have you any authority that says so?

Mr. Kavanagh: No authority, your Honor.

The Court: I think I have your point, Mr. Kavanagh; you may have your exception. Is there any other point?

(Exception allowed, signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

Mr. Kavanagh: That is the only reason that we are submitting at this time outside of those we submitted on the previous occasion when the order was made.

The Court: Overruled.

Mr. Kavanagh: Exception to your Honor's rule.

The Court: I doubt if you have any right to an exception, this being an entirely discretionary matter. However, your clients are on trial for their lives and it is a matter of vast importance to them, and if there is any exception allowed to you I will be only too happy to allow it in order that their interests may be protected and properly safeguarded by you in the presentation of the case.

(Exception allowed, signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

Mr. Drewen: I allow to the defense the right to strike first.

The Court: While I don't think it is essential, if counsel desires to have his clients here during this proceeding we will send to the County Jail for them.

Mr. Drewen: These defendants are on bail, your Honor.

The Court: Do you waive the appearance of your clients?

Mr. Kavanagh: Yes, we will waive it.

The Court: Proceed.

Mr. Kavanagh: Your Honor, we strike from the list of sixty names number seven,

Mrs. Alice V. Hamilton, 173 Jewett Avenue, Jersey City.

Mr. Drewen: The State strikes the name of T. Richmond Wells.

Mr. Kavanagh: The Defendants strike from the list the name of Robert F. Dennis, 92 Gifford Avenue, Jersey City.

Mr. Drewen: The State strikes from the list the name of Nathan Abramson.

Mr. Kavanagh: We will strike from the list the name of Clarence Forney, Cartaret Club, 2572 Boulevard, Jersey City.

Mr. Drewen: The State strikes from the list the name of Mrs. Celia M. Pritchard.

Mr. Kavanagh: The Defendants strike from the list the name of Harvey B. Nelson, 379 Fairmount Avenue, Jersey City.

Mr. Drewen: The State strikes from the list the name of Mrs. Edith W. Stewart.

Mr. Kavanagh: The defendants strike from the list the name of Mrs. Anna Dinkel, 50 Glenwood Avenue, Jersey City.

Mr. Drewen: The State strikes from the list the name of William Rannenberg, 403-44th Street, Union City.

Mr. Kavanagh: The Defendants strike from the list the name of Miss Bessie Polk, 50 Glenwood Avenue, Jersey City.

Mr. Drewen: The State strikes from the list the name of Mrs. Amelia E. Dubois, 35 West 34th Street, Bayonne.

Mr. Kavanagh: The Defendants strike from the list the name of Miss Beatrice Koonz, 253 Harrison Avenue, Jersey City.

Mr. Drewen: The State strikes from the list the name of Margaret Sullivan, 2600 Boulevard, Jersey City.

Argument.

Mr. Kavanagh: The Defendants strike from the list Chester E. Hoagland, 277 Argyle Place, Kearny.

Mr. Drewen: The State strikes from the the list the name of Jacob Solomon, 66 Phasent Place, Kearny.

Mr. Kavanagh: The Defendants strike from the list the name of James Y. Burnett, 19 West 36th Street, Bayonne.

Mr. Drewen: The State strikes from the list the name of Frank Lau.

Mr. Kavanagh: The Defendants strike from the list the name of William A. Jones, 99 Seeley Avenue, Kearny.

Mr. Drewen: The State strikes from the list the name of Charles E. Heidt, 2600 Boulevard.

Mr. Kavanagh: The Defendants strike from the list the name of Roger W. McAdams, 48 Grand Place, Kearny.

Mr. Drewen: The State strikes from the list the name of Thomas Shea.

Mr. Kavanagh: The Defendants strike from the list the name of C. Alfred Burhorn, 65 10th Street, Hoboken.

Mr. Drewen: The State strikes from the list the name of Charles Thomas,. 2600 Boulevard.

HUDSON COUNTY COURT OF OYER AND TERMINER.

STATE OF NEW JERSEY *vs.* FRANK DONATO, GEORGE ORMSBY, VINCENT O'KEEFE and FRANK McNALLY, Defendants.	Before: Hon. Thomas H. Brown, J. and a Jury.

Jersey City, N. J., June 24, 1929.

Appearances:

JOHN DREWEN, Esq., Prosecutor of the Pleas, for the State.

WILLIAM A. KAVANAGH, Esq., EDWARD J. HART, Esq., for the Defendants.

Mr. Drewen: If your Honor pleases the State moves for trial of the case of the State of New Jersey *vs.* Frank Donato, George Ormsby, Vincent O'Keefe and Frank McNally, the indictment being for murder, and ask for the calling of the jury brought here for the trial of this case. Of course, I also move that the Court resolve itself into the Hudson County Court of Oyer and Terminer in the absence of the Justice of the Supreme Court.

The Court: It is so ordered.

Mr. Drewen: And it is in that Court that I move to try the indictment.

The Clerk: Your Honor, I have a struck jury list of thirty-six names, numbered according to the veniremen, in the case of the State of New

Jersey *vs.* Frank Donato, George Ormsby, Vincent O'Keefe and Frank McNally, at the Bar.

Mr. Kavanagh: If your Honor pleases, at this time I desire your Honor to permit us to withdraw our plea of not guilty, heretofore interposed in this case, in behalf of all four defendants, in order that we may make a motion to quash the indictment.

The Court: What does the Prosecutor say to that?

Mr. Drewen: Why, I suppose Mr. Kavanagh is right to make this motion.

The Court: It is the customary proceeding. Very well.

Mr. Kavanagh: We move to quash the indictment in this case against Frank Donato, George Ormsby, Vincent O'Keefe and Frank McNally, and assign to your Honor the following grounds: This is an indictment for murder. There are three counts in the indictment. The first count is for murder. The second count is for manslaughter and the third count is for assault and battery. The first count reads: "The Grand Jury of the State of New Jersey in and for the body of the County of Hudson, upon their respective oaths present, that Frank Donato, George Ormsby, Vincent O'Keefe and Frank McNally, late of the City of Jersey, of the County of Hudson, on the 6th day of November in the year of Our Lord one thousand nine hundred and twenty-eight, with force and arms at the City of Jersey, in the aforesaid County, and within the jurisdiction of this Court, on Catherine McGee, in the peace of God and of this State, then and there being, did wilfully, feloniously and of his malice aforethought, kill and murder, contrary to the form of statute in such case made and provided and against the

peace of this State, the Government and the dignity of the same.

My first motion to quash the indictment is on the ground that the first count does not set forth with any clearness or any perspecuity whatever, the charge against these four men. In other words, the first count of the indictment sets forth four men as being the defendant, and then in the material, substantial part, that is, the charging part charging this crime of murder the indictment goes on to say "one Catherine McGee in the peace of God and of this State then and there being did wilfully, feloniously and of his malice aforethought kill and murder."

Now I say to your Honor that the indictment—the first count of the indictment should be absolutely quashed and have nothing holden, on the ground that there is a fatal variance between the defendants who are charged with this crime and the wording of this first count. In other words, there are four defendants charged with this murder and in the most material part, most substantial part of the indictment the adjectives used "did wilfully, feloniously and of his malice aforethought kill and murder."

Now, it is incumbent upon the State, under the law, it seems to me, your Honor, to start with absolute clearness and absolute perspicuity the person who is alleged to have committed this murder, but this first count of the indictment does not do that. It charges four men with the crime of murder and then in the most important part of the indictment, the very substance of the indictment, the very material and substantial part of the indictment, charging the crime, alleges that he or his.

Now, who did commit the murder? I say to your Honor with all respect that there is a fatal variance between the charging part and the defendants who are alleged to have committed this crime. No particular person is claimed. They are not charged as principals or accessories. No one in this first count is charged as a principal, and no one in this count is charged as an accessory, and I say to your Honor that in view of that absolute variance, fatal variance, to our minds in this indictment, the indictment ought to be quashed, and I respectfully ask your Honor to quash the indictment, and I also allege, as I said before, that we do not know who is charged with the crime, as we are bound to know under the indictment.

The State does not tell us, as it is bound to tell us, who is principal and who are accessories in this indictment, and for that reason the indictment being fatal, there being a fatal variance in the wording of the indictment, I submit to your Honor with all respect that the indictment ought to be quashed against all four of these defendants.

The Court: Mr. Kavanagh, let me understand you. Is it your allegation and insistment that the language of the indictment is not sufficiently certain; in other words, that it is ambiguous?

Mr. Kavanagh: Absolutely, sir; not only that, but there is a fatal variance in the wording, in the entire wording of the indictment.

The Court: Under the case of State *vs.* Read, reported 98 N. J. Law Reports at page 350, and particularly at page 353, the question of an indictment was there passed upon in that case, on the question of ambiguity, and the court there in the course of its opinion, said that if the language was not sufficiently certain to apprise the defendant as to which of these alternatives, that is re-

ferring to the indictment, the State proposed to rely upon, the remedy was by way of a demand for a bill of particulars.

Mr. Kavanagh: I understand that, your Honor.

The Court: So your motion will be denied.

Mr. Kavanagh: I am not in this case or any other case, if your Honor please, bound to demand a bill of particulars. The State does not find or make any defendant or defendants demand from the Prosecutor a bill of particulars in respect to any allegation in the indictment. I understood the matter of the bill of particulars, and I purposely did not ask the Prosecutor for one, because of the reasons that I am now urging on this motion. I ask an exception to your Honor's ruling.

(Exception allowed, signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

Mr. Drewen: We at this time move the court for leave to amend the indictment by stating for the word "his", in the first count preceding the words "malice aforethought, kill and murder", the word "their", so that the indictment will read that "Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe, late of the City of Jersey City in the said County of Hudson on the 6th day of November in the year of our Lord one thousand nine hundred and twenty-eight with force and arms at the City of Jersey City aforesaid, in the County aforesaid, and within the jurisdiction of this Court, one Catherine McGee, in the peace of God and of this State, then and there being, did wilfully, feloniously and of their malice aforethought, kill and murder."

Mr. Kavanagh: I object to that, if your Honor please. I think the request for an amendment comes too late at this time, and I object to it.

The Court: It will be allowed.

Mr. Kavanagh: I take an exception to your Honor's ruling.

(Exception allowed, signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

The Court: I suppose we ought to arraign these defendants, now that their plea has been withdrawn, for the purpose of the motion.

Mr. Drewen: Your Honor is correct about that.

The Court: So we will have the four defendants step forward.

Mr. Kavanagh: We interpose a plea of not guilty, as originally interposed.

The Court: Note for the purpose of the record that all four defendants are being arraigned before the court and that through their counsel Mr. Kavanagh they desire to enter the plea of not guilty, and the State now moves the trial.

Mr. Kavanagh: I have another motion, if your Honor please, at this time to set forth to your Honor, and I have put the motion in writing. It is not only a motion, but it is also a challenge, to quash the array of jurors, and I submit my written challenge to your Honor, and I will now read to your Honor my reasons for quashing the panel heretofore drawn in this case and summoned to appear here this morning for the trial of this case, and also to quash the array of the jurors on this panel.

To the Honorable, Thomas H. Brown, Judge of the Hudson County Court of Oyer and Terminer.

Preliminaries.

Defendants, Frank Donato, George Ormsby, Vincent O'Keefe and Frank McNally, by their Attorneys, William A. Kavanagh and Edward J. Hart, challenge the array of Jurors drawn for the trial of the indictment in this cause and move to quash the said array upon the following grounds:

1. Because Chapter 246 of the Laws of 1929, under which the order was made for the striking of a Jury for the trial of the said Indictment against the said defendants, denies the said defendants due process of law.

2. Because the aforesaid Act violates the constitutional provision respecting *ex post facto* law, for the reason that the said Act:—

(a) changes the method of regulating peremptory challenges.

(b) is founded upon an illusory classification, namely, murder cases, which in itself is special and discriminate legislation.

(c) if it is intended to be applied to murder cases because of the severity of the penalty, it does not include within its purview the cases of treason and assault of governmental executives, which are likewise punishable with death.

3. The aforesaid Act of 1929 is entitled: "A further supplement to an Act entitled 'An Act relating to Courts having criminal jurisdiction and regulating proceedings in criminal cases' (Revision of 1898), approved June 14, one thousand eight hundred and ninety eight", when in fact its context refers to selecting struck juries, which method is now repealed by reason of the Act of 1929 relating to the appointment of struck juries selected by the sheriff and the jury commissioner.

Preliminaries.

4. The Act of 1929 provides for the striking of certain names "in the usual way", which under the law must mean the legal way. Is the usual way to be found in the present struck jury act or where is it to be found?

5. The aforesaid Act of 1929 does not provide in any way for any repeal of any provision inconsistent with the law passed in 1898.

6. The aforesaid law of 1929 substitutes a new method of striking and empanelling a jury, legislatively depriving the defendants of a right which existed in the law when the crime of which they are charged was committed.

7. The aforesaid act of 1929 subjects the defendants to an illegal disadvantage which was legally non-existent at the time of the crime for which they were indicted and legally works manifest wrong and injury to them, because said act changed to their detriment and injury the number of peremptory challenges to which they were entitled.

8. The aforesaid act is unconstitutional because it is a statute which was passed by the legislature after the commission of the alleged offense for which the said defendants were indicted, and respecting said offense and in relation thereto and its consequences, said act of 1929 alters the situation of the defendants accused of the commission of the said offense to their disadvantage.

Even assuming for the sake of argument that the aforesaid Chapter 246 of the laws of 1929 is a constitutional enactment and that the legislature may reduce or abolish entirely the peremptory challenges allowed the defendants, the defendants here contend that their case does not

come under the operation of that statute which purports to provide as follows:

"When a rule for a struck jury shall be entered upon any indictment for murder, the court granting such rule may, upon motion of the prosecutor, or of the defendant, or on its own motion, select from the persons qualified to serve as jurors in and for the county in which any indictment was found, whether the names of such persons appear on the list of jurors prepared and selected by the commissioners of jurors of the persons qualified to serve as jurors in and for such county or not, sixty names with their places of abode, from which the prosecutor and the defendants shall each strike twelve names in the usual way, and the remaining thirty-six names shall be placed by the sheriff in the box in the presence of the court, and from the names so placed in the box, a jury shall be drawn in the usual way."

10. In this case the defendants have not been indicted for murder only, but they have been indicted for murder, manslaughter and assault and battery, all of which offenses are alleged to have arisen out of the assault and slaying of Catherine McGee, and all of which are contained in the same indictment, and the mere appellation on the endorsement of the said indictment while taken to be true as far as it goes to describe the indictment as an indictment for murder, is inadequate, for the reason that the endorsement outside of the form and signature has no legal validity whatsoever. But if the endorsement has any validity whatsoever, it utterly fails to set forth the true facts of all the indictment contains, namely, that the said defendants in addition to being charged with murder are also charged with the crimes of manslaughter and assault and battery.

11. If the Court were to construe the said indictment against said defendants as a plain indictment for murder, what would follow? Under the present struck jury law in criminal cases (Newman's Criminal Law, page 558) no struck jury can be had on the trial of an indictment for assault and battery. Under the first count in the indictment against defendants they could be tried under the law of 1929 on the charge of murder, but a rule could not be entered for a struck jury under the 1929 Statute whereby the second count, the manslaughter count, could be heard, but a struck jury might be taken from the list of struck jurors selected by the jury commissioners under the procedure found in Newman's Criminal Law, at page 558. On the assault and battery charge a jury would be selected from the general panel, selected and empanelled in the ordinary way by the jury commissioner under the Fielder-Chancellor Jury Act. On the murder charge defendants would be entitled to five challenges; on the manslaughter charge if the jury were struck under the act as found in Newman's Criminal Law at page 558, they would be entitled to five challenges, and on the assault and battery charge ten challenges, all of which challenges, being, of course, peremptory challenges.

12. Because under the 1929 Act there is no mention whatsoever respecting who is going to empanel or who is going to bring into court for the trial of said defendants the names of the jurors who have been selected. Paragraph four, on page 1845 of the Compiled Statutes, respecting Criminal Procedure, sets forth in detail the manner in which juries in criminal cases shall be struck, served and returned in the same manner

as in the case of struck juries ordered in the trial of civil causes, except as otherwise provided.

For those reasons that I have just set forth I respectfully ask your Honor to quash the array of jurors.

The Court: Application denied.

Mr. Kavanagh: Exception.

(Exception allowed, signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

The Court: I might say this to the jurors at the outset, that the Court has been importuned by a number of jurors, actuated evidently and manifestly with the best of intentions to be excused, some for reasons of their health, some for the reason that they are exempt firemen, others because they feel that they are just a little over the age limit, and others because they are going away on pleasure trips.

You have heard the application that has been made to quash the array of jurors here. You have heard a very vivid plea made by counsel for the defendants to quash the array of jurors in which he claims and contends that certain of his constitutional rights may have been infringed upon, or the rights of his clients.

Now, this court is desirous of seeing that a fair and impartial trial is had of this cause. This court is very anxious to see that these defendants shall be tried fairly and impartially by a jury of its peers as required by law, and as they are entitled to in order that they may have their constitutional rights, and the court is going to ask you jurors, in order that the ends of justice may

be had, not to come up here and urge useless and trifling excuses. Proceed.

(The Clerk thereupon proceeded to empanel a jury.)

FRANK SAMUELSON, called as a talesman, was placed upon his *voir dire*.

The Court: Before any of the jurors are sworn, I think we had better establish the practice that if any of the jurors insist upon being excused or desire to be excused, that they ask to be excused before they are sworn. I think that will be for the benefit not only of the State but for the benefit of the defendants.

Mr. Samuelson: May I have a word with your Honor privately?

The Court: No. I feel that in doing so I would be infringing upon the rights of these men, if I were to confer with you privately. If you have any requests to make, the Court will be happy to receive it in the open.

By Mr. Kavanagh:

Q. Mr. Samuelson, have you heard from previous statements or the motions what the case is about? A. I have.

Q. Have you read this case in the newspapers or discussed it with anyone? A. No, not that I can recall. I have had a little conversation this morning to get an idea that it was a murder trial, but I know nothing about the facts of it.

Q. Have you formed any opinion of the guilt or innocence of these defendants from a reading of the newspapers or from a discussion with anybody this morning or at any other time? A. I have not.

Q. You feel that if you were to sit in this case as a juror, Mr. Samuelson, and if the court should charge you that it is your solemn duty as a juror to render your verdict only upon the evidence or lack of evidence in this case, that that is all that would guide you in reaching your verdict? A. Yes, sir.

Q. Now, Mr. Samuelson, if it were shown in the course of this case some of these defendants had been convicted of some petty crime or other, do you feel that it would affect your judgment in the matter as to whether you would not find them not guilty if the evidence showed that they were not guilty? A. No.

Q. You feel, Mr. Samuelson, that you can give a fair and impartial verdict in this case on the evidence and after the evidence is all in in this case? A. I feel so.

Mr. Kavanagh: He is satisfactory to the defendants.

Mr. Drewen: Satisfactory to the State.

(The talesman was thereupon sworn as juror number one.)

Robert Talbot, called as a talesman, was satisfactory to the State.

Mr. Kavanagh: I challenge for cause and ask your Honor to put Mr. Talbot on his *voir dire.*

(The talesman was thereupon placed upon his *voir dire.*)

By Mr. Kavanagh:

Q. Mr. Talbot, have you ascertained from our previous questions what this case is about? A. No, sir; I have been away; I have been away from the country.

Q. You have read about this case in the newspapers and discussed it with anyone? A. Sometime ago in the newspapers.

Q. You have read it in the papers? A. In the political news of the city. I did not read the particulars. I saw the names mentioned; that was all.

Q. Have you discussed it with anybody? A. I have not.

Q. Have you formed any opinion as to the guilt or innocence of the defendant, from reading the newspapers? A. I could not form any opinion, because I did not read enough of it.

Q. You feel if you were chosen as a juror in this case you could render a fair and impartial verdict in the case of the evidence? A. I do.

Q. You feel if you sit in this case as a juror and if the court should charge you that it is your solemn duty as a juror to render your verdict only upon the evidence or lack of evidence in the case, that this is all that would guide you in reaching your verdict? A. Yes.

Q. If it should be shown in this case, Mr. Talbot, that one or more of these defendants had been previously convicted of petty crimes, would you feel from that fact that you could not render a fair and impartial verdict if the evidence showed that they were not guilty?

Mr. Drewen: Don't answer that, Mr. Talbot. I object to the question on the ground

that it is illegal because of the fact that it incorporates a hypothesis which is not allowed in questions upon the *voir dire* and it characterizes testimony before it is in. Mr. Kavanagh asked this witness what would he do in the event that evidence were introduced in the case of a trifling crime.

The Court: Do you desire to reply to that, Mr. Kavanagh?

Mr. Kavanagh: I think I have a perfect right to, if your Honor pleases.

The Court: Under what theory?

Mr. Kavanagh: Under my challenge for cause to ascertain if this prospective juror, Mr. Talbot, has formed any opinion as to the guilt or innocence of these defendants in respect to any reading of any newspapers or in respect to his discussing the case with anyone, and I have a right to question him under the law as to whether it——

The Court: Do not let us discuss what you would like to question him upon. Just direct your argument to the question before the Court at the present time.

Mr. Kavanagh: I am attempting to answer you, your Honor.

The Court: Do not let us dilate from the direct point.

Mr. Kavanagh: All right, your Honor. I think I have a perfect right under the law, under all the decisions to attempt to glean from this prospective juror, in answering my questions, any questions respecting whether he might or might not be prejudicial or biased in this matter.

Mr. Drewen: I might fairly admit that, but Mr. Kavanagh does not get the gist of

my objection. I said that he has no right at this time to incorporate in any of his questions put to jurors any reflection, any characterization of his own testimony in his case. He says, supposing there was proof of the conviction of these defendants for a trifling crime. He has no right to anticipate any such proof, if there is to be such proof, by qualifying its character in that way.

The Court: I will sustain the objection and say this to counsel, if his question is directed somewhat in this fashion to the prospective juror, would your mind be prejudiced, assuming for the purposes of this question, that there was a previous conviction recorded against one of these defendants, I will allow that question.

Mr. Drewen: The State would not object to that.

The Court: Because after all the characterization classing crime, merely in that language, would not be permissible. A question asked in that fashion would be clearly incompetent. A question that is propounded at the trial would have to be, have you ever been convicted of crime, yes or no.

Mr. Kavanagh: I will withdraw the question and re-frame it.

Q. Assuming it were proved that some of these defendants, or one of these defendants, was proved to have been convicted of a former crime, Mr. Talbot, would that fact in any wise affect your judgment as to whether or not you could give a fair and impartial verdict after and upon a consideration of all the evidence in the case? A. It would all depend upon the nature of the crime.

Q. Do you mean to say that if it was proved that any one of these defendants or some of them were convicted of crime and after the State's case was in the State did not make out a case, that is, did not prove that the defendant or defendants was guilty beyond a reasonable doubt, that you would not acquit the defendants?

Mr. Drewen: Objected to on the ground that he is now referring to a matter that is entirely within the control of the Court. After all——

The Court: Let me say this, Mr. Kavanagh, I think you are going a little beyond the line. If such a fact should develop during the course of the trial, you know, that this Court would instruct the jurors that the mere fact that a defendant had previously been convicted should not motivate them or call them or coerce them to come to a determination adverse to these defendants, and that that line of testimony would only be competent from the angle of effecting the credibility of the witness solely,—under the case of State *vs.* Bolton.

Mr. Kavanagh: I quite agree with your Honor.

The Court: If you would incorporate would the prospective juror be willing to follow the Court's charge on the law that the credibility of the witnesses would only be involved, why, the Court would only be too willing to allow the question from that angle. You withdraw your question?

Mr. Kavanagh: Yes.

Q. Mr. Talbot, if it were proved in the course of this State that one or some others of the de-

fendants were previously convicted of crime, would that affect your judgment in respect to your not bringing in a verdict in their favor or in his favor, if the State did not make out its case and prove him guilty beyond a reasonable doubt? A. Not at all.

Mr. Kavanagh: All right.

Mr. Drewen: There appears to be no challenge, and I ask that the talesman be sworn.

(The talesman being satisfactory to the State and satisfactory to the defendants was sworn as juror number two.)

WALTER M. PATTERSON, called as a talesman.

The Clerk: Your Honor, we have a letter received this morning by the Sheriff, from Dr. G. Marks, certifying in fact that "Walter M. Patterson became totally deaf in the left ear in 1914 and was under the care of Dr. McKern, ear specialist, for about six months thereafter. This one-sided deafness seems to me to preclude him from competently handling the duties of a juror, as he cannot locate sound and his hearing is confused except when he is directly addressed. Respectfully, Edward G. Marks."

The Court: Is he here in court?

The Clerk: The juror is not here. This came here by mail this morning to the Sheriff's office.

The Court: Where does he live?

The Clerk: 118 Seely Avenue, Kearny.

Mr. Drewen: I move that the court send for the juror. He has no excuse for being absent this morning.

The Court: All right, it is so ordered. Send for that order right away.

HENRY P. HANLEY, called as a talesman, being satisfactory to the Defendant was challenged by the State.

CHARLES F. GALLAGHER, called as a talesman, being satisfactory to the State and satisfactory to the Defendant was sworn as juror number three.

ARTHUR F. CRAIGHTON, called as a talesman.

The Talesman: Judge, one minute, if I may.

The Court: Now, Mr. Craighton I believe was in chambers before to see me, in company with four other jurors, and I told him at that time the same thing I've told the other four, that I did not feel that I had any authority in a struck jury case on my own initiative to excuse him or any other jurors. I believe Mr. Craighton has a Doctor's certificate, if I recall correctly, in his possession. Is that correct?

The Talesman: Yes.

The Court: You may show it to counsel for the defense, if you will, and it may be that,—he has just gotten out of a sick bed—

it may be that both the State and the Defense may consent to his being excused. If they do, why, there is no objection upon the part of the court to his being excused.

Mr. Drewen: I would suggest for the present that Mr. Craighton stand aside so that we can see what we can do with the rest.

The Court: Let Mr. Craighton sit in the front seat.

Mr. Kavanagh: We also agree that he may stand aside.

The Court: That is what I mean; I would not want to do anything without your consent.

Orlando V. Burke, called as a talesman, being satisfactory to the Defendant and satisfactory to the State, was sworn as juror number four.

Harry M. Thompson, called as a talesman.

The Talesman: Had I better say at this time that I personally know one of the State's attorneys in this case?

The Court: I do not see that that should make any difference.

(The above talesman was satisfactory to the State but was challenged by the Defendant.)

ARTHUR ROLAN, called as a talesman.

The Court: I might say to counsel for the Defense and for the State that Mr. Roland was also in to see me this morning and he desires to be excused because he is deaf. He is very hard of hearing. I know it was with considerable difficulty that the Court talked to him and after the Court got all through talking to him, the Court asked him if he heard what the Court said. He said he heard part of it and it was necessary to tell it all over to him again.

Mr. Drewen: With the consent of counsel for the defense I suggest that Mr. Roland stand aside for the present.

Mr. Kavanagh: We will agree to that.

JAMES B. BROOKS, called as a talesman, being satisfactory to the State, was challenged by the Defendant.

HAROLD E. BIRD, called as a talesman, being satisfactory to the State.

Mr. Kavanagh: We challenge for cause and ask that the juror be placed upon his *voir dire,* your Honor.

(The talesman was thereupon placed upon his *voir dire.*)

By Mr. Kavanagh:

Q. Mr. Bird, have you read about this case in the newspapers or discussed it with anyone? A. No, sir.

Q. Have you formed any opinion as to the guilt or the innocence of any of these defendants? A. No, sir.

Q. From either inspection of the newspapers or discussing it with anyone? A. No, sir.

Q. You feel that you could render a fair and impartial verdict in this case after all the evidence has been adduced on the part of the defendant and on the part of the State? A. I do.

Q. If the court should charge you that before the defendants or any of them can be convicted of the offense that they are charged with, the State must prove their guilt by evidence beyond a reasonable doubt; if the court should charge you that that was the law and the State should fail to prove them guilty of this offense by evidence beyond a reasonable doubt, would you vote to acquit these men? A. I would.

Mr. Kavanagh: Satisfactory.

(The talesman being satisfactory to the State and satisfactory to the Defendant, was sworn as juror number five.)

KENNETH B. HICKEY, called as a talesman.

Mr. Kavanagh: I challenge for cause, your Honor, and ask that Mr. Hickey be sworn on his *voir dire.*

The Court: He may be.

(The talesman was thereupon placed upon his *voir dire.*)

By Mr. Kavanagh:

Q. Mr. Hickey, have you read of this case in the newspapers or discussed it with anyone? A. No.

Q. Have you formed any opinion as to the guilt or innocence of these defendants? A. No.

Q. Do you feel that if you sit in this case as a juror and if the court should charge you that it is your solemn duty as a juror to render your verdict only upon the evidence, or the lack of evidence, that that is all that would guide you in reaching your verdict? A. Yes.

Q. And you feel that you, after and upon a consideration of all the evidence in the case, both as far as the State is concerned and also as far as the defendant is concerned, that you could render a fair and impartial verdict? A. Yes.

Q. Now, if the court should charge you that before the defendants or any of them can be convicted of the offense that they are charged with the State must prove their innocence beyond a reasonable doubt, if the court should charge you that that is the law, after all the evidence is in, and if the State did not prove the defendants guilty beyond a reasonable doubt, would you vote to acquit them?

Mr. Drewen: I object to the question on the ground that it is incomprehensible and involved.

Mr. Kavanagh: Read the question.

The Court: Well, I can tell you that you fell into an error in which you spoke about the reasonable doubt of the innocence.

Mr. Kavanagh: I withdraw the question.

Q. If the court should charge you that before the defendants, or any of them, can be convicted of the offense that they are charged with the State must prove their guilt beyond doubt, if the court should charge you that that is the law in this case and if the State should not prove them guilty beyond a reasonable doubt, would you vote to acquit the defendants? A. Yes.

(The talesman, being satisfactory to the State and satisfactory to the Defendant, was sworn as juror number six.)

Henry J. Gordon, called as a talesman, being satisfactory to the State, was challenged by the Defendant.

The Court: How many challenges have the defendants had so far?

The Clerk: That is the third peremptory challenge, your Honor.

Charles W. Greenfield, called as a talesman.

Mr. Kavanagh: Your Honor, I ask that Mr. Grenefield be sworn on his *voir dire.*

(The talesman was thereupon placed upon his *voir dire.*)

The Talesman: Your Honor, may I speak a moment? I am an exempt fireman having an exemption certificate duly filed by the County Court. May I present this at this time?

The Court: Do you want, Mr. Greenfield, to use that as an xecuse?

The Talesman: No, I usually would not do so, because I believe it is the duty of every citizen to serve as a juror, but I have a very important engagement at this time that I would like to take care of.

The Court: Naturally, Mr. Greenfield, every citizen has business to take care of. this whole court room is full of business men and every man has his own duties and his own affairs to take care of.

The Talesman: I am willing to withdraw the objection, your Honor, if you so wish me to do it.

(The talesman was thereupon placed upon his *voir dire.*)

By Mr. Kavanagh:

Q. Have you read about this case in the newspapers or have you discussed it with anybody? A. I have not.

Q. And have you formed any opinion, Mr. Greenfield, in your mind as to the guilt or innocence of any of these defendants? A. I have not.

Q. You feel that if you sit in this case as a juror and if the court should charge you that it is your solemn duty as a juror to decide the case on the evidence only or the lack of evidence, do you feel that that is the only thing that would guide you in reaching your verdict? A. I do.

Q. Do you feel that you could fairly and impartially try the issues joined in this case? A. I could.

Q. Now, if the court charged you, Mr. Greenfield, that before the defendants or any of them

can be convicted of the offense that they are charged with in the indictment, the State must prove the defendants guilty beyond a reasonable doubt, if the judge should charge you that that is the law in this case and if the State should not prove that these defendants or any of them are guilty beyond a reasonable doubt, would you vote to acquit these young men, Mr. Greenfield? A. Yes.

Mr. Kavanagh: Satisfactory.

Mr. Drewen: No challenge by the State.

(The talesman being satisfactory to the State and satisfactory to the defendant was sworn as juror number seven.)

GEORGE REED, called as a talesman.

The Clerk: Your Honor, I have received word that Mr. Reed is now in Montreal and we have here a certificate certifying the fact that he is an exempt fireman of the Town of Kearny, and a certificate has been filed in the County Clerk's Office, April 25th, 1917.

The Court: What is the return of the Sheriff's Office to the service made in that particular case on that particular man, and if so what sort of service was made? Was it left with his wife?

Mr. Drewen: Respectfully I say this. Your Honor should send for this juror and require his presence here in court to answer for himself.

The Court: I want to see in the first instance whether the subpoena was left with

his wife or whether it was left with him or what member of his family it was left with. He cannot get here to-day, of course, because he is in Montreal, but the court is surely going to take some action in the matter. In order to save time if there is no objection on the part of the defendant or on the part of the State we will proceed to the calling of the next juror. If you object we will wait for a moment to see what the return is.

Mr. Kavanagh: Well, your Honor, I do not object.

THOMAS E. HALPIN, called as a talesman, being satisfactory to the State and satisfactory to the defendant, was sworn as Juror No. 8.

GEORGE W. HEATH, called as a talesman.

The Court: This juror is one of the jurors that waited upon me in chambers this morning. I think he has just gotten out of a sick bed, been there under a doctor's care for some time. How long?

Mr. Heath: I have been home three weeks. I have been in the hospital; I have had an operation.

The Court: He feels that in this warm weather he would not be physically able to stand service.

Mr. Kavanagh: We agree that he stand aside.

Mrs. Ellen Murphy, called as a taleswoman.

The Court: Mr. Kavanagh and Mr. Drewen, I understand that you both agree that Mrs. Murphy should be excused?

Mr. Kavanagh: Yes, your Honor. I think we will agree that Mrs. Murphy may be excused. Mr. Hart and myself feel that under the circumstances we would agree that she should be excused entirely if the Prosecutor is satisfied.

Mr. Drewen: Do I understand counsel asks it? Is that correct?

Mr. Kavanagh: I don't say that, Mr. Drewen.

Mr. Drewen: Don't misunderstand me. I am simply asking whether it is on your motion that this juror is being excused.

Mr. Kavanagh: No, that is not the fact.

The Court: Suppose we have Mrs. Murphy stand aside and the chances are we will get enough jurors from the way the jury box is being filled up now.

I might say this, for the enlightenment of the other jurors in the rear, that this has simply been suggested because of the fact that on this particular panel of jurors Mrs. Murphy is the only woman juror. I don't want any of you men who think you ought to be excused to feel that you are being discriminated against, because you are not.

WILLIAM J. GREEN, called as a talesman.

Mr. Kavanagh: I challenge Mr. Green for cause, and ask that he be sworn on his *voir dire.*

(The talesman was thereupon placed upon his *voir dire.*)

By Mr. Kavanagh:

Q. Mr. Green, have you read about this case in the newspapers or discussed it with any one? A. No, sir.

Q. And have you formed any opinion in anywise as to the guilt or innocence of the defendants? A. None whatever.

Q. Do you feel that you could render a fair and impartial verdict in this case on and after a consideration of all the evidence in the case, the evidence adduced by the State and the evidence adduced by the defendant? A. I do.

Q. You have no prejudice or bias one way or another against these defendants? A. No.

Q. You feel that you could conscientiously render a just and impartial verdict under all the evidence adduced in the case? A. I do.

Mr. Kavanagh: The defense is satisfied.

Mr. Drewen: Satisfactory.

William J. Green was thereupon sworn as Juror No. 9.

THOMAS H. WILLIAMS, called as a talesman.

Mr. Williams: I have evidence of a National Guard discharge.

The Court: Mr. Williams, do you want to urge that seriously as a ground for exemption?

Mr. Williams: Yes, sir, I do.

The Court: Is it filed with the County Clerk?

Mr. Williams: Yes, sir, it is.

The Court: I don't know whether we are going to be able to get a jury, Mr. Williams, to try this case, if everybody is going to be taking advantage of their exemptions. Would you be willing to step aside?

Mr. Williams: No, sir; I prefer to claim my exemption.

The Court: It will be allowed then.

Thomas H. Allison, called as a talesman.

Mr. Allison: I would like to be excused. I have a doctor's certificate here if you would like to see it.

Mr. Drewen: If the defendants consent, I agree that this gentleman stand aside for the present.

Mr. Kavanagh: That is satisfactory to the defense.

Carl Meyers, called as a talesman, and was declared satisfactory to the State.

Mr. Kavanagh: I challenge this talesman for cause, if your Honor please, and I ask that I may question Mr. Meyers on his *voir dire.*

(The talesman was thereupon placed upon his *voir dire.*)

By Mr. Kavanagh:

Q. Have you read about this case in the newspapers, Mr. Meyers, or discussed it with any one? A. No, sir.

Q. Have you formed an opinion one way or another as to the guilt or innocence of any of these defendants? A. No, sir.

Q. Do you feel that you could render a fair and impartial verdict on and after a consideration of all the evidence in the case? A. I do.

Q. And do you feel that if you were chosen as a juror in this case, and if the Court should charge you that it is your solemn duty as a juror to render your verdict on the evidence only, or lack of evidence, that that is all that would guide you in your rendering of your verdict? A. Exactly.

Mr. Kavanagh: Satisfactory to the defense.

Carl Meyers was thereupon sworn as Juror No. 10.

Samuel W. Garrison, called as a talesman was challenged by the defendant.

Peter Leveson, called as a talesman, being satisfactory to the State and satisfactory to the defendants, was sworn as Juror No. 11.

Frank S. McArthur, called as a talesman.

Mr. Kavanagh: I challenge this talesman for cause, and ask your Honor to place him on his *voir dire.*

(The talesman was thereupon placed upon his *voir dire.*)

By Mr. Kavanagh:

Q. Mr. McArthur, have you read about this case in the newspapers or discussed it with any one? A. Some time ago I read it in the papers.

Q. Have you formed any opinion as to the guilt or innocence of any of these defendants from your reading it in the newspapers and discussing it with anybody? A. No, I have not.

Q. You feel, Mr. McArthur, that you could render a fair and impartial verdict in this case after a consideration of all the evidence that has been adduced in the case? A. I feel so.

Q. Do you feel that if you are chosen as a juror in this case, and his Honor would charge you that it was your solemn duty to decide this case on the evidence only or lack of evidence, that this is all that would guide you in rendering your verdict? A. It would.

Mr. Kavanagh: Satisfactory.

Mr. Drewen: Satisfactory to the State.

Frank S. McArthur was thereupon sworn as Juror No. 12.

Mr. Drewen: May it please your Honor and gentlemen of the jury: The defendants at the bar in this case are indicted for the crime of murder. So that you may have a terse statement of the charge against them, at the outset I am going to read the indictment:

HUDSON OYER AND TERMINER,

September 18, 1928.

The Grand Inquest of the State of New Jersey, in and for the body of Hudson, on their respective oaths present, that Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe, alias Brasch, late of the City of Jersey City, in the said County of Hudson, on the 6th day of November, in the year of our Lord 1928, with force and arms in the City of Jersey City aforesaid, and the County aforesaid, and within the jurisdiction of this court, one Catherine McGee, in the peace and in the peace of God and of this State then and there being, did wilfully, feloniously and of their malice aforethought kill and murder contrary to the form of the statute in such case made and provided, and against the peace of the State, the government and dignity of the same.

There is a second count in the indictment which charges in effect the crime of manslaughter, which is a degree of homicide less than that of murder, and there is a third count in the indictment which charges the crime of assault and battery.

Now, gentlemen of the jury, some of you have been carefully examined upon what the law calls in a rather old-fashioned way, a *voir dire,* that is to say you were sworn to tell the truth with regard to questions that were to be put to you by defendants' counsel with regard to your fitness impartially and justly to try this issue. Of course, the State is no less interested in a just and in an impartial verdict in this case than are the defendants. This is a solemn business for all of us and the State is here sanctioned under an oath that the law prescribes for all of the State's officers

here represented, myself and my assistants. The Court is bound by an oath; defendants' counsel are bound by oath as members of the Bar of this State, and you, lastly, have most recently been sworn to render a true verdict according to the evidence in this issue.

Now the State will prove to you, gentlemen, that November 6th, 1928, the day upon which this murder is charged to have been committed, was Election Day of the year 1928, the Presidential Election. In the Second District of the Third Ward—I am not sure of the correct designation of the district—which is a public school facing on Erie Street, Jersey City, an election was being held for that election district, and all day long on that day these four defendants were in and about the polls. They didn't live there. They lived nowhere near there; and they had access to and exclusive use of an automobile. The defendant O'Keefe was part owner with one Daniel Reilly of an automobile, a Chandler sedan, and they were responsible for disturbance in the school building and on the streets in front of the school building. Not only did they have access to an automobile, but the State will show you that they had provided themselves with baseball bats which they had placed in the automobile. What these men were doing in and about the polling place is a matter of their defense.

Watever these men were doing there, a little child was killed, and the State charges the child was murdered. Her name was Catherine McGee.

Now, as the day went on, whatever purpose these men had in being at the polling place became a thing of increasing boldness until the evening came, when it became necessary for the police rather abruptly and strenuously to interfere.

Finally one of these men, that is to say, O'Keefe, this man who sits at the end next to the officer's left, became engaged in a personal encounter, and he was struck on the mouth, and they were all driven by the police into the street, and this encounter continued on the sidewalk in front of the school. These four defendants then betook themselves to their automobile, and armed with the instruments I have referred to. What did they do? They went out in the manner of the tribesmen or the gangsters, as the State will prove to you, to get revenge on their enemies. Ormsby was driving the car. Now, gentlemen, here was the school building near the corner of Fourth Street. The automobile turned on Fourth Street and had gone five or ten feet when Ormsby stopped the car and the rest of the men got out of the car with their bats in their hands, to do what? The State contends that there was a man on the sidewalk there against whom they had a grievance and against whom they had a score to settle, a man named Whalen, who had no part in this altercation before, but he happened to be the man for whom they set out. The girl, Catherine McGee, happened to be there at the time. A blow was struck at Whalen by one of these men, probably O'Keefe, and the baseball bat glanced off the body of Mr. Whalen and struck the skull of the little girl, causing her to fall on her face. She was taken to St. Francis Hospital and died without ever regaining consciousness.

Of course, when the proper time comes his Honor will charge you on what the law is.

I trust I have made the case clear to you. Of course if the State proves what I have outlined to you we will expect at your hands a verdict of guilty.

AFTER RECESS.

FRANK J. O'LERI, sworn.

Direct examination by Mr. Drewen:

Q. Where do you reside? A. 14 Monitor Place, West New York.

Q. What is your profession? A. Civil engineer and surveyor.

Q. Did you as civil engineer and surveyor make a survey of the intersection of Erie Street with Fourth Street? A. Yes.

Q. Was a blueprint made of that survey? A. Yes.

Q. Is this the blueprint I show you that was made by you? A. Yes.

The Court: In order to save time, is there any objection to it?

Mr. Kavanagh: No.

Mr. Drewen: I offer it in evidence.

The Court: It may be received, there being no objection by counsel for the defense.

(Admitted and marked Exhibit S-1.)

Q. Mr. O'Leri, will you step down here, please? Does this survey, made by you, which is S-1 in evidence, show the location of Erie Street at the point of intersection with Third and Fourth Streets? A. Yes.

Q. Does it also show the location of the building on the easterly side and the westerly side of Erie Street? A. Yes.

Q. Have you designated on this survey the character of the buildings that are shown? A. Yes.

Q. For example you show on the easterly side

of Erie Street public school No. 2; is that public school No. 2 shown there? A. Yes.

Q. For example, the word "grocery" written upon the place showing the location of the building at the southeasterly corner of Fourth Street and Erie Street. What do you mean by the word "grocery"? A. It designates a grocery store at the corner in that building.

Q. Coming south, southerly from the grocery store, the next building is "candy store"? What do you mean by that? A. That designates a candy store in the building in that location.

Q. The scale of this map is what? A. Ten feet to the inch.

The Court: It is so designated, is it, on the map, in case we have occasion to designate it after?

The Witness: It is.

Cross-examination by Mr. Kavanagh:

Q. What is the length of Erie Street, Mr. O'Leri, between Third and Fourth Street, the length of that block, Erie Street, between Third and Fourth Street, approximately? A. Between curbs?

Q. Between curbs, yes. A. About 230 feet.

Q. What is the width of Third Street between Erie and Grove? A. I have not that on the map. I have not designated Grove Street, so I do not know.

Q. What is the width of Third Street between Erie and Jersey Avenue? A. I have not that on the map.

Q. Do you know the width of Fourth Street between Erie Street and Grove Street? A. No, sir.

Q. Do you know the width of Fourth Street be-

tween Erie Street and Jersey Avenue? A. You mean by "width" the distance?

Q. Yes. A. Between the blocks?

Q. Yes. A. I do not know.

Mr. Drewen: That is all, Mr. O'Leri.

WILLIAM R. HARRISON, sworn.

Direct examination by Mr. Drewen:

Q. Mr. Harrison, what is your profession? A. Photographer.

Q. And you have been such for how long? A. Over forty years.

Q. Did you make these photographic pictures of Erie Street, showing the location on Erie Street of Public School No. 2? A. Yes.

Q. Did you make a photographic picture of Erie Street, showing the point of intersection of Erie and Fourth Street? A. Yes.

Q. I show you photographs purporting to be the pictures that I described, and ask you if those pictures were made by you? A. Yes.

Q. The view of the east side of Erie Street was taken— A. The seventeenth day of December, 1928.

Q. The three pictures that you now hand me, you say, were all made by you? A. Yes.

Mr. Drewen: I offer the pictures in evidence and ask that they be marked.

The Court: Is there any objection? Do you desire to cross-examine on them?

Mr. Kavanagh: Yes, I do.

The Court: It is allowed.

Cross-examination by Mr. Kavanagh:

Q. When were these pictures taken, Mr. Harrison? A. On the 17th day of December, 1928.

Mr. Kavanagh: No objection.

(Admitted and marked Exhibits S-2, S-3 and S-4.)

By Mr. Drewen:

Q. I show you photograph in evidence, S-2, and ask you what that represents. A. That is a photograph of the southeast corner of Fourth Street and Erie Street, Jersey City.

Q. I show you photograph in evidence, S-3, and ask you what that represents. A. That is a photograph of the east side of Erie Street between Third and Fourth Streets, Jersey City.

Q. Can you think what the large building is on the east side of Erie Street, shown in the picture? A. Public school number two.

Q. I show you photograph in evidence S-4, and I ask you what that picture represents? A. That is the picture showing the entrance to public school No. 2, on Erie Street.

Q. The entrance to the front of the building? A. The entrance to the front of the building, taken directly in front.

Q. I show you a photograph of a child, and ask you if that picture was made by you? A. Yes.

Q. When? A. November 7th, 1928.

Q. Where? A. At Higgins' undertaking establishment.

Q. Where is that? A. 117 Montgomery Street, Jersey City.

The Court: I propose, Mr. Prosecutor, when you say "the child", you refer to Catherine McGee?

Mr. Drewen: Yes. I will identify it, if your Honor pleases. I do not know whether this man can do it or not. I offer the picture in evidence.

Mr. Kavanagh: No objection.

(Admitted and marked Exhibit S-5.)

Q. This picture, S-5, Mr. Harrison, that was the body of a child that you photographed in the morgue known as Higgins' Morgue? A. Yes.

Q. You did not know that child yourself, did you? A. I did not.

Mr. Kavanagh: Are you offering that in evidence.

Mr. Drewen: They are all in evidence.

Mr. Kavanagh: No objection.

The Court: They have been offered and received.

Mr. Drewen: I understand there are some witnesses outside, excluded by virtue of your Honor's order. I ask that they be admitted.

The Court: Just call them in, Mr. Clerk.

Mrs. Mary McGee, sworn.

Direct examination by Mr. Drewen:

Q. Mrs. McGee, where do you reside, please? A. 290 Ege Avenue.

Q. And on the sixth day of November, 1928, where did you reside? A. 385 Grove Street.

Q. Mrs. McGee, how far is that from Public School No. 2 on Erie Street? A. About two blocks.

Q. You are the mother of Catherine McGee, were you not? A. Yes.

Q. Do you remember when you last saw Catherine alive on the 6th day of November, what time of day, about, was it? A. Well, I should judge it was about eight o'clock.

Q. In the morning or in the evening? A. In the evening.

Q. Where was it you saw Catherine at eight o'clock in the evening? A. At the door.

Q. At your door? A. Yes, sir.

Q. Did she leave you there? A. Yes, sir.

Q. Was she sent on an errand, or under what circumstances did she leave? A. She just went around the corner and told me she would be right back.

Mr. Kavanagh: I move to have that answer stricken out.

The Court: Strike it out.

Q. How long after that did Catherine leave you where you were at the time? A. About ten minutes.

Q. She went away then, did she? A. Yes.

Q. Is that the last tme you saw her alive? A. Yes, sir.

Q. When did you next see Catherine dead or alive after that? A. I saw her alive in the hospital.

Q. In the hospital? A. Yes, sir.

Q. What hospital? A. St. Francis.

Q. What time of night or day was it you saw her? A. It was around half-past eight I think; I am not sure of the time.

Q. Half-past eight that evening? A. Yes, sir.

Q. So that you saw her again at St. Francis Hospital about a half hour after she left you at the door of your home? A. Yes, sir.

Q. Was she conscious when you saw her at the hospital? A. No, she could not talk at all.

Q. Could not speak at all? A. No, sir.

Q. When did your daughter Catherine die? A. The next morning, the following morning.

Q. Did she die at home or in the hospital? A. We were just going to the hospital. I was at home.

Q. While you were on your way to the hospital? A. Yes, sir.

Q. When you got to the hospital she was dead? A. Yes, sir.

Mr. Drewen: That is all.

Cross-examination by Mr. Kavanagh:

Q. Mrs. McGee, I just want to ask you a few questions: How do you fix the time as being eight o'clock when you last saw your little girl Catherine? A. I judge it was around that time.

Q. You had not looked at any watch or any clock? A. I was in the door for a long time. She just left me at the door and went away and said she would be right back.

Q. Did you look at any watch or clock before little Catherine left your home? A. No, sir, I was sitting at the door since half-past six that evening.

Q. Then it might have been before eight o'clock? A. Well, it was around that.

Q. But it might have been about seven-thirty? A. Between seven-thirty and eight I should judge.

Q. You are not sure, Mrs. McGee, are you? A. No, sir.

Mr. Kavanagh: That is all.

Re-direct examination by Mr. Drewen:

Q. You say it was at half-past eight the same evening, November 6th, you saw Catherine in the hospital unconscious? Am I right about that? A. Yes, sir.

Mr. Drewen: That is all.

The Court: I show you a photograph that has been marked in evidence here, State's Exhibit 5, and ask you if that is a photograph of your daughter? A. Yes, sir.

JOHN MCGEE, sworn.

Direct examination by Mr. Drewen:

Q. You are the husband of the last witness, are you not? A. Yes, sir.

Q. On the 6th of November where did you live? A. 385 Grove Street.

Q. And that is a block or two, as I understand it, from Number 2 school on Erie Street? A. Yes, sir.

Q. Erie Street is located between Third and Fourth? A. Yes.

Q. Where were you during the day and during the early evening, that is to say prior to eight o'clock on the evening of Election Day, November 6th, 1928? A. I was working as a worker at the polls in the Third District, Third Ward.

Q. Where was that polling place located? In the school house? A. It might be 395 Grove.

Q. It was not in the school house? A. No, sir.

Q. How far was the place where you were working at the polls from school No. 2 on Erie Street?

A. Well, I should say a block and a half. I was on Grove between Second and Third.

Q. Did you have occasion at any time on the evening of November 6th to go to St. Francis Hospital? A. Not until my daughter was there.

Q. Did you go to St. Francis Hospital at any time that evening while your daughter Catherine was there? A. I remained with my daughter until four o'clock in the morning.

Q. But you did go to the hospital? A. Yes, sir.

Q. What time did you get to the hospital on the evening of November 6th? A. Well, I will tell you. In my excitement I just could not recall the time, but it was after the first 100 votes was cast.

Q. You do not remember exactly the time? A. No, sir, I was so excited.

Q. When you got to the hospital did you see your daughter Catherine? A. Yes.

Q. Was she conscious or unconscious? A. She was in convulsions.

Q. When did Catherine die? A. Well, I should figure she died in the neighborhood of about nine o'clock the following morning.

Q. Were you at the hospital that morning? A. No, we were just preparing to go and we had come home at four o'clock.

Q. Aside from what you have told us you do not know anything about this case except what has been told to you? A. True.

Mr. Drewen: Cross-examine.

Mr. Kavanagh: No questions.

LOUIS JANICKE, sworn.

Direct examination by Mr. Drewen:

Q. You are a member of the Jersey City Police Department? A. Yes, sir.

Q. And you have been for how long, Officer? A. About three years and three months.

Q. On the sixth day of November, 1928, Election Day, where were you doing duty? A. School number Two, Third Ward of the Sixth District.

Q. Where is School number Two located? Where were you doing duty? A. On Erie Street.

Q. That is between Third and Fourth Streets, is it? A. Yes, sir.

Q. What time of the day did you go to the polls of Number Two School to do duty? A. Well about seven o'clock in the morning.

Q. When did you leave there? A. About two o'clock the next morning. I had relief in between.

Q. During the evening of November 6th did you witness any fight or disturbance around the school building or on the sidewalk in front of the building?

Mr. Kavanagh: I object to it on the ground that it is incompetent, irrelevant and immaterial to this issue. It cannot in any wise bind any of these defendants. It is not evidential against them.

The Court: The Court will allow the question and instruct the witness to answer it yes or no.

A. Yes, sir, I did.

Mr. Kavanagh: Exception.

(Exception allowed, signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

Q. Where did this disturbance you refer to occur on the sidewalk in front of the school or inside the school?

Mr. Kavanagh: I object unless a time is fixed.

The Court: Sustain the objection.

Q. What time did you see this disturbance you have mentioned? A. About 8:30, as near as I can recall.

The Court: In the morning or the evening.

The Witness: In the evening.

Q. What did you see in this disturbance at about 8:30 o'clock in the evening? A. I see a gang of fellows about six or eight of them all in a general free for all fight.

Q. In front of the school? A. Yes, sir.

Q. Go ahead. A. Well, I rushed up and asked them in a nice way to disperse.

Mr. Kavanagh: I object on the ground that it is incompetent, irrelevant and immaterial.

Mr. Drewen: I consent.

The Court: It will be stricken out, what he said.

Q. Never mind telling us what you said. When the time comes for that I will ask you what you said. Tell us first what you saw in this disturbance you have now started to describe. A. A general fight.

Q. What do you mean by fight, what happened?

Mr. Kavanagh: I object on the ground that it is purely and absolutely immaterial.

It cannot bind any of these defendants, it is not evidential against them and not competent to this issue in any wise whatever. For those reasons I object.

The Court: The question was what happened at that time and place?

Mr. Drewen: Yes.

The Court: I will allow it.

Mr. Kavanagh: I ask an exception.

(Exception signed, sealed and allowed accordingly.

THOMAS H. BROWN,
Judge.)

A. Well, I told you.

Q. Well, tell us again what you saw, what happened? A. There was a general fight, a free for all, and when I asked them in a nice way to disperse they continued to fight.

Mr. Kavanagh: I object.

Mr. Drewen: It may be stricken out by consent.

Q. Just tell us what you saw take place? A. A general fight.

Q. Did you or did you not disperse the fighters? A. I did.

Mr. Kavanagh: I object to that.

The Court: The objection is belated. The question is allowed.

Mr. Kavanagh: I move to strike it out.

The Court: The motion is denied.

Mr. Kavanagh: Exception.

(Exception signed, sealed and allowed accordingly.

THOMAS H. BROWN,
Judge.)

Q. At the time of this fight, this general disturbance, as you call it, was there any vehicle of any kind standing at the curbstone in front of the school?

Mr. Kavanagh: I object on the ground that it is incompetent, irrelevant and immaterial for the purposes of this issue and not binding on these defendants and not evidential against them.

The Court: The Court would be inclined to agree with you were it not for the fact that the Prosecutor cannot prove his whole case in one question. He has to do it step by step. I will reserve to you the privilege of renewing your motion if he does not connect up his proof. The Court will control it at this time. The motion will be denied reserving you the right to renew it later.

Mr. Kavanagh: Exception.

(Exception signed, sealed and allowed accordingly.

THOMAS H. BROWN,
Judge.)

A. Yes, sir.

Q. What kind of a vehicle? A. I don't know whether it was a coach or a sedan, but it was a closed car.

Q. An automobile? A. Yes, sir.

Q. Do you know what make it was? A. No, I am not sure of the make.

Q. Now, did you see any men after you broke up this fight, as you say, did you see any men that had been in that fight get into this sedan?

Mr. Kavanagh: I object on the ground that it is absolutely incompetent, imma-

terial and irrelevant. It can in no wise bind these defendants, what happened there at another time outside of the time this little girl was struck.

The Court: I assume that the Prosecutor intends to connect it up.

Mr. Drewen: Of course I do.

Mr. Kavanagh: I object.

The Court: I will allow the question.

Mr. Kavanagh: Exception.

(Exception signed, sealed and allowed accordingly.

THOMAS H. BROWN,
Judge.)

A. Yes, sir.

(Question repeated.)

A. Yes.

Q. How many? A. Four.

Q. After these men got into the sedan what happened then to the sedan? A. The sedan drove east on Fourth Street, around the corner.

Q. Well, before it got to Fourth Street what happened to it, did it drive along Erie Street? A. It drove along Erie Street to Fourth Street and turned to the——

Mr. Kavanagh: I object to that and ask that it be stricken out.

The Court: The question will be allowed.

Mr. Kavanagh: Exception.

(Exception signed and sealed.)

THOMAS H. BROWN,
Judge.

Q. When you say you saw these four men get into the sedan, in which direction was the sedan pointed, towards Fourth Street, this direction

toward Fourth Street, or towards Third Street? A. It was north, toward Fourth Street.

Q. How long after these men got into the car was it that you say it started towards Fourth Street? A. Immediately, right away.

Q. Did you see which way the car turned after it got to Fourth Street? A. No, not then, no sir.

Q. How? A. At this particular time, you mean?

Q. No, after this car left and went towards Fourth Street, dd you see which way it turned when it got to Fourth Street? A. I did, but not right away, later I saw it, see?

Q. Yes, how long after? A. Well, about two or three minutes, I guess, I judge about that.

Q. Did it take two or three minutes for this car to get from No. 2 School on Erie Street to Fourth Street? A. No, I saw it the second time, two or three minutes from the first time I did see it. It disappeared, see.

Q. And when did you see it the second time? A. I saw it near Grove.

Q. That is to say Grove Street is east of Erie Street, is it not? A. Yes.

Q. Is that right? A. Yes.

Q. And where were you standing when you saw this automobile nearing Grove Street? Do you understand that question? A. Say that again, Prosecutor.

(Question repeated.)

A. On the corner.

Q. On which corner? A. Fourth and Erie.

Q. At any time that night did you witness anything unusual occur on the corner of Fourth Street and Erie Street?

Mr. Kavanagh: I object to that, unless the time is fixed, and on the further ground

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that the question is too general a question. Anything unusual occur. Anything unusual that might occur might mean anything at all. I submit, if your Honor pleases, that the question is too general, and also that it is incompetent, irrelevant and immaterial, in respect to the case that is being tried now. It cannot bind any of these defendants and cannot be evidence of any kind against them, and for those reasons I respectfully object to it.

The Court: Question allowed.

Mr. Kavanagh: Exception.

(Exception allowed, and signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

(Question repeated.)

A. There was a crowd of people on the corner.

Q. Did you see anything happen there? A. No, sir, I did not.

Q. At any time did you see a little girl on the corner of Fourth and Erie Street? A. No, sir.

Q. Now, when you say that these four men—come down, will you. I refer you to the sketch in evidence marked S-1, and call your attention to the location of Public School No. 2, on Erie Street. Here is the curb in front of the public school, marked with the word "curb". When you say that the four men got into the automobile, where was the automobile standing, with reference to the front of the school building?

The Court: I would suggest for the purpose of the record that the witness take a pen and mark it with a "C".

Q. Now, here is the entrance to the building, so marked on the map S-1. With relation to that entrance tell us where the car stood at the time you say the four men got into it?

Mr. Kavanagh: If he knows.

The Witness: I do not know anything about these measurements.

Q. If you know. All right, I will change the question. How many feet north or south of the main entrance of the school building was the car standing? A. About eight feet.

Q. In which direction? A. North.

Mr. Drewen: All right, now, Mr. Kavanagh, one inch is ten feet. Will you admit that this is about a right mark for it? (indicating).

Mr. Kavanagh: I will.

Mr. Drewen: All right, I will mark "car" there.

Q. That is about where you say it was? A. About eight feet.

Q. Now, when you saw these four men get into the car, as it stood at the point indicated where you were standing— A. I was standing about in front of the school.

Q. In front of the school entrance? A. About that.

Q. When the car left and went north, as you say, were you still standing in front of the school entrance? A. As the car pulled up and started around the corner, why, I walked just about——

Q. All right, when you quit looking at this car, while the car was moving toward the corner of Fourth Street, up here, where was the car, how many feet from Fourth Street, or had it turned

into Fourth Street? A. Well, when the car left here (indicating) you know, eight feet from the entrance, as it turned into Fourth Street, I turned to go back to my polling place.

Q. You turned to go back to your polling place in the building? A. Outside of the building.

Q. Now, when you turned to go to your post on duty, outside of the building, the car was where, with reference to the corner of Fourth Street? A. Just about disappeared down Fourth Street.

Q. All right. Did you see the car at any time after that?

The Court: Just yes or no.

The Witness: Yes.

Q. How long after that did you see the car? A. Oh, about three minutes after.

Q. And where was the car when you saw it three minutes after it turned into Fourth Street? A. Going towards Grove.

Q. Where were you standing at the time you saw it going towards Grove? A. At the corner.

Q. Corner of Fourth and Erie? A. Yes, sir.

Q. What caused you to go back to the corner of Grove and Erie when you saw the car going towards Grove?

Mr. Kavanagh: I object.

The Court: The objection is sustained.

Q. Did you go back, yes or no? A. Yes.

Q. For what reason?

Mr. Kavanagh: I object to that.

Mr. Drewen: That is the most proper way I know of to show just what this man did and why he did it.

The Court: He can tell what he did.

Whatever reasons motivated him really do not concern the jury, Mr. Prosecutor.

Mr. Drewen: All right, I will retire from my position.

Q. When you went back to the corner of Fourth and Erie Streets, when you say that you saw this car for the second time, what did you see happen on the corner of Fourth and Erie, what did you see?

Mr. Kavanagh: If anything?

Mr. Drewen: Oh, yes, if anything.

A. I saw a commotion; everybody was excited, and I asked what the trouble was.

Q. All right, never mind what you asked.

Mr. Kavanagh: I ask to have that stricken out.

Mr. Drewen: I struck it out before you thought of it.

Q. Where was this commotion that you have mentioned? A. At the corner of Fourth and Erie Street.

Q. How many persons were there? A. Oh, there was a large crowd.

Q. What did you do when you got to this place where the commotion was? A. I inquired what was wrong.

Mr. Kavanagh: I object to that and ask that it be stricken out.

The Court: It is ordered stricken out.

Q. Can you describe any of these men you saw get into the sedan in front of the entrance? A. Not positively, no, sir.

Q. Was there anything peculiar about the face or the dress or the arrangement of any one of them?

Mr. Kavanagh: I object on the ground that the answer to the other question was that he could not possibly describe any of them.

Mr. Drewen: The next question is different, and the witness already answered there was before the objection was made.

Mr. Kavanagh: Then I ask that it be stricken out.

The Court: The question is allowed.

Mr. Kavanagh: Exception. And I except also to Mr. Drewen's statement to your Honor that the question was answered before I interposed my objection. I did not have a chance to interpose my objection. I interposed my objection almost immediately. I am sure we are allowed some little interval in between the propounding of the question and the answering of the question, in order to register an objection.

The Court: I am going to allow counsel a full opportunity even if there is a so-called snap answer. You can rest assured that the Court will control it. But the last question was fully and thoroughly answered, and your objection to this second question now is based upon what the witness has already answered in the previous question. In other words, you are urging as one of the grounds of your objection to the last question—his answer to the previous question. You cannot blow hot and cold. You cannot have the advantage of a previous answer, and at the same time set

this up as a ground for insisting on your objection to the second question.

Mr. Kavanagh: I submit that there would be an absolute conflict, inasmuch as the question before had been propounded in certain language, and the answer was that he could not possibly. Now, the propounding of the next question is in language which is in absolute conflict and in absolute antogonism to his answer to the first question.

(Question repeated.)

A. There was.

The Court: I will allow the question.

Q. All right, what was it?

Mr. Kavanagh: I will ask for an exception.

The Court: You may have it.

(Exception allowed, and signed and sealed accordingly.

THOMAS M. BROWN.

Seal.)

Q. What was it? A. The hair was disarranged and it looked as though they had been through a fight.

The Court: The last part of the answer may be stricken out, what it looked like, but the part of the answer which refers to the hair being disarranged, may be allowed to stand.

Q. What did you see that indicated to you that they had been in a fight? A. Well, there was two

of them had handkerchiefs up to their faces, holding their faces. One fellow—I do not know whether he was bleeding or not. I saw blood on his handkerchief.

Q. Speak up? A. He had a handkerchief in his hand and it was covered with blood, blood stains on it.

Q. And you say that one of those men, or one of the men, had a handkerchief over his mouth, that got into the car, is that right? A. Yes.

Q. Was the handkerchief tied on his mouth or was it held there? A. He was holding it there.

Mr. Drewen: Cross-examine.

Mr. Kavanagh: If your Honor please, I respectfully ask your Honor to strike out all the testimony of this witness on direct examination of the Prosecutor, on the ground first that all of the testimony that was adduced by this witness is absolutely immaterial, irrelevant and incompetent to this issue. Second, on the ground that it cannot in anywise bind the defendants in this case. It cannot in anywise be evidential against them. Out of the mouth of this witness himself, on the question of Mr. Drewen the question is asking if he saw or could describe any of these four men who were alleged to have got into the car, he said it could not be possible. There was no mention whatsoever during the course of this direct examination on the part of the Prosecutor in respect to the questions he propounded to this witness and the answers that were submitted to those questions by this witness, whether any of these defendants were there at that time, that any

of these defendants were in that car at that time, that any of these defendants participated or engaged in what he said was some kind of an altercation, and for those reasons I submit that this testimony is absolutely irrelevant, and absolutely incompetent, and absolutely immaterial; it cannot bind these defendants and is not evidential against them. For those reasons I must respectfully request your Honor to strike it out.

The Court: Before I pass upon your motion I will propound a question to the officer himself.

Officer, what time was it that you saw this fight that you described as a general fight, in which six men were involved, as you have stated?

The Witness: I judge it was about 8:30.

The Court: Where was the exact place of this alleged general fight?

The Witness: About eight feet from the entrance to the school.

The Court: The court will allow this testimony on the assumption that the Prosecutor hopes at a later hour to connect it up.

Mr. Drewen: Of course we will. We do not need a speech like that from Mr. Kavanagh.

Mr. Kavanagh: I object and ask for an exception.

The Court: I will allow it.

(Exception allowed, and signed and sealed accordingly.)

THOMAS H. BROWN.

(Seal)

PATROLMAN LOUIS JANICKE (recalled).

Cross-examination by Mr. Kavanagh:

Q. What time did you say you went to duty on the morning of November 6th? A. About 7 o'clock A. M.

Q. What precinct are you attached to? A. Second Precinct, downtown.

Q. Seventh Street? A. Yes, sir.

Q. Where is your regular post of duty outside of special assignment, say on days like Election Day? A. Well, I was working at that school Election Day.

Q. I know. Outside of Election Day you are not assigned outside of the school every day? A. Not outside of the school, no,—oh yes, I have a regular post, traffic at school crossings in the morning, at lunch time, you know, for the children.

Q. Is third Street your regular post? A. No.

Q. Where is your regular post? A. I generally work on Newark Avenue.

Q. The upper end of Newark Avenue or the lower? A. Some nights I am down and some nights I am down, see? Starting from the bridge down.

Q. You say that you were relieved during the course of the day, on November 6th, is that right? A. Yes.

Q. When were you relieved? A. Just give me a moment to figure it out.

Q. Do you want a drink of water? A. No, give me a moment to figure it out, what time I was relieved.

Q. Oh, surely, I am sorry. A. I believe it was about one o'clock.

Q. About one o'clock in the afternoon? A. Yes.

Q. You are sure of that, are you? A. Well, I judge it was about one o'clock.

Q. And where were you then, down in that polling place at No. 2 School? A. Outside polling place.

Q. Didn't you do any duty in the school itself? A. No, I was not in there.

Q. You were not in there at all during the day? A. No, sir, I was not.

Q. You are sure of that? A. Yes, sir.

Q. You were outside on the street? A. Yes.

Q. From seven o'clock in the morning up to the time that you quit? A. Yes, sir.

Q. You are sure of that? A. Yes.

Q. You mean to say you remained outside on the street after the polls closed at seven o'clock? A. They did not close at seven o'clock; they stayed open until two o'clock in the morning, in my polling district.

Q. Well, now, you misunderstood me, Officer. Under the law the polls close on Election Day, they closed at seven o'clock in the evening, didn't they? A. Yes.

Q. Sure they did. And you don't mean to tell us after the polls were closed at seven o'clock, after the election officers began counting ballots, that you still remained out on the sidewalk? A. No, sir, that is right, I was in.

Q. Certainly you were inside. Now how long were you inside? A. Well, from the time they closed until they finished up counting the ballots.

Q. You were in there continuously to guard against any trouble being had during the counting of the ballots? A. Yes, sir, that is right.

Q. Wasn't that part and parcel of your business? A. Yes, sir.

Q. Do you remember when the election officers in this particular school finished counting the ballots? A. It was about two o'clock I believe.

Q. About two o'clock in the morning? A. Yes, sir.

Q. What did you do after that? Did you go back to your precinct? A. No, sir, I accompanied the boxes to the City Hall.

Q. When did you have your lunch that day, November 6th, Mr. Janicke? A. About one o'clock I guess.

Q. And how long did you take to have your lunch? A. Well, we were told to go off at one o'clock and come back, I forget, three or four o'clock, something like that.

Q. And you were away for three or four hours, were you, from the polling place, from the school? A. Something like that, yes.

Q. Now, when did you have your supper that night? A. Supper?

Q. Yes. A. I think we were away about four o'clock and had to be back at six o'clock.

Q. Do you mean to tell the court and jury that you were relieved for lunch or dinner at one o'clock and you remained away for three hours from the polling place and then went again for supper at six o'clock? I am not trying to entrap you, Mr. Janicke, don't get that idea, I am just trying to elicit from you the true facts in the case. Don't imagine I am trying to entrap you in any manner, shape or form; that is not my purpose. A. Well, as near as I can recall, I was relieved for lunch during the afternoon and then later on, I remember we had to be back at six o'clock. I forget what time we were off for supper.

Q. You do not recall that? A. No, on Election Day they don't keep no regular routine, they do

the best they can, because we are all working overtime and when they get a chance to let you go to have your lunch, you go and come back.

Q. Then I take it from you that you do not remember what time you went to supper then? A. I know I had to be back at six o'clock; I know that for a fact.

Q. Did anyone relieve you while you were gone for your supper, any other officer? A. Yes, sir.

Q. Who relieved you? A. I don't recall his name now.

Q. And did he relieve you in the school or outside the school? A. Outside.

Q. Now you were within the school when they began to count the ballots, weren't you? A. I don't know what time they started to count the ballots.

Q. Well, you know the polls closed at seven o'clock, don't you? A. Yes.

Q. And you know that immediately after the polls closed the election officers begin to count the results, don't you know that? A. Yes.

Q. Surely. Now, that was all part and parcel of your duty, wasn't it, Mr. Janicke, to be inside the election precinct when the ballots were begun to be counted, is that right? A. I don't know anything about counting ballots. The Election Board had charge of that and my duty was to keep the people away 100 feet from the polls.

Q. But you were inside when the polls closed, weren't you? A. No, sir, I was not.

Q. Well, why did you tell us a minute ago that you were inside the polling place at seven o'clock or after the polls closed until the morning? A. I don't recall telling you I went in there when they closed.

Q. Do not recall that? Now take your time and

consider whether you were or not. I don't want to hurry you, Mr. Janicke.

The Court: The court will strike out your remarks of its own volition and order because what you have to say is by way of a statement. If there is any admonition to be given the witness the admonition will come from the bench.

Mr. Kavanagh: I am sorry if I seem to encroach upon your Honor's prerogative. I beg your Honor's pardon.

Q. Well, were you inside the polling place or were you outside after seven o'clock? A. Outside.

Q. You know the polls closed at seven o'clock, don't you? A. Yes, sir.

Q. What was the purpose of your being outside the place after the election was all over? A. Well, the election was not over according to the crowd out there; they were all anxious and hanging around the polls and I had a job keeping them away. They wanted to crowd into the school.

Q. Who wanted to crowd into the school? A. The crowd.

Q. Do you know what they wanted to go in there for? A. No, I don't know. There were too many of them there and I was not letting anybody in.

Q. Do you know the reason why they wanted to get in? A. No, sir, I don't.

Q. You do not know that? A. No, sir; over anxious I suppose.

Q. You mean they wanted to see the count, is that the idea? A. I suppose that is what it was.

Q. Did you go in any time after seven o'clock? A. I remember walking—there is an alley there

at the side of the school. The entrance to the polling place is down a few steps. I went there and saw people there that had been in there and were lined up going to vote. I just kept looking in and I didn't go outside again.

Q. Then you did go inside? A. No, sir, I didn't go in, I went to the head of the stairs where I could see the line-up.

The Court: When you speak of a line do you refer to a line going into the polling place who had not as yet voted when seven o'clock came along?

A. They were lined up in the polling place.

The Court: You appear to be intelligent and ought to know what the court is talking about. Do you know what a line is on Election Day when they cannot get in to vote? You have seen a long line waiting to vote, haven't you, at a polling place, yes or no?

The Witness: Yes.

The Court: Is that the kind of a line you are talking about?

The Witness: No, sir.

The Court: Was there a line there at seven o'clock?

The Witness: I told counsel there was a line inside.

The Court: And what space did that line cover? How many feet?

The Witness: Well about, I should judge, ten or twelve feet.

The Court: Can you give us an idea how many people were in that line, approximately?

The Witness: No, I could not estimate that.

The Court: All right, proceed.

Q. You say you saw some disturbance, something or other at the time, is that right? A. No, sir.

Q. You did not see any disturbance at all there that evening, did you? A. Yes, sir.

Q. What time did you see the disturbance? A. About 8:30.

Q. Are you sure it was not before that? A. Yes, sir.

Q. Are you sure the disturbance there wasn't before seven o'clock, before the polls closed? A. What kind of a disturbance? There was this crowd of voters were anxious to hear the returns, they were jamming around.

Q. Is that what you call a disturbance? People attempting to get the result of the count? Is that what you call a disturbance? A. Well, they can endeavor to get it in a nice manner and they can be boisterous about it.

Q. Nobody attempted to strike you? A. No, sir.

Q. Nobody used any harsh words or called you out of your name? A. No, sir.

Q. This disturbance you spoke of took place just before the polls closed when they tried to get in to hear the count, didn't it? A. I am talking about the curiosity seekers and these people anxious to hear the result of the returns and could not wait.

Q. They were not creating any disturbance, were they, simply attempting to get in to hear what was going on? A. I think pushing and shoving is enough.

Q. That was at seven o'clock, is that right? A. Around that time.

Q. Was anybody hurt at that time? A. No, sir.

Q. Nobody assaulted you before seven o'clock? A. No, sir.

Q. Are you sure of that? A. Well, you can assault a person by laying your hand on them, if that is what you mean.

Q. Didn't you have to use your powers as an officer to disperse certain people that were creating some kind of a disturbance or an altercation before the polls closed at seven o'clock? A. No, sir.

Q. Are you sure of that? A. That was later on.

Q. Did you make any arrests that night? A. No, sir.

Q. Were you or were you not outside of Number Two School on the evening of November 6th, 1928, between the hours of half-past six and seven o'clock or were you to your supper? A. I was back at six o'clock from supper; I cannot recall the time I went.

Q. You say you were back at six o'clock? A. Yes, sir.

Q. How do you know you were back at six o'clock? Did you look at any watch? A. I looked at my watch, yes.

Q. Now, I ask you again, Mr. Janicke, didn't you have to disperse some people who were engaging in an assault before that Number Two School just before the polls closed? A. No, sir.

Q. Are you sure of that? A. Yes, sir.

Q. Did any other officer have to disperse anyone? A. Not at that time.

Q. How do you know they didn't? A. Because I could see for myself; I was there.

Q. How many officers were on duty there with you when you were at this school? A. Two.

Q. In and about the school, from First Street on Erie to Fourth Street on Erie, how many police officers were there on duty? A. Well, two of us beside myself that I know of.

Q. Making three in all? A. Yes, sir.

Q. Are you sure there was not any more than three? A. I was only working with three; if there were any more I didn't see them.

Q. You were walking up and down the block you say? You did not go down to Grove Street nor up to Jersey Avenue at any time during the course of the day, did you? A. Yes, sir.

Q. You did? A. Yes, sir.

Q. Do you remember how many times you were away from your post of duty? A. Just both times.

Q. Three or four times. Did you go back to your precinct? A. No, sir.

Q. Well, where did you go to? A. To eat, that was all.

Q. I know you went to eat. I don't mean your going to eat. You went to eat you say at one o'clock and you got back you say two or three hours afterwards, isn't that right? A. Well, about two hours, I guess.

Q. That would make it approximately around three o'clock, isn't that right? A. I am giving you these times as well as I can remember them.

Q. That is all I want you to do. Then you went away to supper again. A. I am not sure whether it was at four o'clock or when, but I was back at six o'clock.

Q. Do you mean to say that you only remained an hour after coming from dinner before you went to supper? A. Most likely; that happens on Election Day.

Q. I want to know if you did, as a matter of fact, do that? A. I cannot swear to that hour; I am not sure whether it was an hour.

Q. When did you go to Jersey Avenue, around six, between six and seven? A. No, sir.

Q. Well, when? A. I didn't go to Jersey Avenue.

Q. Did you go to Grove Street? A. I was brought to Grove Street in the performance of my duty. I saw some disorderly carrying on.

Q. When were you brought to Grove Street? What time in the performance of your duty? A. About 8:30, I guess.

Q. And who brought you to Grove Street? A. Some passerby called my attention to a disturbance in front of the school.

Q. Well, the school is not on Grove Street, is it? A. No, sir.

Q. Well, where was the fight? A. Near the entrance to the school.

Q. Then the fight was on Erie Street and not on Grove Street? A. You asked me what brought me to Grove Street and I am trying to tell you—on Fourth Street.

Q. Did you go to Grove Street? A. Not to Grove, no.

Q. Did you leave Erie Street at all? A. No, sir, I did not.

Q. You did not leave Erie Street at all? A. No, sir.

Q. Well, why did you say a minute ago that you left your post several times during that afternoon or evening? A. I said when I went to lunch.

Mr. Kavanagh: That is all.

JOHN A. MCFALL, sworn.

Direct examination by Mr. Drewen:

Q. You are a member of the Jersey City Police Department? A. Yes.

Q. And you have been for how long? A. Four years.

Q. Where were you doing duty on Election Day, November 6th, 1928? A. Number Two School.

Q. On Erie Street between Third and Fourth? A. Yes, sir.

Q. Jersey City? A. Yes sir.

Q. When did you go on duty that day? A. Well, seven a. m.

Q. Well, when did you leave your post of duty finally for the day? A. About half-past ten that night.

Q. And during the day where were you doing duty, in the school building or outside or both? A. Outside until the polls closed.

Q. What time did the polls close? A. Seven o'clock.

Q. And did you immediately go inside? A. Yes, sir.

Q. And you were inside all evening? A. Until I came out and they had trouble outside.

Q. What time was that? A. Around 8:30, twenty after eight.

Q. And I understand then you were inside from seven o'clock until about 8:30 when you came outside? A. Yes, sir.

Q. When you came outside what was happening in front of the school?

Mr. Kavanagh: I object on the same grounds as my previous objections to the same questions propounded to Officer Janicke, that the question is incompetent,

irrelevant and immaterial and not binding on these defendants or any one of them, not evidential against them.

The Court: I will allow it.

Mr. Kavanagh: Exception.

(Exception allowed, signed and sealed.
THOMAS H. BROWN,
Judge.)

A. When I came out there had just been a fight out there.

The Court: Strike that out. If you did not see it you cannot tell us.

A. When I came out I saw the car standing there and there was four or five fellows in it and a couple of officers standing in the street there and Frank Donato was just coming from the middle of the street and got in the car.

Q. Go ahead.

The Court: Which one is Frank Donato?

Mr. Kavanagh: Stand up, Donato.

The Court: You identify this man as that young man?

The Witness: That is him. So he jumped in the car.

Mr. Drewen: I would like to have the records show that he identifies the defendant Donato.

The Witness: (Continuing.) When he jumped in the car the car started up and went around Fourth Street, turned east on Fourth Street and about a few seconds afterward, about a half a minute later, maybe a little sooner, there was a fellow ran around and he had a little girl in his arms and he said——

Mr. Kavanagh: I object.

The Court: You cannot tell us what he said.

Q. He had a child in his arms, tell us what happened after that. A. So he brought the child down and the other officer took him and the child to St. Francis Hospital.

Q. That is all you know about it? A. That is all.

Q. I show you, Officer, the survey in evidence, S-2? I show you public school as designated as Public School Number Two on the survey; now, when you came out of the school building at the time you saw this automobile leave with Donato in it, about what time did you say that was? A. I should say around half past eight.

Q. In the evening? A. Yes.

Q. What part of the school building were you at before you came out on the street? A. In the basement down in here, on the north side.

Q. When you came out of the building what was going on on the sidewalk, what was happening?

Mr. Kavanagh: If he knows.

Q. If you know, certainly. A. Why, there was not anything happening there. There was a few people around there; that was all.

Q. How far north or south from the school entrance was this automobile standing which you say Donato got? A. That was I should say around here, around the entrance.

Q. Well, how many feet? Here is the entrance right here (indicating). A. The side entrance; that is where I came out.

Q. Was the car moving or standing when you first saw it? A. Standing.

Q. What kind of a car was it, sedan or open? A. Sedan.

Q. When you first saw Donato where was he? A. He was in the middle of the street, around here. Half a dozen people were around there and a couple of officers.

Q. He was in the middle of the street directly in front of the school? A. Yes, sir.

Q. What was he doing? A. He was waiking; he was going for the car just as I came out.

Q. Forgetting the map for an instant; tell me how many feet, as you judge, north of the entrance of the school was the car standing, eight, ten or how many feet? A. Well, I should say about twenty-five.

Q. Now, when you saw—first saw Donato walking on Erie Street, in which direction was he walking, toward the car? A. Toward the car.

Q. What did he do with reference to the car? A. He got in the car, got in the back seat and the car started off.

Q. How long after Donato got in the back seat did the car start off? A. Right away.

Q. Did you know any of the men in the automobile? A. No.

Q. Where were you standing, Officer, when you saw Donato get into the automobile and start off? A. Standing about here, just a little ways from the entrance.

Mr. Kavanagh: Designating.

Mr. Drewen: About a distance mid-way between the northerly end of the school building and the entrance.

Mr. Kavanagh: All right.

The Court: That is agreed, that that is so, for the purpose of the record?

Mr. Kavanagh: Yes.

Q. When the car started off, did you continue looking at it or not? A. I watched it go around the corner.

Q. Which corner? A. Fourth and Erie.

Q. That is, toward Grove Street? A. Right.

Q. From which direction do you say you saw the man coming with a child in his arms? A. He came from Fourth Street, around this way (indicating).

Q. Did he come around the corner into Erie Street? A. He came right around the corner, yes.

Q. He came from Fourth Street, you say, east of Erie Street? A. Yes.

Mr. Kavanagh: I object to that as leading.

Mr. Drewen: Well, he has just demonstrated it. There is no question about it.

The Court: All right. If you press your objection the court will sustain the objection. Simply repeat the question. You are wasting time, Mr. Kavanagh.

Q. Indicate on the map the direction from which you saw this man coming with the child in his arms? A. He came from Fourth Street, down this way.

Mr. Drewen: Do you admit that the witness says he came from the direction of Fourth Street on Erie?

Mr. Kavanagh: I do.

Q. How long after you saw the automobile turn into Fourth Street was it that you saw the man come as you say, with the child in his arms? A. Why, only a few seconds. It might have been half a minute.

Q. Might it have been less? A. Well, around a half minute, I think. It might have been less or more.

Q. Were you standing with anyone or were you alone when this man rushed back onto Erie Street with the child in his arms? A. I was standing alone.

Q. Did the man come up to you? A. No.

Q. What did you do when you saw the man with the child in his arms? A. I ran up to him and Patrolman Porter and I went up to the corner of Fourth Street.

Q. When you went up to the corner of Fourth Street where did you leave the man with the child in his arms? A. With Patrolman Porter.

Q. How many—do you know who that man was that was carrying the child? A. No.

Q. You say he took the child to the hospital? A. Yes.

Q. St. Francis Hospital? A. Yes.

Q. After you saw this child in the arms of the man and you went to Fourth Street, what did you see there? A. I did not see anything.

Q. Were any people there? A. A few people were around; that was all.

Q. Was there any automobile in sight? A. No.

Q. Did you speak to the man that had the child in his arms? A. No.

Q. Did he speak to you? A. No.

Q. How close to you did he come while he was carrying the child? A. Why, he went right by, maybe three or four feet.

Q. Went past you, went toward the school? A. He came down toward me. I was in front of the school. He came down to the—He stopped pretty near where I was, maybe three or four feet.

Mr. Drewen: All right, take the witness.

John A. McFall—Cross.

Cross-examination by Mr. Kavanagh:

Q. How long did you say you have been in the Police Department? A. Four years.

Q. Four years? A. Yes.

Q. What precinct are you attached to? A. Second precinct.

Q. Where is your post of duty ordinarily? A. Why, I have different posts, I have no steady post.

Q. You were assigned to duty at Number Two School on Election Day last year, were you? A. Yes.

Q. And what duties were you to perform there on that day, I mean what police duties? A. Well, I was supposed to keep the people away.

Q. Keep what people away? A. Keep the people away from the polls that are not supposed to be around there—keep them 100 feet from the polls.

Q. You didn't keep the people that were legally entitled to go in there, in that precinct, away, did you? A. Oh, no.

Q. Well, you got there at seven o'clock in the morning, Mr. McFall? A. I think it was seven, yes.

Q. Could it have been later? A. No, I do not think so.

Q. What? A. No, seven o'clock.

Q. What time do you generally go out in the morning? A. It is according to what time the polls open.

Q. What time did the polls open on Election Day last? A. Seven o'clock, I believe.

Q. Are you sure they did not open earlier? A. They may have.

Q. Were you in the school at any time during the morning? A. In the morning?

Q. In the course of your official duties as an officer? A. No.

Q. What time did you go to lunch that day? A. One o'clock.

Q. One o'clock? A. Yes.

Q. Did you go home for lunch? A. Yes.

Q. What time did you return to the school? A. Four o'clock.

Q. Four o'clock? A. Yes.

Q. Did the former witness, Mr. Janicke, go to lunch with you? A. I do not know.

Q. Or any— A. He did not go with me.

Q. What? A. Nobody went with me. I went alone.

Q. I am asking you if he went along with you to lunch, at one o'clock? A. No.

Q. Did any other officer go with you to lunch? A. No.

Q. And from one o'clock until four you were not at Number Two School where the election precincts were? A. No.

Q. You were home all during that time? A. Yes.

Q. Or the most part of it? A. Yes.

Q. What time did you return to Number Two School that day? A. Four o'clock.

Q. Did you have any supper that night? A. Yes.

Q. What time did you get off from your duties? A. What?

Q. What time did you get off from your duties; what time did you leave Number Two School? A. For lunch or for the day?

Q. No, for the day. A. About ten-thirty.

Q. Had the polls closed—— I withdraw that. Had the officials, the election officials, finished their count at ten-thirty? A. Yes.

Q. Did Mr. Janicke go away with you at ten-thirty? A. I do not know, I do not think so.

Q. Did he report back to the precinct with you at ten-thirty? A. No, sir, I did not report back. I took the boxes down to the City Hall and went home.

Q. Did you take all the boxes? A. The boxes from my precinct.

Q. Were you in the same district as Mr. Janicke? A. No, sir.

Q. How do you account for taking boxes away to the City Hall after the count was finished, if you were not assigned in the precinct and not outside on the street; how do you account for that? A. I do not understand the question.

Q. (Question repeated.) A. Well, after the polls were closed I was assigned to that district.

Q. How? A. After the polls were closed I was assigned to that district, to go down with the boxes.

Q. Who assigned you? A. The Captain.

Q. What Captain? A. Captain Murphy.

Q. Weren't you assigned in the morning inside the election precinct? A. No, sir, unless there was trouble or something to go in for.

Q. When did Captain Murphy tell you to take the boxes to the City Hall? A. Well, they tell you in the morning when they read the roll.

Q. Then he did tell you in the morning? A. Sure, when the poll closed, to go in there.

Q. The only part of your duties was not alone to patrol the street in front of the school but also to participate, within the election precinct in the school, if there was any disorder happened therein? A. Oh, surely.

Q. Or any disturbance of any kind? A. Surely.

Q. There is no doubt about that? A. No, no.

Q. When did you eat, after you had your lunch, when did you eat next? A. When I went home, about eleven o'clock maybe.

Q. Are you sure you did not have any food, did not have any meals between the hours of one o'clock and half past ten or eleven o'clock that night? A. No, sir.

Q. Did you leave the school at any time in the evening on Election Day? A. Not after seven o'clock. I may have left before seven.

Q. You did leave before seven, didn't you? A. I am not sure whether I did or not. I did not say I did. I say I may have.

Q. You are not sure whether you did or not? A. No.

Q. Now, if you may have left, where did you go; did you go back to the precinct? A. Well, no, not exactly; I may have went somewheres.

Q. Somewheres outside of the precinct? A. Yes.

Q. Say over to Grove Street or over to Jersey Avenue? A. Surely.

Q. Or down to Henderson Street or up to Monmouth Street, or down to Newark Avenue, or down to Pavonia Avenue; you may have done that between six and seven o'clock that night, is that right? A. I may have.

Q. Did you see any disturbance or any quarrels or any altercations of any kind outside of that school between the hours of half-past six and seven on that evening? A. No.

Q. There may have been quarrels or disturbances or altercations while you were away, is that right? A. I am not sure what time I went away. I went at 6:30 or——

Q. You do not remember whether you went away or not, do you? A. No, I am not sure.

Q. Well, now, if you did go away from the place where your duties were, did you have any power of your own to go away or say so? A. Oh, yes.

Q. You did not have to stick there all the time? A. I could have went, because there is two men assigned to each polling place until seven o'clock until they close.

Q. There were other officers there; you did not make any arrests on that day, did you? A. No.

Q. How many other automobiles were in front of that school on that evening—were there ten? A. No—at what time do you mean?

Q. Well, around seven o'clock.

Mr. Drewen: That is incompetent, irrelevant and immaterial to this issue, how many automobiles were around there at seven o'clock. Eight-thirty is the time.

Mr. Kavanagh: All right, I withdraw it, then.

Q. How many other automobiles were around the school at eight-thirty, around the time you specified? A. There was only one car in front of the school.

Q. Were there any cars on the other side of the street? A. There may have been. I did not take much notice.

Q. You could see; you had a full view of the street in front of the school between Erie and Third and Fourth Streets, didn't you? A. I had a good view, yes, but I did not notice it.

Q. You had a clear and unobstructed view, didn't you?

Mr. Drewen: He said yes, but he did not notice the car.

Q. How many cars did you notice altogether? A. I didn't notice any, only the one that was in front of the school.

Q. And you were standing on the steps of the school, weren't you? A. Yes.

Q. At that time? A. Yes.

Q. And you had a clear view up to Fourth Street, didn't you, on Erie? A. Only for the one car that was there.

Q. You had a clear view, didn't you? A. Not exactly, I would not call it a clear view of the cars there.

Q. What was to obstruct your view of Erie Street between Third and Fourth Streets as to your ascertaining how many automobiles were there? A. Why, there was nothing to obstruct it, only the one car that these fellows was in.

Q. One car would not obstruct the view of other cars that were on that street, would it? A. No.

Q. There might have been other cars on the street, for all you know? A. There may have been on the other side. There was not any on the side next to the school.

Q. Were there any on the side of Fourth Street between Third and Grove Streets—you say you walked up to the corner? A. Yes.

Q. Were there any automobiles on Fourth Street between Erie and Grove Streets? A. I did not see any.

Q. Did you look for automobiles? A. I looked for the one car that went around the corner, yes.

Q. You did not see any car on Fourth Street, did you, between Grove and Erie; you did not testify to that, did you? A. No, I did not say I did.

Q. You do not know where you were between seven and eight o'clock, do you? A. Yes.

Q. Where were you? A. I was inside at the polling place.

Q. You were in what—supervising the count? A. Well, I was not supervising the count. I was just watching there, that there was not any trouble; that was all.

Q. You were there in case that any trouble might arise, is that right? A. Yes.

Q. And the polls closed at seven o'clock, did they? A. At seven o'clock.

Q. And you were there continuously, inside continuously, from seven until the time you left, at ten-thirty, supervising— A. No, sir, seven until about eight-thirty, around eighty-thirty or eight twenty-five.

Q. Well, the count had not finished at eight twenty-five or eight thirty, had it? A. No.

Q. Why did you come outside at that time? A. Because there was a fight outside.

Q. Did you see the fight? A. No, the fellow told me.

Q. Somebody told you about itt? A. Yes, they says there was a fight outside.

Q. You did not personally see it, did you? A. No.

Q. You did not see who the participants in the fight were, did you? A. No.

Q. Did you arrest anybody that night? A. No, sir.

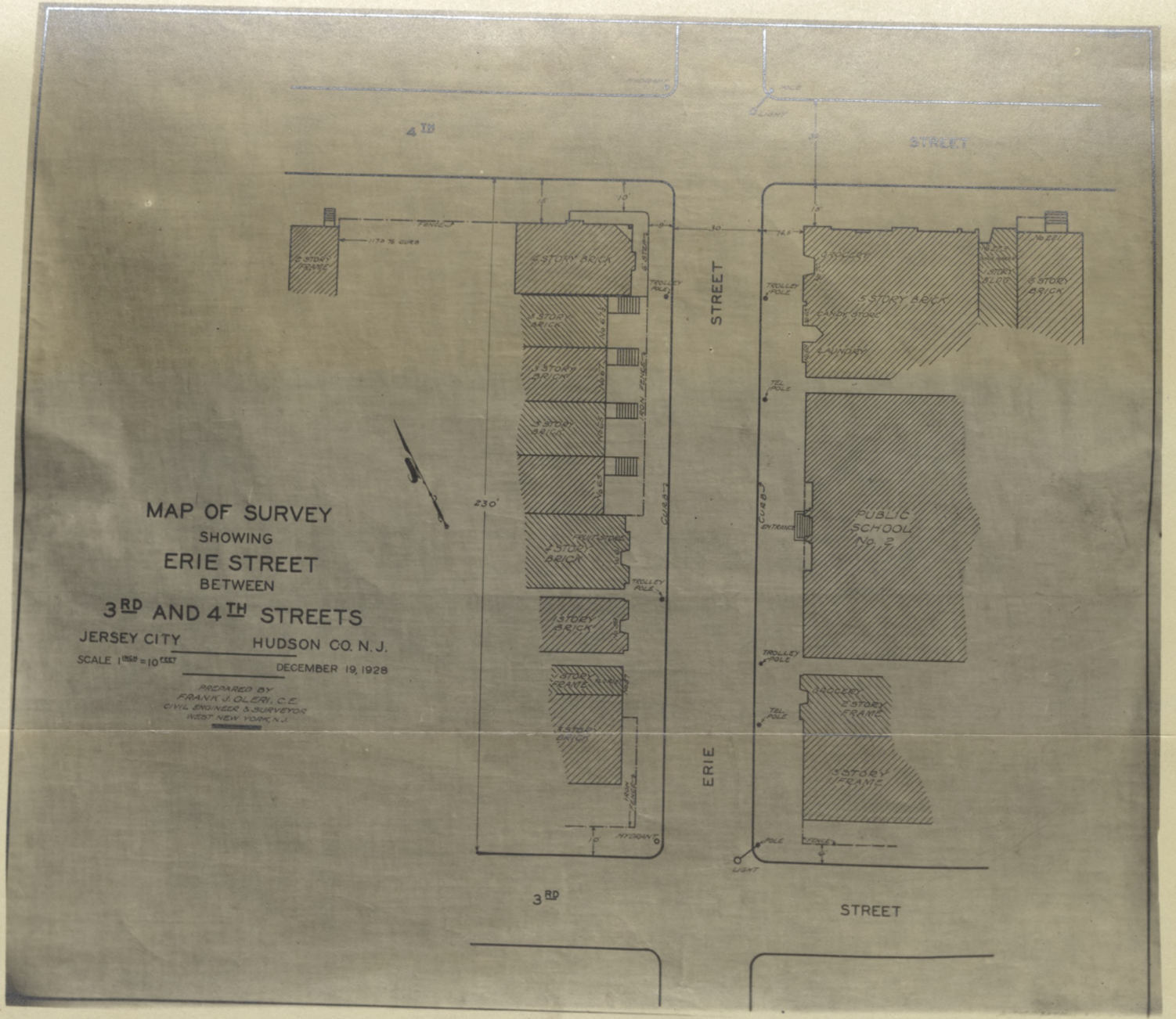
Q. Was anybody arrested by any of your co-workers, your fellow officers? A. Not that I know of.

Q. Did you arrest anyone after you came out, after hearing that there was a fight? A. No.

Q. You do not know whether there was a fight immediately before the polls closed, do you? A. No, I could not say.

Q. You do not know that? A. No.

Q. You say you saw Frank Donato, this gentleman here? A. Yes.


MAP OF SURVEY
SHOWING
ERIE STREET
BETWEEN
3RD AND 4TH STREETS
JERSEY CITY
HUDSON CO. N.J.
SCALE 1 INCH = 10 FEET
DECEMBER 19, 1928
PREPARED BY
FRANK J. OLERI, C.E.
CIVIL ENGINEER & SURVEYOR
WEST NEW YORK, N.J.
4TH
STREET
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ENTRANCE
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SCHOOL NO. 32


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Q. Stand up, Mr. Donato. This gentleman? A. Yes.

Mr. Drewen: This defendant here.

Q. You say you saw this defendant? A. Yes.

Q. Frank Donato? A. Yes.

Q. Where did you see him? A. Saw him in front of the school, in the middle of the street.

Q. Were you talking to him? A. No.

Q. Where were you standing when you say you saw Donato that night, at eight thirty, you say, is that right? A. I was standing on Erie Street, in front of the school, about half way between the entrance and the northern end of the school.

Q. What were you doing? A. I just had run out, just had come out on account of the fight.

Q. Did you grab anyone? A. No.

Q. Did you see any fight? A. No, there was no fight there.

Q. You just ran out? A. When I came out they were all in the car and he had run up to the car and got in and drove away.

Q. You did not see anyone get into that car; you testified, outside of Donato? A. No.

Q. Why did you say they were all in the car? A. I said there were a bunch in the car, four or five people.

Mr. Kavanagh: I ask to have that stricken out.

The Court: Don't get excited. It won't be stricken out.

Mr. Kavanagh: Exception.

(Exception signed, sealed and allowed accordingly.

THOMAS H. BROWN,
Judge.)

The Court: He might have seen four people in the car. He has a right to see that.

Q. Now, you said you did not see any disturbance of any kind at that time, did you? A. Not at that time. When I came out the fight was all over.

Q. You did not see any disturbance or fight at any other time, is that right? A. That is right.

Q. Did you know Frank Donato? A. Yes.

Q. You knew him? A. Yes.

Q. You knew him to talk to him? A. Why, I used to talk to him.

Q. Answer that question now, yes or no; did you know Frank Donato to talk to prior to November 6th of last year? A. Yes.

Q. You are sure of that? A. Yes, I have known him for over three years, three years and a half.

Q. You have known him for over three years? A. Yes.

Q. What time was it you came out of the school? A. Eight thirty.

Q. Eight thirty? A. Eight twenty-five, eight thirty.

Q. Was it dark that night? A. Was it dark that night at that time?

Q. Yes. A. Why, yes, it was just—yes, it was dark.

Q. Pretty dark, wasn't it? A. Well, it was dark where there was not any lights.

Q. There is no light in front of that school, is there, no electric light in front of the school? A. I could not say for sure.

Q. Well, you were on duty there that day, Mr. McFall? A. Yes.

Q. And you had a chance to observe if there was any light in front of the school, didn't you? A. Yes.

Q. Well, was there a light there or not? A. Well, I do not know whether there was a light there or not.

Q. Now, eight-thirty was the time and it was the evening of November 2nd, you know the street at that time was very dark, don't you? A. Why, I don't know—I would not say it was very dark.

Q. Well, there was no light in front of the building. You did not speak or see Donato coming out of the building, did you; out of the school, I mean? A. Not at that time, no.

Q. I mean at that time, 8:30? A. No.

Q. You did not speak to him or he to you? A. No.

Q. Well, now, what makes you so sure it was Donato and not somebody else of the same size and same height as Donato? A. Because I know him.

Q. Might you not have been mistaken as to your identity of Donato at that time, at 8:30? A. No.

Q. How was he dressed? A. I think he had a blue suit on.

Q. Blue suit on. What else? A. Blue suit and a soft hat, I believe.

Q. A what? A. A fedora hat, a soft hat.

Q. What kind of a soft hat? A. I believe it was a gray.

Q. Gray soft hat? A. I believe so.

Q. It was not a cap, was it, or a fedora, which? A. It was a gray soft hat, I am pretty sure it was.

Q. When you speak of soft hats, what do you mean? Do you mean a fedora hat? A. Yes.

Q. Not a cap? A. No.

Q. What else did he have on? Did he have an overcoat on? A. No.

Q. He did not have any overcoat on? Did he have a sweater on? A. I could not say whether he had a sweater on or not.

Q. Well, you saw him, didn't you? A. Yes.

Q. You saw him out in the street? A. Yes.

Q. You say you saw him getting into the car? A. Yes.

Q. How far were you away from him at the time you say you saw him? A. Well, I guess probably it was fifteen or twenty feet.

Q. And was the space between you and him light enough so as you could see him, or was it dark so you could not distinguish the clothes that he wore or his features? A. It was light enough so that I could tell who it was.

Q. And you knew him for three or four years, you say? A. Yes.

Q. And you did not bid him the time of the day or accost him in any way, the time of the night? A. No, sir.

Q. Or say a word to him, how? A. No, sir.

Q. Were you friendly with him? A. Why not—

Q. Were you friendly enough with him to talk to him, to bid him the time of the day? A. Yes.

Q. Why didn't you speak to him that night if you knew him? A. Because I was not going to speak to him when he was out there causing a disturbance in the street.

Mr. Kavanagh: I object and ask that the answer be stricken out as an unwarranted assumption of fact, and not in response to my question.

The Court: You have asked the question. You have wagered with the answer. Your

question was a very dangerous question and the answer will have to stand.

Mr. Kavanagh: Exception.

(Exception allowed and signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

Q. You did not talk to him, Mr. McFall? A. No sir.

Q. Did you see him engaged in any disturbance at the time? A. Not at the time, no sir.

Q. Did you see anything about the sidewalk or in front of that school between half-past six and seven o'clock in the evening? A. No sir.

Q. You do not know whether he was there or not at the time, did you? A. I am not sure, no sir.

Q. Well, you said a minute ago that you did not know whether you had gone away from the place or not? A. That is what I say, I am not sure.

Mr. Kavanagh: That is all.

Re-direct examination by Mr. Drewen:

Q. I don't know whether I asked you this or not. Can you tell us in what part of the automobile Donato sat when he got in? A. Why he got in the back seat on the left hand side.

By the Court:

Q. You said you saw the man with the child in his arms? Is that correct? A. Yes, sir.

Q. Did you see the automobile with Donato in it leave before you saw the man with the child in his arms, or after? A. Before.

Q. Well, how soon before? A. Well, about a half a minute or so; he just turned around the corner about a half minute.

Q. And when the automobile went off around the corner what would you say with regard to the speed of the car? A. I could not say how fast it was going.

Q. Do you drive an automobile? A. Yes sir.

Q. Do you ride a motorcycle? A. Yes sir.

Q. Do you mean to tell this jury that you do not——

Mr. Kavanagh: I object, if your Honor please.

Q. Can't you tell it with that knowledge, how fast the car was going? A. No, I could not say how fast.

The Court: Counsel will please remain seated.

Q. You could not tell? A. No sir.

Q. Have you any idea as to the rate of speed? A. Well, I would say around maybe fifteen or eighteen miles an hour anyway.

Q. Was the car at the moment of time you saw it going toward the corner, in first, second or third speed, if you know? A. Why, I didn't take much notice; I think it went around the corner in second speed.

Mr. Kavanagh: I object.

Q. How did you know that, how could you determine that? A. Just by watching him shift, the way he shifted.

Q. How near was the child that this man had in his arms, to you? A. Maybe about four feet.

Q. Did you see the child? A. Yes sir, I could have seen her if I looked.

Q. Not what you could have done, but did you see the child? A. No sir, I never took notice.

Q. Now you say you saw the body of the child in the man's arms, or could you see the child's face so that you could identify the child's face? A. No, I didn't see the child's face.

The Court: That is all.

Frank W. Bulwicz, sworn.

Direct examination by Mr. Drewen:

Q. You are a member of the Jersey City Police Department? A. Yes sir.

Q. And you have been for how long? A. Seven years and about three months.

Q. On Election Day, November 6th, 1928, where were you doing duty? A. I was doing duty at 321 Henderson Street.

Q. Well, from seven o'clock in the evening where were you doing duty? A. From eight o'clock in the evening I was on Erie Street.

Q. What part of Erie Street? A. From Newark Avenue to Pavonia Avenue and Erie Street.

Q. Does that include the blocks Fourth and Third Streets, on Erie? A. Yes sir.

Q. You say that is about midway between the boundary lines of your post? A. That is, from Third to Fourth Street, between Grove and Jersey Avenue.

Q. Do you know Frank Donato? A. Yes sir.

Q. Do you see him in Court? A. Yes sir.

Q. Where is he? A. Sitting on that bench there.

Q. Identify him, put your finger on him. A. The second man on the bench.

Mr. Drewen: Identifying the defendant Donato.

Q. How long have you known Donato? A. About seven years.

Q. On the evening of Election Day, November 6th, 1928, did you see Frank Donato while you were patrolling your post on Erie Street? A. I did see him, that is about 8.25.

Q. Where was he then? A. He was getting in the car on Erie Street.

Q. Do you know where School No. 2 is, on Erie Street between Third and Fourth? A. Yes sir.

Q. With relation to School No. 2, where was the car in which you say you saw Donato get in? A. The car was on the east side of Erie Street in front of the school.

Q. And which way was the car headed? A. It was headed north towards Fourth Street.

Q. Now, where were you just before you came out on post and saw Donato get into the automobile on Erie Street?

Mr. Kavanagh: I object unless the time is fixed.

Q. 8:25, just before 8:25 when you say you saw Donato get into this automobile, where were you? A. In the basement of the school.

Q. School No. 2? A. Yes, sir.

Q. And when you came out on the street from the basement of School No. 2, what was happening out on the street, what did you see? A. I seen Patrolman Janicke dispersing a crowd, and I grabbed some fellows and pushed them away,

and then started chasing the people and children away, dispersing them.

Q. With reference to that when was it you saw Donato get into the automobile? A. That was about a minute later than that.

Q. A minute after you dispersed this crowd? A. Started to disperse them.

Q. Then you saw Donato get into the automobile, is that correct? A. Correct.

Q. Where was Donato when you first saw him, on the street, or the sidewalk, or where? A. I seen him getting in from the outside of the car.

Q. That is from the street side of the car? A. Yes, sir.

Q. Which side of the street do you say the car was standing on? A. On the east side of Erie Street.

Q. That is the right side of Erie Street as you look at it on the map, Exhibit S-1? A. Yes, sir.

Q. I call your attention to the fact that I am now pointing to the entrance to School No. 2, and ask you how far from that entrance north or south that car was standing when you saw Donato get into it? A. It was, I judge, about 25 feet from the center of the steps.

Q. North or south? A. North.

Q. Now, where were you standing when you saw Donato get into the car? A. About the center of the steps.

Q. About here, in the center of the school steps? A. About the center of the school steps.

Q. Now where was the car standing—you were on the school steps, and the car, you say, was about 25 feet north of where you were? A. Yes, sir.

Q. Where was Donato when you first saw him? A. I seen him at the back of the car getting in. He was on the north side.

Q. And he was getting in, you say, from the left hand side of the car as you looked at it? A. As you looked at it, yes, sir.

Q. Was anybody else in the car when he got in it? A. There was a fellow sitting at the wheel.

Q. Anybody else? A. That is all I could see.

Q. You know the man that was sitting at the wheel? A. No, sir.

Q. Do you know any of these other defendants here? A. I just know one fellow.

Q. Who is he? A. That is McNally.

Q. Did you see McNally that night? A. I did not.

Q. Well, do you remember seeing him, or is it you don't remember whether you saw him or not? A. That is it, I don't remember.

Q. When Donato got into this car what became of it? A. I looked around and I seen the car turning on Fourth Street.

Q. Fourth Street is up here? A. Yes sir.

Q. Now, did you see the car start off after Donato got in it? A. No sir, I did not.

Q. How long after you saw Donato get into the car was it before you saw this car turning around east on Fourth Street? A. What is that?

Q. How much time passed from the time you saw Donato get into this car until you saw him turn into Fourth Street? A. It could not have been a minute.

Q. Less than a minute, you say? A. Yes sir.

Q. You say it went east on Fourth Street? A. Yes sir.

Q. Now, as this car turned into Fourth Street you remained standing in front of the school entrance? A. Kept pushing the people away, chasing them from in front of the school.

Q. That is after the car had turned into Fourth Street? A. Yes sir.

Q. What next did you see happen after this car turned into Fourth Street? A. I seen a lot of people on Fourth Street at the corner and I seen a man with a child in his arms bending over; I thought he was picking the child up, and I started to walk toward the corner when Patrolman Porter grabbed the child from that man's arms, and I hurried to the corner and found there Inspector Casey and told him about——

Q. Never mind what you told Inspector Casey. You say you saw a crowd on the corner of Fourth Street? A. Yes sir.

Q. And that was how long after the automobile turned into Fourth Street? A. Just about a half minute.

Q. When you saw this crowd on the corner of Fourth and Erie Street, what did you do and where did you go? A. I went towards the corner.

Q. Did you go to the corner? A. To the corner.

Q. You were right up to the corner? A. Yes sir.

Q. When you got to the corner what did you see? A. I seen a crowd there.

Q. Did you see anything else? A. At that moment there was an automobile, a truck went by on Erie Street, and I stayed there a minute.

Q. I know, but where was this child you say you saw the man pick up? A. The man was right on the corner when I seen him.

Q. Where was the child when you first saw it after you got to the corner of Fourth and Erie? A. In the man's arms at the corner.

Q. The child was not in a car? A. No sir.

Q. In a man's arms? A. Yes sir.

Q. Do you know the name of the man who had the child? A. No sir.

Q. Where was Officer Porter when you say you saw the man bearing the child? A. He was right in back of me.

Q. How far from you? A. About a foot or so.

Q. Was Officer Porter up on the corner of Fourth and Erie before you came there, did he go there with you? A. He was following me up.

Q. What was this man doing who was carrying the child at the time you got to the corner? A. I didn't take notice.

Q. Was he walking or standing still, or what was he doing? A. When I seen him he was bent over.

Q. Will you illustrate to the jury just how the man was carrying the child? A. When I seen him he was about half way down with the child in his arms.

Q. In this posture? A. About half way down, yes.

Q. And he was standing still? A. At that moment.

Q. Now when you saw the man bending over like this, as you say, with the child in his arms, how far from the corner, the southeast corner of Fourth and Erie, which is this corner here on the map, was the man? Was he on Erie Street or was he on Fourth Street? A. He was right about the corner there.

Q. Now, What became of the child? Did the man continue to carry the child or did some one else carry it? A. He continued carrying the child and Patrolman Porter took the child out of his arms.

Q. Where was this man when Patrolman Porter took the child out of his arms? A. Just about where the laundry is.

Q. Is this where you mean? A. Yes sir.

Q. The point indicated by the word "laundry" on the map? A. Yes sir.

Q. Did the man walk on towards the school on Erie Street with the child? A. Yes sir.

Q. And when he got to the laundry you say he met Patrolman Porter? A. Yes sir.

Q. And there Patrolman Porter took the child? A. Yes sir.

Q. Do you know where the child was taken then? A. Well, later I found out——

Q. Never mind if you don't know? A. No sir, I don't know.

Q. Did you see the child carried, which way they went? A. No sir.

Q. Where did you go after you saw Patrolman Porter? A. I went to the corner.

Q. Which corner? A. The southeast corner.

Q. After Patrolman Porter had got the child in front of the laundry and then went on to do his duty in that regard, you went back to the corner of Fourth and Erie? A. Yes sir.

Q. What did you see when you got there? A. I saw a crowd of people there, and an American Express truck driving on.

Q. Were there any other policemen there on the corner when you say you saw the crowd there? A. I didn't take notice.

Q. What type or character of automobile was this in which you say you saw Donato get? A. It might have been a sedan or coach, I didn't take notice. It was a closed type.

Q. Do you know what make it was? A. No sir.

Q. When you saw this car in which you say you saw Donato go, did you see anybody behind the wheel? A. I did not.

Q. At that time? A. When it was standing.

Q. Yes, you did see it? A. I saw a man sitting there, but did not see his face.

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Q. I didn't ask you that. Did you see a man seated behind the wheel of the automobile when Donato got in? A. Yes.

Q. Can you tell us how many men were in the automobile when Donato got in? A. I just seen that one man.

Q. Besides Donato? A. Donato.

Q. Whether there were more there or not you do not know? A. I do not know.

Mr. Drewen: Cross-examine.

Cross-examination by Mr. Kavanagh:

Q. How do you spell your name, Officer? A. B-u-l-w-i-c-z.

Q. You are attached to the Second Precinct, are you? A. Yes sir.

Q. Seventh Street, Jersey City? A. Yes.

Q. Where is your regular post of duty? A. I work all over the precinct.

Q. You were working where on last Election day, November 6th? A. I was working Erie Street. That was around 8 P. M.

Q. Where were you working on the morning of November 6th, at 8 A. M.? A. I was at 331 Henderson Street, at the Election Board.

Q. That is another polling place, polling precinct? A. Yes sir.

Q. What time did you leave there, Officer? A. Well, when I left there it was about one o'clock.

Q. Did you go to your lunch then? A. Yes.

Q. Where did you go after your lunch? A. After my lunch I returned to the precinct.

Q. Were you assigned to a new post? A. Yes sir.

Q. In the precinct? A. No.

Q. Where were you assigned to after you got to the precinct? A. Then I was assigned to 331 Henderson Street.

Q. After you got your lunch you went back there again? A. Yes sir.

Q. When did you quit there? A. About at 7.15.

Q. After the polls closed? A. Yes.

Q. And who told you to leave 331 Henderson Street? A. I was told to take in the reports after the polls closed.

Q. Who told you to take in the reports? A. The Lieutenant at the desk.

Q. Well, were you told to take in the reports from 331 Henderson Street? A. Henderson Street.

Q. What do you mean by "reports", Officer? A. Oh, that is the account of the votes, total votes that were balloted that day for that board, that district.

Q. Not the result of the count? A. That is the result.

Q. How could the count be finished at 7.15 when you left 331 Henderson Street, when the polls closed only at seven o'clock? A. That was the total amount of votes that were cast.

Q. Oh, just the number that were cast during the day, without there being any count? A. Yes.

Q. And you went back to the 2nd precinct then? A. Yes sir.

Q. And you reported to whom? A. The lieutenant at the desk.

Q. And you got to the 2nd precinct approximately what time? A. I judge about ten minutes later.

Q. About 7.25? A. About 7.25.

Q. Or 7.30, is that right? A. Yes.

Q. What did you do when you got to the precinct? A. We were told to go upstairs on reserve.

Q. How long were you upstairs? A. Until about eight o'clock, a few minutes after eight.

Q. And then you were directed to go where? A. On Erie Street.

Q. From Pavonia Avenue to Newark Avenue? A. Yes.

Q. You were on that post of duty prior to that day, weren't you? A. Well, yes.

Q. You are pretty well acquainted with that neighborhood, aren't you? A. Yes.

Q. How far is 7th Street from Pavonia Avenue, one block? A. From Pavonia Avenue is two blocks.

Q. And when you left the precinct at about eight o'clock or eight five, which direction did you go on the post that you were told to tour, to patrol? A. I went south on Erie Street.

Q. Toward Pavonia Avenue? A. No, toward Erie Street.

Q. Well, south? Oh, I see. A. South.

Q. And you were directed to go into No. 2 School, were you? A. No.

Q. Why did you go in there? A. I thought I had reasons to go in the school.

Q. What time did you go in the school? A. Well, I did not go right in there. Of course, I took my time walking the post.

Q. How long did it take you to walk from the precinct to the school? A. Well, it took me quite a while.

Q. Well, how long would you say? A. Well, about fifteen minutes.

Q. And then you went into the school, is that right? A. Yes sir.

Q. There was not any disturbance outside of the school when you arrived there, about 8.20 or 8.25? A. No.

Q. There was no altercation or fight of any kind at that time? A. No.

Q. You did not see any car outside of the school, did you? A. No.

Mr. Drewen: What time is that?
The Witness: About 8.20.

Q. You went into the school, is that right? A. Yes sir.

Q. What did you go in there for? A. I just went in there to see how the voting was going on.

Q. How long did you remain in there? A. Just a few minutes.

Q. Did you see anybody inside? A. I seen Patrolman McFall.

Q. Did you have a conversation with him? A. I just asked him how the voting was going on.

Q. How long did you hold conversation with him? A. Just a couple of minutes.

Q. It might have been longer? A. It could have been about three or four minutes.

Q. What did you do then? A. I started out towards the street.

Q. Nobody had come into the polling place at that time when you were with Mr. McFall, to tell you there was some fight outside? A. Inspector Casey.

Q. What? A. Was coming in and he told me to go outside that there was trouble.

Q. No, you do not understand what I mean. At the time that you were in there in conversation with Mr. McFall, nobody reported in there to tell you that there was trouble outside? A. No sir.

Q. Then you came out without hearing that there was trouble of any kind? A. I was on my way out.

Q. And you met Inspector Casey? A. Yes.

Q. Where did you meet the Inspector? A. Right at the door.

Q. And you did not see any altercation there, or fight, or disturbance of any kind? A. Not at the door. The door is——

Mr. Drewen: Not at the door.

Q. Not at the door? A. The door is in the alley of the school.

Q. Yes, you came out through the alley of the school. Then when you came out on the sidewalk you did not see any disturbance? A. I seen Patrolman Janicke dispersing the crowd.

Q. Dispersing the crowd; what do you mean by that? A. Chasing the people away.

Q. But you did not see any fight going on? A. No.

Q. Or any disorder of any kind? A. No.

Q. Outside of, you say, the officer telling the people to go away? A. Yes.

Q. You did not have any occasion to go and mix into the crowd and tell them to leave, or anything like that, did you? A. Yes.

Q. Why did you do that when you did not see any disturbance of any kind? A. There were too many people around and they said there was trouble there.

The Court: Your superior officer, Inspector Casey, ordered you out there, did he not?

The Witness: Yes.

Q. You did not see any trouble, as a matter of fact, did you? A. No.

Q. It was because you saw some people there you went over and told them to go away? A. Yes.

Q. Now, the polls were closed at that time, weren't they? A. Yes.

Frank W. Bulwicz—Cross.

Q. Now, you say you saw Frank Donato there that night, is that right? A. Yes.

Q. Was it dark that night when you came out of the school? A. Yes.

Q. Pretty dark, wasn't it? A. Yes.

Q. It is pretty dark at that time, half past eight in the month of November, isn't it? A. Yes.

Q. Eight thirty or thereabouts? A. Yes.

Q. Were there any lights in front of the school? A. There was, at the main entrance.

Q. There were no lights at the alley, though? A. No, the lights were lit in the basement.

Q. I am not asking you now, never mind that. There are no lights at the alley? A. No.

Q. And there is no electric light in front of that school, is there? A. No.

Q. The nearest light, if you are familiar with that locality, is at the northeast corner of Fourth and Erie Streets, isn't that right? A. Northeast corner.

Q. That is right, isn't it? A. Right.

Q. And that electric light is over the sidewalk, the northeast sidewalk, at the intersection of Fourth and Erie Street, that is true, isn't it? A. Yes sir.

Q. There is no electric light in the middle of the block, is there? A. No.

Q. Did you have any conversation with the man you say you saw, that you say was Donato? A. No.

Q. Did you say anything to Donato? A. No sir.

Q. Or rather the man you say was Donato? A. No sir.

Q. You say you have known Donato for seven years? A. Yes sir.

Q. And you knew him pretty well all during that time? A. Yes.

Q. Was there anybody with him at that time? A. I could not say.

Q. And how far away from you was this man that you say was Donato? A. At the time——

Q. No, at the time you say you first saw him? A. When I first saw him was at the car.

Q. How many feet was that away from you? A. About fifteen or twenty feet.

Q. Where was he coming from? A. He was getting in the car.

Q. All right; what direction was he coming from prior to the time that you say he was getting into the car? A. He was out in the middle of the street.

Q. I know, but you say you saw him getting into the car; what direction was he coming from, was he walking west, from the east to west, or from west to east at the time when you first saw him, as you said? A. Yes. He was at the car, going into the car then.

Q. Going in the car? A. In the car, yes.

Q. From what side? A. From the street side.

Q. From the gutter side, is that right? A. Yes.

Q. Then he was, was he, coming from the west side of the street? A. Well, I said he was right at the car. I did not see him walking.

Q. You do not know? You do not know where he came from, do you? A. No, I do not.

Q. Did you hear the former witness, Mr. McFall, say—or by the way, I withdraw that, please. Mr. McFall was there at that time when you came out of the alley, wasn't he? A. Yes.

Q. Where was he in reference to you at that time? A. I could not tell you—in that crowd.

Q. Did you see him? A. I do not know if I seen him with that crowd of people around.

Q. Well, try to remember. A. Well, not at that moment.

Q. Can you remember now, fixing your imagination, your mentality, on what happened at that time, on what happened at the alley, can you remember now by going back to it and conjuring your mind, as to what happened at that time with respect to whom you saw there, and so forth? A. I paid no particular attention to anybody, as I was busy dispersing the crowd.

Q. Then you did not see McFall at that time? A. Well, I did not pay no attention looking for McFall.

Q. Did you see him aftrewards in front of the building? A. Oh, well, I seen him near the corner, near Fourth Street, later.

Q. You did not say a word to Mr. Donato? A. No, sir.

Q. Notwithstanding the fact that you had known him for seven years? A. Yes.

Q. You saw him getting into the car? A. Yes.

Q. You did not bid him the time of the night, did you? A. No.

Q. Did you ask him where he was going or what he was doing, or anything of that kind? A. No, sir.

Q. Irrespective of the fact that you knew him for these long years you did not ask him anything about whether there had been a fight there or a quarrel or an altercation of any kind at all, did you? A. I had no time to see him and speak to him.

Q. Well, no, I know, but I am asking you did you or did you not? A. No, sir.

Q. How was Mr. Donato dressed that night, if you say you saw him? A. At that time I paid no particular attention to how he was dressed.

Q. Do you mean to tell this Court and jury that you saw him at that particular moment, a

man whom you were acquainted with for over seven years, getting into an automobile, who was within fifteen feet distance from you, and you cannot tell the Court and jury how he was dressed? A. No, sir.

Q. Did he have an overcoat on? A. I cannot say.

Q. Well, what kind of a hat did he have on? A. I do not know.

Q. What kind of a suit did he wear? A. I do not know.

Q. Did he have gloves on? A. No, sir.

Q. You do not know? A. I do not know.

Re-direct examination by Mr. Drewen:

Q. Were you acquainted with Donato in such a way that you would speak to him as a matter of greeting whenever you saw him on the street? A. I would say "Hello", and speak to him, yes.

Q. You said something about Inspector Casey. Mr. Kavanagh, the defendant's counsel, brought out a statement from you to the effect that Inspector Casey made a report to you while you were in the school building, of something that was going on outside, is that correct? A. Yes.

Q. And you say when Inspector Casey told you what was happening outside you were then already on your way out? A. On my way out.

Q. When you say you were on your way out you say you were about to leave the school building by the side entrance? A. Yes.

Q. That is the entrance of the school or the exit from the school on the northerly alleyway? A. Yes.

Q. Where my finger is, is Public School No. 2. This is the northern alleyway, on the northerly

side of the building—correct? A. On the girls' side.

Q. Where was Inspector Casey, did you pass him on your way out? A. He was right up at the head of the stairs, right in the doorway.

Q. He gave you your orders? A. Yes.

Q. Did you pass him when you went out? A. Yes.

Q. Did he remain there? A. I do not know.

Q. From where did you come; did you come directly outside on the street? A. Yes, sir.

Q. How long after you got there was it you say that you saw Donato getting into the car? A. About half a minute later, when I got walking towards the street.

Mr. Drewen: That is all.

CHARLES FRANCIS PORTER, sworn.

Direct examination by Mr. Drewen:

Q. You are a member of the Jersey City Police Force? A. Yes, sir.

Q. Were you a member of the Department on Election day, 1928, November 6th? A. Yes.

Q. Now, speak up loud, please. Where were you on duty on the evening of that day? A. Public School No. 2.

Q. On Erie Street? A. On Erie Street.

Q. Between Third and Fourth Street? A. Yes.

Q. Do you know this defendant, Donato? A. Yes.

Q. How long have you known Donato? A. Five and a half years.

Q. Do you know the defendant, McNally? A. Yes.

Q. How long have you known McNally? A. I knew him a good many years.

Q. Will you please identify these two defendants, McNally and Donato, where are they? A. The second and third man.

Q. The second and third man on the bench? A. Yes.

Mr. Drewen: I would like the record to show the identification.

The Court: Go down and put your hand on them, so there will not be any doubt about it.

(Witness complies.)

The Witness: That is Donato (indicating); that is McNally (indicating).

Mr. Drewen: Have the record show that the witness identifies the defendants, Donato and McNally.

Q. Now, at about eight o'clock in the evening, Officer, were you in the basement of this school? A. No.

Q. Where were you then? A. Upstairs.

Q. In the upper part of the building? A. Yes.

Q. What were you doing? A. Getting returns of the ballots.

Q. From the election board? A. From the election board, of each one hundred ballots, one hundred votes.

Q. Was there an election board holding a session in the upper part of the building? A. Yes, sir.

Q. And one in the basement? A. Two in the basement.

Q. And you were assigned to duty at the board in the upper part of the building? A. Yes.

Q. Tell us what you saw that night with regard to any actions or conduct of Donato and McNally, and what you did. A. At seven o'clock, when the voting was closed, I went into the school. I was in there about fifteen minutes and I heard a commotion out in the hall.

Q. In the hall of the school? A. Yes.

Q. Yes. A. And I go outside and they have a fire hose pulled off the wall.

Q. Who had the fire hose pulled off of the wall? A. There was about eight or nine of them there, and when I came out Donato ran out into the street and I went out and brought him back again.

Q. Did you see McNally there at that time? A. Yes.

Q. What was McNally doing? A. They were all standing around when I ran out.

Q. After you brought McNally back again what happened? A. I made them put the place back in the condition that it was in, and then I put them all out again. I went back and resumed getting the count.

Q. Were you again called to the street in front of the school after that? A. About 8.30 I was.

Q. Tell us what happened then? A. I went outside, about 8.30, and I meets Inspector Casey on the steps of the stoop, that is the center of the school, and I says, "What was the trouble?" He says, "There was a fight"——

Mr. Kavanagh: I object to that and ask that it be stricken out.

The Court: Strike it out.

Q. Now, do not tell us what the conversation was. See if I can help you. Did you have a conversation with Inspector Casey? A. Yes.

Q. After you had a conversation with Inspector Casey what did you do, or see take place in front of the school building? A. Nothing.

Q. Where did you have this conversation with Inspector Casey? A. On the steps.

Q. While you were talking with Inspector Casey was any commotion going on in front of the school? A. No sir.

Q. Did you or did you not go out to the front of the building in response to a summons from Inspector Casey? A. In response to some people who told me there was a fight out there.

Mr. Kavanagh: I object.

The Court: Strike it out.

Q. As the result of certain information which you received, what did you do? A. I went out on the street.

Q. You went out on the street. Did you see an automobile standing in front of the school? A. Yes sir.

Mr. Kavanagh: May I ask that the time be fixed?

Q. What time was this when you went out and saw an automobile there? A. Between 8.25 and 8.30.

Q. And how far from the entrance to the school where you say you stood, either north or south, was this automobile standing? A. Between twenty and twenty-five feet.

Q. North or south? A. North.

Q. Which way was it pointed? A. North on Erie Street.

Q. Which side of Erie Street was it on, the school side or the other side? A. On the east side of Erie Street.

Q. That is, the school side? A. Yes sir.

Q. Did you see anybody get in the car while you were standing there? A. No sir.

Q. After you got out on the street you saw the car standing; did you see Donato and McNally? A. Yes sir.

Q. Where were they then? A. In the car.

Q. Who else was with them, can you tell us? A. No sir.

Q. You do not know? A. No sir.

Q. Do you know this defendant Ormsby? A. I know him by sight.

Q. Can you tell us whether or not Ormsby was in the car at that time when you saw Donato and McNally in the car? A. No sir.

Q. You cannot tell? A. No sir.

Q. And is the same thing true of the defendant Brasch alias O'Keefe? A. Yes sir.

Q. You cannot tell us whether or not he was in the car? A. No sir.

Q. Now, while you were standing there and you saw Donato and McNally in the car, did you see the car leave? A. Yes sir.

Q. Which way did it go? A. North on Erie Street.

Q. Did you see where it turned, if it did turn? A. Yes sir.

Q. Where did it turn? A. East on Fourth Street.

Q. Was your attention again called after you saw the car turn in on Fourth Street—was your attention again called to the neighborhood of Fourth and Erie Street? A. Yes sir.

Q. Now, when your attention was called to it, where did you go? A. I ran toward Fourth Street.

Q. Along Erie? A. Yes sir.

Q. Now tell the jury, please, what happened when you went toward Fourth Street? A. I gets as far as the grocery store on the corner of Fourth and Erie, and there is a man carrying a baby, this little girl, in his arm, and I ran over and helped him with the baby, and I asked him what was the matter, and he said——

Mr. Kavanagh: I object and ask that the answer be stricken out.

The Court: He has not told us anything yet.

Q. You got as far as the grocery store and you met a man carrying a baby in his arms; what did you do? A. Inspector Casey ordered me and the child to the hospital, and I helped the man into a standing automobile, and we moved the child to St. Francis Hospital.

Q. Now you say you went as far as the grocery store, is that right? A. Yes sir.

Q. Do you mean the store marked on the map, "Grocery", on the southeast corner of Fourth and Erie? A. Yes sir.

Q. Now, when you got to that point, Officer, where was the man who was carrying the child when you first saw him? A. Right about to the end of the building on the Erie Street side.

Q. What was he doing, standing or walking? A. He was running with the child.

Q. In your direction? A. Yes sir.

Q. And he had the child in his arms? A. Yes sir.

Q. And where was it you took the child away from him? A. We both carried the child right across the street here.

Q. Across Erie Street? A. Yes, right across Erie Street, and there was a car on the opposite side, opposite the school.

Q. A car parked on the west side of Erie Street? A. Yes sir.

Q. You got to the car with the child, you and the other man, then what did you do? A. We got in the automobile and the man drove us to St. Francis Hospital and we left the child in the emergency room.

Q. In the emergency room? A. Yes sir.

Q. Do you know who the man was that was carrying the child before you got there? A. I took his name and his address in the hospital, and we both went to the station house.

Q. Do you know who the man is? A. His name?

Q. Yes. A. Daniel Reilly.

Q. Did anyone else accompany you and Reilly with the child to the hospital? A. Yes.

Q. Who? A. A fellow named Kelly.

Q. Now, Officer, how much time elapsed from the moment you saw the car turning from Erie into Fourth Street till your attention was called to a man carrying a child in his arms? A. About a minute or a minute and a half.

Q. Might it have been less than a minute? A. I don't think so; it could not have been much less than that time.

Q. I show you a photograph marked Exhibit S-5 and ask you if that is the photograph of the child whom you carried to the automobile? A. Yes sir.

Q. What was it caused you to go to Fourth and Erie Street? Was it the man carrying the child? A. I saw all the people running, and I ran too. They were running toward me and I ran toward them.

Q. Well, was it the fact you saw people running toward you from Fourth Street that caused you to go to Fourth Street? A. Yes sir.

Q. And how did you know, Officer, that the trouble was at Fourth Street when you saw the people

running away from Fourth Street? A. There was nothing the matter down where I was, but I knew there was some commotion up that way.

Q. You mean at the corner of Fourth and Erie? A. Around the corner; there was no commotion on the corner.

Q. Around the corner? A. Yes, some place around the corner.

Q. Which part of the car were Donato and McNally seated in, can you tell? A. In the rear.

Mr. Drewen: Cross-examine.

Cross-examination by Mr. Kavanagh:

Q. What time did you get to the school that evening, Officer Porter? A. Five o'clock.

Q. That is the evening of Election Day? A. Five o'clock.

Q. Where were you doing duty prior to that time? A. 321 Henderson Street.

Q. Down at the same place the other officer was? A. Yes sir.

Q. What time did you leave Henderson Street? A. One o'clock.

Q. And you were sent to No. 2 school at five o'clock? A. I went home and I had dinner and returned to the station at 4:45.

Q. Then you were sent to No. 2 school? A. Yes, sir.

Q. And you were sent to do duty inside or outside on the street? A. I was sent over there to do police duty in and out.

Q. You were not told what particular things you were to do? A. Just regular duty, that is all.

Q. I mean, you were not told to remain in the polling place, were you? A. My place was inside and out.

Q. I am asking you, Officer, were you told where to remain or not? A. No, sir.

Q. Now, did you go into the polling place? A. Not until after they closed.

Q. Where were you between five and six o'clock? A. Well, from five to five-thirty I remained outside of the school, and from 5.30 until six I went and had coffee.

Q. You were not patrolling the whole street from Newark Avenue to Pavonia Avenue, were you? A. No, sir.

Q. Did you, as a matter of fact, at any time that evening patrol Erie Street from Newark Avenue to Pavonia Avenue? A. No, sir.

Q. You did not? A. No, sir.

Q. Did you, with the exception of the time you left between 5:30 and 6 to get some coffee, leave No. 2 school? A. No, sir.

Q. Are you sure of that? A. Positive.

Q. Now, there was trouble in that school and outside of the school, wasn't there, before the polls closed, Mr. Porter? A. Not to my knowledge.

Q. Are you sure of that? A. Positive of that.

Q. Are you sure that you did not see some disturbance of some kind or other prior to the time that the polls closed at nine o'clock? A. No, sir.

Q. In other words, about approximating about quarter to seven, twenty minutes to seven o'clock, or ten minutes to seven o'clock? A. No, sir.

Q. In which disturbance or in which fight somebody was hurt and brought into the school just prior to the time that the polls closed at seven o'clock? A. There was no trouble whatever outside the school.

Q. Are you sure of that? A. Positive.

Q. You say you were outside the school just before seven o'clock, were you? A. Yes, sir.

Q. You did not see any one taken into the washroom to have blood bathed from his head and face? A. No, sir.

Q. You did not see any one, I mean a police officer or police officials disperse the crowd of people just before the polls closed? A. We dispersed them all day long as they hung around there. There was no trouble. We kept them one hundred feet from the polls, but there was no trouble. We dispersed them all day long.

Q. And you did not see any one hit or assaulted before seven o'clock? A. No, sir.

Q. Just prior to the time the polls were closed? A. No, sir.

Q. Sure of that? A. No, sir.

Q. What polling place were you doing duty in? A. I believe it was the fifth district of the fifth ward.

Q. Was that located in the basement of the building or upstairs? A. The upper part.

Q. Up on the first floor, is that right? A. Yes, sir.

Q. In the back of the building facing Grove Street, or in the front of the building facing Erie Street? A. Facing Erie Street.

Q. And where with reference to the windows overlooking Erie Street was the election board located? A. Right under the windows.

Q. What do you mean by that, near the windows? A. Right next to the windows. Here is the windows here and the election board was over there.

Q. Assuming that these windows back of these gentlemen look out on Erie Street? A. Yes, sir.

Q. That window there looks out in a westerly direction, is that right? A. Yes, sir.

Q. And this room here is the classroom, or whatever it may be, in which the election Board

was located. Where in this room was the board located? A. Right alongside the windows.

Q. Over here where the gentlemen of the jury are seated? A. Yes, sir.

Q. Now, you went there at five o'clock? A. Yes, sir.

Q. Then you went for a light lunch at 5:30? A. Yes, sir.

Q. Then you returned at six? A. Yes, sir.

Q. Did you go right back in the room then? A. I was not in the room.

Q. You were not in the room at six o'clock? A. No, sir.

Q. Do you mean to say that you were not in the election booth at any time prior to the time the polls closed? A. No, sir.

Q. That is true, is it? A. Yes, sir.

Q. Did you have any reason or any occasion to go in for anything at all, is that right? A. No, sir.

Q. Now, between six and seven o'clock where were you? A. I was outside.

Q. What do you mean by outside, outside of the school on the street? A. Outside of the school, right on the street.

Q. Outside on the front stoop, not where the basement is? A. No, sir.

Q. Where the alley leads into the basement? A. No, sir.

Q. You never left the front of this school between the hours of six and seven o'clock? A. No, sir.

Q. You are sure you did not leave? A. No, sir.

Q. Was any officer with you at the time? A. There was another officer with me, and there were two on the entrance to the alleys.

Q. Between the hours of six and seven o'clock, did you have any occasion to disperse any people that were congregating there? A. No, sir.

Q. You didn't have any reason to at all? A. No, sir.

Q. You didn't disperse anybody? A. No, sir.

Q. Are you sure of that? A. Positive.

Q. Now you say that McNally took a fire hose from the wall? A. I didn't see who done it.

Q. Well, was McNally in the school? A. Yes, sir.

Q. What time was he in the school? A. About 7:15.

Q. Are you sure he was not in the school prior to the time the polls closed? A. I could not tell you.

Q. You do not know, do you? A. No.

Q. And did you talk to McNally that night at all? A. No sir.

Q. How long have you known McNally? A. I have known him for a good many years, but not a speaking acquaintance.

Q. When you say a good many years, what do you mean? A. I probably know him twenty years.

Q. You did not speak to him at all? A. Never have spoken to the man.

Q. Now you went into the election place upstairs immediately after the polls closed, is that right? A. Yes sir.

Q. What time was that? A. Seven o'clock.

Q. And what did you do up there? A. Got the total amount of ballots that were cast that day and I gave them to my partner.

Q. What time did you get the total amount? A. About ten minutes after seven.

Q. Do you mean to say you got the total amount before ten minutes after seven? A. Yes sir.

Q. And wasn't there a line waiting there at seven o'clock, waiting to cast their votes? A. No sir.

Q. There was not a line in this polling place there? A. No sir.

Q. Do you mean to tell the court and jury that at the minute of seven o'clock the election officers stopped their work, and that no more votes were recorded, no more votes were cast, and they immediately began to count the ballots? A. About ten minutes after seven.

Q. How long did it take to count the first one hundred? A. Probably three quarters of an hour.

Q. That would bring it up to when? A. About ten minutes to eight.

Q. Then what did you do when the first one hundred were counted? A. Sent them to the station.

Q. Gave them to a messenger to take to the station? A. Yes.

Q. How long did it take to count the second hundred? A. I don't know.

Q. Can you give us some approximate idea? A. I have no idea because it varies in every one hundred.

Q. And you say it took the election board about three-quarters of an hour to count the first hundred? A. I gets the first hundred at ten minutes to eight.

Q. But you did get the second hundred? A. Yes.

Q. And you don't know how long it took the board to count the second hundred? A. No sir.

Q. You don't know whether you got the second hundred at about quarter to nine, do you? A. No sir.

Q. Whether it was about half past eight? A. No sir.

Q. Did you dispatch the second hundred? A. Yes sir.

Q. Did you dispatch the third one hundred? A. Yes sir.

Q. Where were you when you got the count of the third one hundred? A. In the school.

Q. What time did the board finish the counting of the third one hundred? A. I don't know.

Q. You had not left that room from ten minutes after seven, or immediately after the polls closed until you got the third count of the board, is that a fact? A. No, sir.

Q. But you got the third one hundred, didn't you? A. Certainly I got the third one hundred.

Q. You got the count of the first one hundred? A. Yes, sir.

Q. Well, you tell the Court and jury it took about three-quarters of an hour? A. Yes, sir.

Q. You got the count of the second hundred, and tell us you do not know how long it took the board to count the second one hundred? A. No, sir.

Q. You got the count of the third one hundred and you cannot tell us what time you got that count? A. No, sir.

Q. Did you leave the room before you got the third one hundred? A. I don't think so.

Q. Isn't it a fact the time you saw McNally and Donato in that place, Number 2 School, was around a quarter of seven or twenty minutes of seven, when some other man was assaulted by somebody else and they had to take him into the washroom in the basement to bind up his wounds and wash the blood from his face, isn't that a fact? A. No, sir.

Q. And do you tell the Court and jury that you did not see McNally and Donato at seven o'clock? A. I saw them about half-past seven out in front.

Q. Didn't you tell the Court and jury that the fire hose was taken around seven o'clock, before the polls closed at seven o'clock? A. I did not.

Q. You did not say that? A. No, sir.

Mr. Kavanagh: That is all.

Re-direct examination by Mr. Drewen:

Q. I don't know whether I asked you this one question: Did you notice the type of car in which you saw Donato and McNally sitting? A. A sedan.

Q. And could you tell the make? A. No, sir.

Mr. Drewen: That is all.

Daniel Casey, sworn.

Direct examination by Mr. Drewen:

Q. You are an officer of the Jersey City Police Department? A. Yes, sir.

Q. And you were Inspector of Police, as you are now, on the 6th of November, 1928, were you not? A. Yes, sir.

Q. Inspector, along about eight o'clock or eight-thirty on the evening of Election Day, November 6th, 1928, did your duty take you into No. 2 School on Erie Street, Jersey City? A. Yes, sir.

Q. About what hours in the evening were you there altogether? A. I was there several times during the day. Around that time, it was around 8:35 that I was there.

Q. Did you see Officer Porter there about that time? A. I was talking to Officer Porter.

Q. Did you see Officer Bulwicz there at the time? A. Yes, sir.

Q. Did you see Officer McFall there? A. Yes, sir.

Q. And Officer Janicke? A. Yes, sir.

Q. Do you know this defendant, McNally? A. Yes, sir.

Q. How long have you known McNally? A. Well, all his life, practically.

Q. Do you know the defendant Donato? A. Yes sir.

Q. How long have you known Donato? A. The same time.

Q. At any time about 8.30 did you see Donato and McNally at or about School No. 2 on Erie Street? A. Yes sir.

Q. Tell us where, and what they were doing, and what you observed? A. They were sitting in the back of a car. It was a sedan parked about twenty-five feet from the entrance going north of No. 2 School, towards Fourth Street. There were four men in that car, the two men in the rear were Donato and McNally.

Q. And who were the two men in the front of the car, do you know? A. I don't know.

Q. When you first saw those men in the car was the car standing or moving? A. The car was standing.

Q. And where were you when you saw it? A. About twenty-five feet away from it right in the center of the doorway of the school.

Q. And were you talking to Officer Porter at the time? A. I was talking to Officer Porter.

Q. Had you seen Donato and McNally get in the car or were they already in it? A. They were in

it when I saw them; I just happened to go by there.

Q. Had there been any trouble there before you got there? A. I understood that there had been trouble.

Mr. Kavanagh: I object, and move to strike the answer out.

Mr. Drewen: I will consent.

The Court: The answer is stricken out.

Q. From which direction did you approach the school, from Fourth Street or from Third? A. Fourth Street. I left the Second Precinct, and walked over from the Second Precinct along Erie.

Q. And did you pass the automobile as you came toward the school, or did you come to the main entrance of the school, or did you go to the side alleyway? A. There was a fellow sitting in the doorway there.

Q. Doorway of what? A. Doorway of the building next to the school on the north side of the school, and there was a woman there standing with him, who had a half a load on, and somebody said somebody slapped him——

Mr. Kavanagh: I object.

Q. You got some information concerning that man you saw there? A. Yes.

Q. Pursuant to that information you got concerning that man what did you do? A. I looked in the school and I saw two policemen in the basement. One was Bulowicz and the other was McFall.

Q. Did you give any orders to Bulowicz and to McFall? A. Yes sir.

Q. After you gave your orders in the basement of the school—by the way, that was the basement

at the north end of the school? A. At the north end of the school.

Q. After you gave your orders to Bulowicz and McFall in the basement of the school at the north end, where did the two officers go? A. Out on the street.

Q. Through the alleyway? A. Through the alleyway.

Q. And did you go with them? A. Yes. Right behind them.

Q. When you and the officers got out on the sidewalk where did you go? A. I stood talking to Officer Porter. I seen him there, right in front of the school door.

Q. Was it then that you say that you saw the two men, McNally and Donato, in the rear seat of the automobile? A. Yes.

Q. After you got out in front there and saw Donato and McNally in the rear seat of the car what happened? A. About a minute after that car started up and went around Fourth Street.

Q. Which direction on Fourth Street, Inspector, east or west? A. I think it went east.

Q. Did you see it turn the corner? A. Yes.

Q. Now, after you saw this car turn the corner east on Fourth Street, did you remain there or did you go elsewhere? A. Well, in about a minute, well, I would not say a minute, about a half a minute, a man came around carrying a child in his arms.

Q. From where did that man come? A. He came from Fourth Street on to Erie.

Q. From the eastern side of Fourth Street? A. Yes.

Q. When you first saw the man carrying the child in his arms where were you standing? A. Right in front of the school, right at the doorway of the school.

Q. And was that the time that Officer Porter took the child? A. I sent Officer Porter with the child. I says, "Rush, and take that child to the hospital". I thought the child was struck with an automobile, with a car that went around the corner.

Q. You did not know what had happened? A. No, I did not know what happened until about a minute after that when I found out just what had happened.

Q. And Officer Porter carried this child, as he has testified, to a standing automobile, and to the hospital? A. Yes.

The Court: Did you see the man who had the child in his arms?

The Witness: I saw him, but I knew who he was afterwards, but at that time I did not know who the man was, I found out afterwards.

Q. What is his name? A. Reilly.

Q. Do you know him? A. Well, yes.

The Court: Is he here today?

Mr. Drewen: Oh, yes, he is here.

Q. That was a sedan car? A. A sedan car, yes.

Mr. Kavanagh: I object to this.

Mr. Drewen: All right, I do not want to lead, but——

Q. Did you know the make of the car? A. No, I did not, I found out afterwards, though, what it was.

Mr. Drewen: Cross-examine.

Cross-examination by Mr. Kavanagh:

Q. Inspector, were you at No. 2 School around seven o'clock, sometime before the polls were closed? A. No, I was not.

Q. Were you there at six o'clock? A. No.

Q. Were you there at five o'clock? A. I was there—I went by there several times during the day, but I cannot——

Q. You did not stop there for any particular length of time? A. No.

Q. Now, you are sure you were not there before seven o'clock? A. Well, I was there during the day several times, all over the city.

Q. Were there any quarrels in front of that school around before the polls were closed? A. Not when I was there.

Q. You do not know anything about it? A. I do not know anything about it, only what I heard, the information I received when I got there.

Mr. Kavanagh: That is all.

The Court: At this time the Court will recess until ten o'clock tomorrow morning. In the meantime the various witnesses who have been under process of subpoena today, both for the state and for the defense, will return tomorrow morning without further subpoena. I repeat and I reiterate, that the witnesses who are under subpoena must return. That order applies to both sides, that is, the witnesses for the state will appear here tomorrow morning and the witnesses for the defense will appear here tomorrow morning.

For you, gentlemen of the jury, the Court has made arrangements for you to be housed for the evening at the Plaza Hotel,

and the Court is going to request you particularly to refrain from reading the local newspapers because the Court feels that you should approach this matter in a fair and impartial manner, thoroughly unbiased, and so that your minds cannot be motivated or warped in the slightest degree by whatever you might read in the newspapers.

Adjourned till tomorrow morning, June 25, 1929, at 10 A. M.

SECOND DAY.

HUDSON COUNTY COURT OF OYER AND TERMINER.

STATE OF NEW JERSEY vs. FRANK DONATO, GEORGE ORMSBY, VINCENT O'KEEFE and FRANK McNALLY, Defendants.	Before: Hon. Thomas H. Brown, J., and a Jury.

Jersey City, N. J., June 25, 1929.

Appearances:

JOHN DREWEN, Esq., Prosecutor of the Pleas, for the State.

WILLIAM A. KAVANAGH, Esq., EDWARD J. HART, Esq., for the Defendants.

The Court: The trial may proceed.

JAMES JOSEPH WHALEN, sworn.

Direct examination by Mr. Brewen:

Q. Where do you live? A. 209½ Fourth Street.

Q. Speak up louder so the Jury may hear you. Do you know these defendants? A. No sir.

Q. Look at them, please. A. (Witness complies.)

Q. Do you know any of them? A. I know them by sight.

Q. Which of them do you know by sight? A. Ormsby.

Q. Which of them is Ormsby? A. The fellow on the right hand to me.

Mr. Drewen: Indicating the defendant Ormsby.

Q. Do you know any of the others by sight? A. No, I never seen any of them before.

Q. Do you remember election day, the 6th of November, 1928? A. Yes.

Q. At any time in the evening of that day were you on the corner of Fourth and Erie Streets, the southeast corner? A. Yes.

Q. What time of day, I mean, I am referring to the evening, any time in the evening? A. I was there in the evening.

Q. About 8 or 8:30 o'clock? A. Around 8:30 or 8 o'clock. I am not sure of the time.

Q. While you were there on the corner of Fourth and Erie Streets, the southeast corner, tell the Court and Jury what happened? A. I was standing on the corner and some excitement had gone before that, and I was standing there to see what was going to happen. I had been

down stairs. I was standing there talking to a young boy going to school, who asked me what was the matter. I was explaining to him what was the matter, when a car pulled around the corner and stopped. When the car stopped in front of me I stopped talking. I looked at the car. Just as I looked the door was opened and I heard somebody say, "Get that fellow in the cap." I was wearing a cap at the time. I hesitated a minute, looked up and down to see what was going on, whether I should go or not. I knew there had been some trouble. I was not going to stand there. I looked back and I seen a fellow going like that (illustrating)—not on top of me, but almost, and coming with a baseball bat. I turned right around, threw my hands and ran back about eight or nine steps, and I heard a crash. Maybe I did not take that many steps, maybe I did——

Mr. Kavanagh: I object and move to have the answer stricken out.

(Answer repeated.)

The Court: The answer will be allowed to stand.

Mr. Kavanagh: Exception, and I state my reasons for my objection first, on the ground that any conversation held——

The Court: Pardon me, if you want to give your reasons, state what part of that answer you wish stricken out. Do you wish the whole answer stricken out?

Mr. Kavanagh: The part of the answer that deals with conversations held between this gentleman and Mr. Whalen, and some other party, respecting something that was going on there, which is in the nature of

hearsay and is not binding on these defendants, not evidential. I ask that it be stricken out.

The Court: I assume the prosecutor will try to connect it up, and it will be allowed.

Mr. Kavanagh: Exception.

(Exception allowed and signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

Q. I show you photograph in evidence marked S-2 and ask you if you recognize that as the picture of the southeast corner of Fourth and Erie Streets where you say you saw what you just described? A. Yes.

Q. All right. Now, will you please with an X mark on the picture just about where you stood when you said the automobile stopped? A. About in here (complying).

Q. That is the X which you have made under the window of the grocery store on the Fourth Street side? A. Right.

Q. How long had you been on that corner at the place where you marked with an X when the automobile turned the corner? A. About five minutes, I guess.

Q. From which direction had you come when you went to that— A. From No. 2 school.

Q. That is the school shown here on the right side of the picture? A. That is right.

Q. How long had you been on the corner? I may have asked you this, but I do not remember; how long had you been standing on the corner after you came from No. 2 school, when the automobile turned the corner? A. About five minutes.

Q. How many other persons were standing on the corner where you were, besides yourself, during that time of five minutes? A. There was quite a crowd, I guess.

Q. Well, about how many? A. I could not judge.

Q. Five, ten, fifteen? A. I guess every bit of that.

Q. I show you again picture S-2 in evidence and ask you to tell me from the picture from which direction the automobile came that turned the corner? A. I do not know.

Q. Where was the automobile when you first saw it? A. I seen it coming down and stop, coming along the southerly curve of Fourth Street.

Q. How far from the corner of the southeast intersection, this corner where the man is standing in the picture, did the car get before it stopped? A. About where that X is, I guess.

Q. Right where the second X is? A. Yes.

Q. Right where the X is I make a ring around, is that correct? A. Yes.

Q. Is it? A. Yes.

Q. Speak up. How long had the car stopped when you say you saw the door open and some people get out? A. A couple of seconds.

Q. And about how far from the corner were you standing when it stopped? A. About 15 feet, I guess.

Q. Could you tell me how many got out of the car? A. No, I could not.

Q. Could you say whether it was more than one? A. I think it was.

Q. It was more than one? A. Yes, sir.

Q. Now, you step down here, Whalen. (Witness complies.)

Q. (Continuing) Let this chair illustrate the automobile that you say stopped at the corner.

All right. You sit in that chair. I am you. I am James Whalen standing here on the street talking. Now, you illustrate to this jury just what was done by the person whom you say came out of the automobile with the baseball bat, with regard to you? A. As the door opened I see somebody getting out and crouching. When I seen that at the same time I looked at this fellow crouching, getting out of the car I heard somebody yelling, "Get that fellow with the cap there".

Mr. Kavanagh: I object and ask that it be stricken out.

The Court: You want stricken out "the man said, 'get that fellow with the cap' "? Was that one of the men that got out of the automobile?

The Witness: I do not know who said it.

Mr. Kavanagh: I ask that that be stricken out.

The Court: It will be allowed.

Mr. Kavanagh: Exception.

(Exception allowed and signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

Q. You heard someone say "Get the fellow in the cap"? A. Yes.

Q. Were you wearing a cap? A. Yes.

Q. Did this man whom you say you saw getting out of the automobile, crouching-like, have anything in his hand? A. I did not notice anything then.

Q. Did you at any later time notice anything in that man's hand? A. I did.

Q. What? A. A baseball bat.

Q. After you saw this man get out of the car crouching, as you say, where did he go with reference to where you stood? A. You see, when I heard somebody yell "get that fellow"——

Q. "Get that fellow, that fellow with the cap"——

Mr. Kavanagh: I object for the same reason.

The Court: It will be allowed.

Mr. Kavanagh: Exception.

(Exception allowed and signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

Q. When you heard that, what did you say you did? A. I looked up and down.

Q. What for? A. To see if anybody was behind me, to see if they meant anybody else, you know, I was excited. I looked back, and when I did he was like that (illustrating) with a baseball bat.

Q. How far was he standing from you when you saw him in that position, with a baseball bat? A. About half way between the two of us.

Q. About here? A. About there (indicating).

Q. About where I am standing now. Now, when you saw him in that position with a baseball bat over his head, was he standing still or still coming? A. I guess he was still on a run like.

Q. Towards you? A. Towards me. I could see that.

Q. When you say he was on the run towards you with a baseball bat in that position, what did you do? A. Threw my hands and turned around and ran around the corner.

Q. Which corner? A. Fourth and Erie.

Q. Did you go on Erie Stret? A. Yes sir.

Q. Did this baseball bat strike you? A. No.

Q. Yes or no? A. It might have but I never felt anything.

Q. When you got around to Erie, how far did you go before you stopped, after this blow was struck at you? A. I do not know, just about the door of the National store there.

Q. Showing you again S-2 in evidence, I ask you to point to the store where you went? A. The front of the store. I did not go into the window.

Q. When you had gotten that far and stopped, what did you do? A. Before I stopped I heard a smash, see, a crack.

Q. Before you stopped? A. Before I stopped.

Q. When you stopped, what next did you do? A. Stopped like that, turned around.

Q. All right. Take the stand. As you turned around, in which direction did you look? A. Right back where I came from.

Q. What did you see? A. I seen a general commotion, everybody was looking toward the corner.

Q. Which corner? A. Right where I left.

Q. Did you see anybody lying on the ground? A. Not yet.

Q. How long after did you see anybody lying on the ground? A. About a minute later. I started going back and I got on top and I seen the child there.

Q. When you started to go back where? Where you came from? A. Yes.

Q. The point where you say the man came at you with the bat—then had a crowd assembled then? A. A big crowd, yes.

Q. Did you get through the crowd? A. I ran around the crowd. I ran to the automobile.

Q. What? A. I ran after the automobile.

Q. Now, will you please tell us whether or not —I guess you have already told us, but I want to be sure about it—if you saw anybody lying on the ground when you turned around and came back to the point where the man struck at you with the bat? A. I did.

Q. Who did you see lying there? A. A child, a little girl.

Q. How was the little girl lying, in what manner? A. I didn't look at that.

Q. You did not notice that? A. I did not notice that.

The Court: You know whether the little child was standing up or lying down?

The Witness: Oh, yes, lying down.

The Court: In what way was she lying down?

The Witness: I didn't look at that.

The Court: Well, on her face, her back, her side, or how was the little girl lying?

The Witness: I don't know how she was lying.

Q. But she was lying down, no mistake about that, is there? A. No mistake about that, no, sir.

Q. Now, will you please indicate again on Exhibit S-2 the point where you say you saw the child lying? A. Right about the X here—under the window.

Q. Under the window? A. Under the window, right.

Q. Now, when you ran back to the point where the man was holding the bat up to you, where was the automobile? A. It was on its way down the block.

Q. Down Fourth Street? A. Down Fourth Street, yes.

Q. In which direction? A. Towards Grove.

Q. That is, going east, is it? A. Going east.

Q. How far down towards Grove Street had it gone when you first noticed it? A. About half way, I guess.

Q. What? A. Almost half way.

Q. Is that a block or half a block? A. Half a block.

Q. Now, besides the facts as you say, that you heard somebody say "get the fellow in the cap," did you hear anything else said? A. No.

Q. Did you hear anything else said, any shout or any call from somebody in that crowd besides that? A. No, sir.

Mr. Kavanagh: I object.

Mr. Drewen: The witness has said no.

Mr. Kavanagh: I will withdraw it.

Q. Had you had any trouble with anybody else that day before? A. None whatever.

Q. What became of the little girl? A. Some man had picked her up and took her away in an ambulance—in his car, to the hospital.

Q. Do you know who that man was? A. No, sir, I don't know who he was. I know he was working on the election board, if I am not mistaken.

Q. You did not, earlier that day, that is to say, before you saw what happened on this corner, had you seen any of the defendants?

Mr. Kavanagh: I object to that, if your Honor please, on the ground that the State is limited to what took place at the time of the alleged assault to this little girl. Anything that took place prior to that time can not in any ways bind the defendants. It is

not part of the issue and I am surprised that the prosecutor should by any question whatsoever attempt to connect some immaterial and irrelevant and incompetent matter with the question at issue. I object to the question.

The Court: The Court will sustain the objection and instruct the prosecutor to fix the time. I imagine I know what the prosecutor has in mind, but——

Mr. Drewen: If your Honor please, the State is not limited in its proof in any such manner as Mr. Kavanagh suggests.

The Court: I understand that, Mr. Prosecutor.

Mr. Drewen: I want to find out from this witness—I am fully aware of the fact that I have no right to prove anything except that which elicits proofs and demonstration of the commission of this crime. What I am asking him now is whether or not prior to this occurrence on the corner, he saw any of these defendants that day. He can answer yes or no.

The Court: I will direct the witness to answer the question yes or no.

A. No.

Q. You did not see them at any time prior that day? A. No.

Q. You did not see Ormsby before on that day? A. No, sir; I didn't, not that I remember.

The Court: Didn't you testify when this case first opened that you saw one of the defendants?

Mr. Kavanagh: I object to that question, if your Honor please. There is no such testimony in this case.

The Court: Weren't you asked the question by the prosecutor: "Did you know any of these defendants?" And your answer was, "No". Isn't that so?

The Witness: That is so.

The Court: Do you recall the prosecuting attorney asking you to look at these men?

The Witness: Right.

The Court: Do you recall answering "I know them by sight"?

The Witness: No, sir; I never said anything like that.

The Court: You do recall then modifying that statement by saying: "I know Ormsby by sight?"

The Witness: By sight, yes.

The Court: What did you mean just now answering the prosecutor by saying, "I do not know"?

Mr. Kavanagh: One minute, please.

Mr. Drewen: I asked him if he saw them any time before that day. The Court possibly misunderstood my question.

The Court: Did you see Ormsby that day?

The Witness: Not that I remember. He is the only one I know, and I don't remember seeing him. He might have been there, but I didn't see him.

The Court: Who is the man that got out of this car with the baseball bat in his hand, in a crouching position you have described?

The Witness: I do not know.

The Court: Do you see him in Court?

The Witness: No, sir; I could not recognize him.

The Court: Could you describe him to the jury?

The Witness: No, sir, I don't think I could. I was too excited. I don't remember anything.

Q. After you heard this smash, as you say, did you see in which direction the men who came out of the car went? A. No, sir, I did not.

Q. You did not? A. No, sir.

Q. I understood you to say that you can not identify anybody whom you saw get out of the car? A. I can not.

Q. Can you tell whether or not any of these defendants are the men who got out of the car? A. No, sir.

Q. You can not tell? A. No, sir.

Mr. Drewen: Cross-examine.

Mr. Kavanagh: I have no cross-examination.

DANIEL A. REILLY, sworn.

Direct examination by Mr. Drewen:

Q. Where do you live? A. 156 Delaware Avenue, Jersey City.

Q. Do you know the defendant, Ormsby? A. I do.

Q. How long have you known Ormsby? A. About a year and a half.

Q. On Election Day, November 6, 1928, where were you? A. On the whole Election Day?

Q. Yes. A. At No. 2 School.

Q. All day? A. Not practically all day, but three-quarters of the day I was there.

Q. When did you arrive at No. 2 School? A. 11 o'clock in the morning.

Q. Then that is on Erie Street between Third and Fourth Streets? A. Yes, sir.

Q. Did you at that time own an automobile? A. I did, half owner in a car.

Q. Who owned the other half ownership? A. Ormsby——

Q. You mean this defendant Ormsby? A. Yes, sir.

Q. What kind of a car was it?

Mr. Kavanagh: I object.

A. A Chandler sedan.

Mr. Kavanagh: One minute, Mr. Reilly. How is this material, your Honor, the fact that Mr. Reilly, this present witness, owned a car, half ownership with somebody else?

The Court: I assume it is going to be connected up. I further assume the prosecutor can not do everything at once.

Mr. Kavanagh: I understand that, your Honor, but on the face of the question it is absolutely——

The Court: It can not possibly do you any harm in its present stage. You might ask him if he owns a Rolls Royce.

Mr. Kavanagh: I object.

The Court: You may have an exception.

(Exception allowed and signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

Mr. Drewen: Now, just what does the stenographic record show?

(Question and answer repeated by stenographer as follows:

"Q. What kind of a car was it?
"Mr. Kavanagh: I object.
"A. A Chandler sedan.")

Mr. Kavanagh: I ask that the answer be stricken out.

Mr. Drewen: The Court has allowed the question.

Mr. Kavanagh: I ask that the answer be stricken out, if your Honor please, as incompetent, irrelevant and immaterial, having no part in this issue at all.

The Court: The answer will be allowed to stand.

Mr. Kavanagh: Exception.

(Exception allowed and signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

Q. Where was that automobile on Election day? A. That is a question I can not answer. I don't know where the car was all day.

Q. You do not know where the car was? A. No sir.

Q. Did you see it at any time on the evening of Election Day on Erie Street? A. I didn't see it all evening, but during the day I saw the car once or twice.

Q. Where? A. On Erie Street.

Q. How far from No. 2 School? A. Well, about —it was on the corner of Third Street I saw it, Third and Erie.

Q. The automobile? A. Yes.

Q. And what time? A. About 2 o'clock in the afternoon.

Q. Did you see it at any time later than 2 o'clock? A. I seen it again about three.

Q. Where was it then? A. The same place.

Q. Did you see it after 3 o'clock?

Mr. Kavanagh: Now, if your Honor please, I must object to this line of questions on the part of the prosecutor for the reasons that they are absolutely immaterial, incompetent and irrelevant for the purposes of this issue—the fact that an automobile was somewhere in Jersey City on some street—how is that competent to this trial? How is it material? How is it relevant?

The Court: I will allow it.

Mr. Kavanagh: I object and ask an exception.

(Exception allowed and signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

Q. No sir.

Q. You did not see it again after three? A. No sir.

Q. Did you drive that automobile yourself? A. No, I didn't know how to drive the car at the time.

Q. Who did drive it? A. I could not tell you all day, there was three or four——

Q. Not that day, but who as owner of this car drove it—you did not?

Mr. Kavanagh: I object for the same reasons I have submitted to your Honor be-

fore. The question is absolutely irrelevant, incompetent and immaterial.

The Court: Question overruled. I will allow the question if you limit it to this afternoon or reasonably at a period of time reasonably approximate to the time of the alleged commission of the alleged crime.

Mr. Drewen: Your Honor understands the situation. This witness has testified that he and the defendant Ormsby are co-owners of a Chandler sedan. He said he did not drive it, he had no license to drive. That may or may not be also true of Ormsby. The importance of this will ultimately develop when the case concludes. Of course, as your Honor has said many times, I can not prove it all at once. This thing must logically develop.

Mr. Kavanagh: In the name of everything that is holy, if your Honor please, how can that be material to this charge against these defendants? A charge of murder on November 6, 1928. How can the fact that someone owned an automobile, half ownership, and somebody drove it at times prior to November 6th, or on November 6th? How is that material? I cannot see the materiality of it. I cannot see the competency of it, and I believe Mr. Drewen himself does not see the materiality of it.

Mr. Drewen: Oh, no, that is the last thing you ought to say.

Mr. Kavanagh: Well, now, Mr. Drewen, pardon me. Without any reflections on the prosecutor, please don't think that I meant that in the shape of any——

The Court: Let us hear the question again.

(Question repeated by stenographer as follows:

"Q. Who did drive it? Not that day, but who as owner of the car drove it? You did not.")

Mr. Kavanagh: I object. It is not material, it is not competent, it is not relevant. It has no place in this trial, your Honor, and I might say I think Mr. Drewen knows it without any reflection.

Mr. Drewen: If your Honor please, all that Mr. Kavanagh can say about these questions is that they are not relevant, they have no materiality, they are not binding upon the defendants. The State invokes commonplace standards of logic and good sense in adducing this proof. Here are four defendants who are charged with murder. Already enough of the *res gestae* has been developed to show the means with which that murder was committed. An automobile turns the corner and men who are armed with deadly weapons leave the automobile——

Mr. Kavanagh: I object. I must object to protect my client——

Mr. Drewen: I am going to ask your Honor to control this man.

The Court: I will.

Mr. Kavanagh: I object to Mr. Drewen summing up at this time.

The Court: I am going to hear the prosecutor.

Mr. Kavanagh: There is no evidence at this time against any of these men.

The Court: He has not said so.

Mr. Kavanagh: And I submit that it is absolutely unfair at this time for the prosecutor to attempt by any innuendo or by any suggestion of any kind to show that these men were guilty of this crime. I think it is absolutely improper. It is an attempt by suggestion, by innuendo to connect some alleged action on the part of this man Reilly, the witness here, with alleged ownership of a car which George Ormsby at some time prior to this date, which has no place in this trial, and I very positively and sincerely object to it and I object to Mr. Drewen at this time attempting to sum up this case to the jury—that is to your Honor—sum up what has happened before, especially when there is not one scintilla of evidence, not one particle of evidence up to this time to incriminate or to show that these men had any part or parcel in this assault. I say it is unfair to these men who are now charged with murder.

The Court: Are you through?

Mr. Kavanagh: Yes, I am.

The Court: Now I will say this to the jury at this juncture: Motions on the question of the admission or rejection of evidence are matters which should not concern you. This is a function that lies distinctly with the Court. You are not to be guided or influenced in the slightest degree by what I do or what I say or how I rule. That responsibility and that duty is mine to dispose of questions of law, so with that admonition I will direct the Prosecutor to proceed. I will ask the distinguished counsel for the defendant to kindly remain seat-

ed. You must not get excited. The day is warm. Now, Mr. Prosecutor, if you have anything more, I will hear you.

Mr. Drewen: I did not say that the State had yet shown that these defendants were responsible for this murder. That duty will be discharged in due time, I trust. At the present juncture, all I stated most respectfully to your Honor was what is known in the law as the *res gestae,* the facts themselves. Now, the facts themselves delineate a situation in which an automobile is described as turning a corner, as stopping at a point short of the corner. The doors of the car are opened and the men leave it with deadly instruments; a blow was struck and a child was killed. An automobile comes most vitally into play in this criminal transaction. I can not at this time put in everything. I can not show the final conclusiveness of my case in its opening stages. That is not possible, as your Honor has already recognized. Now, we come to this automobile. We find that this man is a co-owner of the automobile with the defendant Ormsby. Did Ormsby drive it?——

Mr. Kavanagh: I have to object.

The Court: One minute. Be seated Mr. Kavanagh.

Mr. Drewen: This man, as the owner, has no right to drive it. Of course, before the conclusion of the case the State must show how conclusively the relationship between Ormsby and this car is, but at this stage I want to know who as owner was driver of that car, because somebody as owner and driver of that car has a fair and

reasonable responsibility for the car in the transaction.

Mr. Kavanagh: I ask that Mr. Drewen's statement be stricken out because there is absolutely no evidence that this car which is alleged to have been owned by Reilly and this defendant Ormsby, was the car that was at that place, Fourth and Erie Street, at that night, and I respectfully ask that that statement of Mr. Drewen be stricken out and the jury at this time advised, instructed, that no such testimony as heretofore been adduced in this case as to the particular matter in question, as to Mr. Drewen's statement respecting the connection of a car, and so forth, shall be considere by them. I said to your Honor before that it was not material, it was not competent, it was not in any wise relevant to this case who owned a car at times prior to November 6th; who drove a car prior to November 6th, whether this man drove it or whether any other persons drove it. It certainly is not competent here. How can this man Reilly and this man Ormbsy own a car prior to November 6th, how can that fact be relevant. How is it relevant who drove it at that time. They might have loaned the car out. They might have hired the car out to some one else. They might have hired it out as a jitney. They might have employed a chauffeur or some other person or agent to drive the car. The car might be at any other place in this State or in any other place in this City prior to November 6th, or for that matter on November 6th. I say to your Honor at this

time, and I say it in all sincerity, knowing my duty in this case, that this is an attempt —I won't say it is a covert attempt because I know my friend Mr. Drewen better—but I say it is an attempt by suggestion, by innuendo, by implication, to connect up in some wise this alleged car that was at Fourth and Erie Streets on the night of November 6th, and there is no evidence that it was Reilly's car or Ormsby's car in this case up to date. I say that it is an attempt to connect it up, and I say that that attempt is absolutely illegal. It has no place in the law of evidence. The attempt is absolutely wrong. It is a dangerous precedent to set in this case to attempt by means of this kind to conjure up evidence out of a clear sky, that the law of evidence does not permit in a case of this kind, in a murder case. I say that Mr. Drewen and the State is absolutely limited to what took place at that time. Any other actions or doings on the part of any persons prior to what happened at Fourth and Erie Streets on this occasion, on November 6th, is absolutely irrelevant, incompetent and immaterial, and for that reason I say to your Honor most positively and with the utmost respect that it should be stricken out and the question should not be allowed.

The Court: The question will be overruled. The Court will ask the question, if you were half owner of the car and you could not drive the car, could Ormsby drive the car—yes or no?

The Witness: Well, he did, naturally at times, he did, but there were other drivers,

too, that drove the car. I used to loan that car out to a lot of different people.

The Court: Proceed.

Q. Did you see Ormsby at the polls that day? A. No, sir.

Q. You did not see him at all? A. No, sir.

Q. Did you see him outside of the polls that day? A. No, sir.

Q. Did you see him at all that day? A. No, sir.

Q. Now, Reilly, at any time of the evening of November 6th did you pick up a prostrate child on the street corner of Fourth and Erie? A. Yes.

Q. What time was that? A. I should judge about half past seven or twenty-five after seven.

Q. Are you sure of the time? A. I am pretty positive of it.

Q. Where was the child when you picked her up? A. On the corner of Fourth and Erie.

Q. I show you a photograph in evidence, S-2, and ask you to indicate on that picture where the child was? A. The child was lying here, about here (indicating).

Q. About where I mark the circle with a line through it? A. A little bit further from the curb, about three feet from the curb.

Q. When you arrived at that corner, was the child lying there or did she fall there after you got there? A. When I got there the child was lying there.

Q. Were there any other people around there? A. There was about, I should judge, about eight or ten people there.

Q. How was she lying when you saw her, on her face, her back, or how? A. Her back.

Q. Was she unconscious? A. Unconscious.

Q. Who picked her up first? A. I did.

Q. What did you do after you picked the child up? A. I turned around and I ran over toward Third Street, to an automobile, to take her to the hospital.

Q. Did you see Officer Porter? A. No, sir.

Q. He took the child from you, didn't he? A. I took the child myself, as far as I know. I had the child all the way to the hospital, unless somebody was helping me. I did not know at the time. I was a little excited.

Q. Where did you come from when you went to the corner at the time you saw the child lying there; where did you come from? A. I came out of No. 2 School at the front entrance.

Q. That is the school on Erie Street? A. Yes.

Q. Was your attention directed by anything that caused you to go to Fourth and Erie? A. Not until I walked out on the curb and I seen the crowd there and I seen the child. They spread apart and I seen the child lying there. That is what made me run to the corner.

Q. All right. Step down here for a moment.

(Witness complies.)

Q. (continuing) I show you S-1 in evidence and call your attention to the location of Public School No. 2, so marked, and ask you out of which part of the building you came out before you went to Fourth and Erie Streets? A. The main entrance.

Q. How long were you outside in front of the main entrance of the building when your attention was directed to Fourth and Erie Streets? A. It must have been about 15 seconds.

Q. And then you say your attention was directed by a crowd on Fourth and Erie Streets? A. Yes.

Q. What did you do then? A. I ran to the corner.

Q. Directly on the sidewalk? A. Yes.

Q. And when you got there what did you see? A. I seen a girl lying down.

Q. On her back? A. Yes.

Q. And that is the child you picked up? A. Yes.

Q. Indicate on the corner here. This is the corner Fourth and Erie, the southwest corner. Indicate on the corner just about where the child was lying, or rather you have indicated on this picture? A. I have indicated.

Q. You indicated the spot where I have marked with a circle and a line through it, on Exhibit S-2? A. Yes.

Q. Now, I want to call your attention and ask you this question once more: You say you did not see Ormsby until on Election Day? A. No, sir.

Mr. Drewen: Now, at this juncture I allege surprise and ask the witness this:

Q. Do you remember speaking to me yesterday about this case? A. I do.

Q. Do you remember my asking you yesterday if you saw Ormsby about the polls on November 6th, Election Day, 1928? A. Yes.

Q. Do you remember saying to me that you did see him; you saw him twice? A. No, sir; I saw the car twice.

Q. Don't you remember saying to me yesterday that you saw Ormsby twice? A. No, sir.

Q. On Election Day? A. No, sir. I saw the automobile twice on that day.

Mr. Drewen: All right, that is all, cross-examine.

Cross-examination by Mr. Kavanagh:

Q. Mr. Reilly, I understand you to say that you picked the child up at the corner of Fourth and Erie at that time, at 7:30, did you say? A. 7:25 or 7:30.

Q. How do you fix that time? A. I fix that time, of course, when I was down stairs the polls was closed, it was 7 o'clock, and I stood in there, and I asked the man in there what time it was and he said 20 minutes after seven. I walked upstairs and came out the front entrance, and figured—I looked in the school upstairs, the third ward of the fifth district. From there I did not stop. I just looked in and came out the front entrance. That is why I fix the time at that time.

Q. Can you tell the Court and jury how long after the polls closed—and by the way, the polls closed at 7 o'clock that night? A. 7 o'clock.

Q. Can you tell the Court and jury approximately how long after the closing of the polls you came out from that election district in the school that you were in? A. About half an hour or 25 minutes.

Q. And you came out the main entrance of the school? A. The main entrance on Erie Street.

Q. The election floor where you were was upstairs, was it? A. No, I was downstairs first and then I went upstairs, from downstairs.

Q. And then where did you go to then? A. That is when I saw this child on the corner.

Q. You picked her up, did you? A. Yes.

Q. Did anyone help you pick her up? A. That I could not say at the time.

Q. Did you personally take her to the hospital? A. Yes, sir.

Q. How did you take her to the hospital? A. I took her in an automobile belonging to some-

body that was on the right-hand side of the street, on Erie Street.

Q. Did anybody else go to the hospital with you? A. There was a policeman, I think, went.

Q. Who carried the child? A. I practically carried the child all the way.

Q. All the way to the hospital? A. Yes.

Q. Upstairs to the room? A. Yes.

Q. Did you carry her in your arms? A. Yes.

Q. You are sure the time was 7:25 or 7:30? A. Yes.

Q. There is no doubt in your mind about it? A. No, sir.

The Court: How do you fix the time?

The Wtiness: As I said before, your Honor, I asked the gentleman downstairs what time it was and he told me it was 20 minutes after seven.

The Court: The gentleman down where?

The Witness: Downstairs in the election board.

The Court: How did you come to ask him that?

The Witness: I was warm and I wanted to go upstairs and out in the air.

The Court: Is that all you wanted to do, just to get air?

The Witness: Yes.

The Court: You did not have to ask him what time it was in order to get the air?

The Witness: Well, I wanted to see what time it was.

The Court: Who was the man?

The Witness: I do not know; he was a stranger to me.

The Court: What sort of a looking man was he?

The Witness: I could not tell you that.

The Court: You don't know that?

The Witness: No, sir.

The Court: This witness will be taken in custody by one of the officers and held until after.

RAYMOND MYLOTT, sworn.

Direct examination by Mr. Drewen:

Q. The first thing, Mr. Mylott, I am going to ask you is to remove the chewing gum from your mouth.

The Court: Pardon me, Mr. Prosecutor. Is this one of the witnesses whom we had to wait for yesterday morning?

Mr. Drewen: I do not recall whether that is so or not. I think we waited for all of them for a time.

Q. Where do you live? A. 168 Carteret Avenue, Jersey City.

Q. How long have you lived at 168 Carteret Avenue, Jersey City? A. About six years.

Q. How far is that from Fourth and Rural Street? A. It is a different section of the city. About two and a half miles.

Q. Did you know any of these defendants? A. Yes, one of them.

Q. Which one? A. George Ormsby.

Q. Which one is George Ormsby? A. The last one on the right.

Q. Sitting at the officer's left? A. Yes.

Q. The last one on the right, next to the officer? A. Yes.

Mr. Drewen: Indicating the defendant Ormsby.

Q. How long have you known Ormsby? A. Oh, about ten years, not personally though.

Q. Do you know any of the other defendants? A. No, sir.

Q. Now, on Election Day, November 6, 1928, were you in the vicinity of Public School No. 2 on Erie Street? A. I was.

Q. What part of the day? A. Well, it was in the evening.

Q. In the evening? A. Yes.

Q. Did you see Ormsby that evening? A. Well, I did.

Q. Where? A. No. 2 School, around there.

Q. Around the school? A. Yes.

Q. What time of the evening was it you saw Ormsby? A. Well, that I do not know.

Q. Can you give us some estimate of the time, say 8:30, 7:30? A. I have no estimate of the time at all.

Q. You say it was the evening though, is that right? A. In the evening.

The Court: Were you present at the time the polls closed?

The Witness: Yes.

The Court: With respect to the closing of the polls was it after that or was it before that?

The Witness: Just about around that time.

Q. Do you know a young man named Anthony Cina? A. I do.

Q. Cina was at the polls that day, was he? A. He was.

Q. Did you hear any conversation between Ormsby and Cina?

Mr. Kavanagh: I object to that first on the ground that any conversation between Ormsby and Cina, your Honor, in the absence of the other three defendants, Reilly, O'Keefe——

The Court: I get your point. The evidence will be received and the jury will be particularly instructed to disregard it insofar as the other three defendants are concerned, because nothing that may be said in the absence of the other three defendants could be possibly binding at this period of the case.

Q. Did you hear a conversation between Ormsby and Cina?

The Court: Just answer yes or no.

A. Yes.

The Court: Fix the time and place.

The witness: Oh, about 10 after 7.

Q. Where was that? A. Outside No. 2 School.

Q. What did you hear Ormsby say to Cina, if anything? A. He said, I do not know the exact words, but words to this effect, that now he knows now it is Andy's gang and he is going to get them for it.

Q. Who is Andy? A. Andy Cina.

Q. Do you know anything about any trouble that occurred before that? A. Only I know I seen a few fights, free-for-all fights.

The Court: At this juncture I want to say to the jury—specifically that you are

to disregard anything by way of binding effect, or if it has any effect upon you at all, all conversations between Ormsby and Cina, and I charge you at this time specifically that it can not in any way bind or affect these other three defendants. You are to erase it from your mind, unless subsequently it is connected up.

(Last question and answer repeated.)

Q. How long was it after these free-for-all fights that you heard Ormsby say to Cina "It is your gang and I will get you"? A. Well, about two or three minutes.

Q. About two or three minutes? A. That is all.

Q. Were there any more conversations except that statement? A. Except that, that is all.

Q. Where was Ormsby standing at the time you heard him say that to Cina? A. I think it was right outside of the school, at the front entrance, right outside of the Chinese, on the side entrance nearest Fourth Street.

Q. You mean the laundry here, the place marked "Laundry", Public School? A. Yes.

Q. Where was Ormsby standing at, the curb here, or where? A. Well, about in the center of the street.

Q. Center of the street or center of the block? A. Center of the sidewalk.

Q. Do you know whether or not at that time Ormsby's automobile was standing there? A. It was.

Q. Standing there near where he was standing? A. No, on a little further.

Q. How far from where Ormsby was at that time did you see his automobile? A. About 25 feet.

Q. North or south of where Ormsby was? A. South.

Q. So that the automobile was nearer to the Public School entrance and Ormsby himself was standing nearer to the laundry? A. That is it.

Q. How long did this conversation last between Ormsby and Cina while you were there? A. Well, a few seconds. That was all that was said, just that.

Q. After that where did you go? A. I walked down towards Fourth Street on Erie.

Q. Where did you go? A. Stood on the corner there.

Q. Stood on the corner of Fourth Street? A. Yes, sir.

Q. Did you see anything unusual happen on the corner of Fourth and Erie that night? A. I did.

Q. What was it? A. I seen a car stop upon the center of the street on Fourth Street.

Q. Louder. A. And two fellows—I think now, when the door opened and somebody said, "Now, get that fellow with the cap."

Mr. Kavanagh. I object to that and ask that it be stricken out, as not binding on the defendant.

The Court: It will be allowed.

Mr. Kavanagh: Exception.

(Exception allowed and signed and sealed accordingly.)

THOMAS H. BROWN,
Judge.

Q. The door of the car opened? A. No, I see the door of the car open, and now somebody in the car hollered "Get that fellow with the cap", and a fellow come out of the car with a rag hang-

ing down from his mouth, and he had a bat in his hand.

Q. What kind of a bat? A. It must have been one of these Banister sticks.

Q. Was it a bat or what? A. Well, it was a bat all right.

Q. You mean a baseball bat? A. No, it was not exactly a baseball bat.

Q. How long was it? A. About that long.

Q. Measure with your hand. A. About that long (indicating).

The Court: For the purpose of the record, about three feet.

Mr. Drewen: Yes.

Mr. Kavanagh: Yes.

Q. All right, go ahead. A. Now, as he stepped out of the car I started to run. In fact, everybody started to run, and I seen him pass me and then he made, now, went towards Whalen.

Q. Is Whalen the witness who testified here this morning? A. He was, and he let the bat go at him, that is, holding it in his hand, swung it at him, and he missed and hit a girl on the head. I do not know how the girl got there, but she fell down.

Q. How do you know the child was struck on the head? A. Well, I heard the noise, you know, if it was struck on the body it would not make that terrible sound.

Q. Now, when you heard this terrible sound, as you say, were you looking at the child or not? A. I was not looking at her. I was looking at the fellow and Whalen.

Q. Looking at the man with the bat and at Whalen? A. That is it.

Q. When you heard this crash or this sound, after that did you see the child? A. Well not till the fellow stepped away and started to run towards the car.

Q. Who ran towards the car? A. Well, I do not know; the fellow that swung the bat.

Q. Anybody else? A. That is all I know.

Q. How many men did you see come out of the car? A. I think it was one.

Q. Did you see any more than one? A. I guess that is about all, one.

Q. You do not know positively whether it was more than one or not? A. Yes, one or more, that is it. I do not just know. I know I seen one.

Q. You said something about a rag on the mouth of the man who had the bat? A. Yes.

Q. Tell us what you mean by that? A. Well, it must have been a handkerchief, for it was in his mouth.

Q. Was he holding it in his mouth like this (illustrating)? A. No, it was dangling.

Q. (Illustrating)? A. That is it. Just like hanging down.

Q. That is the man that came out with the bat? A. Yes, sir.

Q. When you first saw this child, where was she, and what was her position after you heard the crash? A. She was lying on her face.

Q. On the sidewalk? A. Yes.

Q. At the time you first saw this child lying on the sidewalk, on her face, where was the automobile that had stopped there, out of which this man stepped with the bat? A. It did not exactly stop. They kept it in first gear at the time and it was just creeping along all the while. He jumped—he started out of the car, and by the time he hit the girl and everything he had to go way over that way.

Q. And he went back to the car and got into the car? A. Yes.

Q. Then what became of the car? A. It went down toward Henderson Street.

Q. That is east? A. Yes.

Q. All right. I will ask you again: When you first saw this child, lying on her face, tell us if you can, about where the automobile was at that instant? A. It must have been about——

Mr. Kavanagh: I object.

The Court: The objection is sustained. Tell us where it was.

Q. Can you estimate the distance it was from this corner (indicating)? A. 50 feet.

Q. Going towards Grove Street? A. Going towards Grove Street.

Q. Do you know whether anybody ran after the car? A. Everybody did.

Q. Do you know whether anybody caught it? A. No.

Q. With whom were you talking when this car came up to the curb there?

Mr. Kavanagh: I object to that as incompetent, irrelevant and immaterial.

Mr. Drewen: I withdraw the question.

Q. Who else was on the corner with you there at the time—I withdraw that too. Was Whalen there on the corner when this automobile came up to the curb and this man got out? A. He was.

Q. How far from you was he standing? A. Well, that I could not say.

Q. Were you talking to him or not? A. No.

Q. What do you say you heard said by some one in the car after this girl was hit?

Mr. Kavanagh: I object to that.

Q. "Get the fellow with the cap"? A. That is it, "Get the fellow with the cap".

Mr. Kavanagh: I object to that. Wait a minute. I object to that.

Mr. Drewen: The testimony is all in.

Mr. Kavanagh: The testimony is not all in.

The Court: What is the objection?

Mr. Kavanagh: I object to that as incompetent, irrelevant and immaterial and in no wise binding on any of these defendants, nor is it——

Mr. Drewen: That testimony had already been given.

Mr. Kavanagh: It had not been given, your Honor, I am very positive of it.

The Court: Yes, he did. He said previously, one of the first things he said on taking the stand was, "I saw the door of the car opened." He first said two fellows got out, and some one said "Get that fellow with the cap".

Mr. Kavanagh: I have been objecting to this kind of examination all the time, if your Honor pleases.

The Court: I realize that, but we won't consider what you previously objected to. We will consider what you are objecting to now.

Mr. Kavanagh: I know particularly at that time when the question was propounded by Mr. Drewen, and I objected to it, and when I objected to it Mr. Drewen continued to propound the question, and part of the answer was given, and I asked

that it be stricken out for the reasons that I have given.

The Court: I will strike it out, and direct the Prosecutor to reframe his question.

Q. Tell us what you heard said by some one in the automobile at the time the door opened and the man got out with the bat?

Mr. Kavanagh: I object for the reasons that I have given.

The Court: The objection is overruled.

Mr. Kavanagh: Exception.

(Exception allowed and signed and sealed accordingly.)

THOMAS H. BROWN,
Judge.

A. "Get the fellow with the cap."

Q. When that was said, "Get the fellow with the cap", what was the man who got out with the bat doing? A. What was he doing?

Q. Yes, what was he doing or where was he going? A. He was going toward the fellow with the cap.

Q. Who was the fellow with the cap? A. Whalen.

Q. And when he was going toward Whalen, did he have his bat in his hand then? A. He did.

Q. How was he carrying the bat, show us? A. Over like that (illustrating).

Q. Over his shoulder? A. Over his shoulder.

Q. With both hands? A. With both hands.

Q. When you saw this man who got out of the automobile at the time you heard the voice from the car say "Get the man with the cap", going towards Whalen, who had a cap on, with a bat over his shoulder like this, where were you stand-

ing with regard to the man who had the bat? A. Well, about ten feet from him, over this way from him. Whalen was almost near the window.

Q. Did you change your position or did you move when you saw this man going toward Whalen with the bat? A. I moved.

Q. When you saw the man going toward Whalen with the bat, I show you on S-2 the corner of Fourth and Erie Streets, you recognize that, don't you? A. Yes.

Q. Where were you standing when you saw the man coming towards Whalen with the bat? A. About right there, right outside of that door there.

Q. Right outside of the side door on the Fourth Street side of the grocery, I will make the figure 2? A. That is it.

Q. When you saw the man got out of the car with the bat, did you stay there or did you go elsewhere? A. I ran over this way.

Q. You ran towards the corner of Fourth and Erie Streets? A. That is it.

Q. How far had you gotten towards the corner of Fourth and Erie Streets when you say you heard the crash? A. Right on the corner.

Q. Then when you heard the crash did you stop? A. I turned around.

Q. And when you turned around, did you look in the direction from which you had come? A. I looked over in that there direction. I just knew where it come from, from the sound.

Q. Did you then see the little girl lying on her face? A. Yes.

Q. And you saw the car going towards Grove Street, you say, about 50 feet away? A. Yes.

Q. When you first saw this automobile turning the corner, as you say, where were you standing? A. Turned the corner.

Q. Turned the corner of Fourth and Erie Streets? A. I did not say I seen it turn the corner of Fourth and Erie.

Q. All right. Then I will ask you this: When was it when you first saw it? A. It was stopped, that is, moving slowly down the middle of the street.

Q. I show you on S-1 the intersection of the northeast corner of Fourth and Erie; you recognize this layout, don't you? A. Yes.

Q. You say you were standing about here at the side door of this grocery store? A. Yes, sir.

Q. Where was the automobile when you first saw it? A. Right here.

Q. In the center of the street? A. Right in the center of the street.

Q. Going slowly? A. Yes.

Q. Where was the automobile when you first saw the door open and a man get out with the bat? A. It was right here in the same place.

Q. Which way did the man with the bat come after he left the automobile? A. Over this way.

Q. Across the street? A. Straight over.

Q. Up onto the sidewalk where Whalen was? A. Yes, sir.

Q. Whereabouts was Whalen standing at that time? A. About right there.

Q. Now, with reference to Whalen, where did the man who got out of the automobile with the bat go; did he come towards Whalen? A. No, he did not. He come towards the crowd here, not towards Whalen.

Q. Can you tell whether or not any of these defendants were in that car? A. Well, sir, I do not know.

Q. Can you identify the man who came out of the car with the bat? A. Well, I do not know; I do not think I can.

Mr. Drewen: Cross-examination.

Cross-examination by Mr. Kavanagh:

Q. You did not see the little girl struck, did you? A. No.

Q. One man, you say, got out of the car? A. One man, one or two, I do not know which. I know I seen one.

Mr. Kavanagh: That is all.

Re-direct examination by Mr. Drewen:

Q. One more question that I forgot to ask you. Did you hear anybody call from the car when it started up again towards Grove Street? A. Yes.

Mr. Kavanagh: I object to that as immaterial, irrelevant and incompetent. It can not in any wise bind these defendants or any of them, and is misleading and is not evidential against them.

The Court: I understand the question is directed to whether any remarks were made by the occupant of the car as the car was leaving the scene of the alleged crime?

Mr. Drewen: Yes.

The Court: The question will be permitted and you may have your exception.

Q. Your answer is "yes"? A. Yes.

Q. What did you hear? A. Some one in the car holler, "Come on Vince".

Q. Where was the man who had the bat? A. Running after the car.

Q. Where was the man who had the bat at the moment you heard somebody in the car say, "Come on Vince"? A. Running after the car.

Mr. Drewen: Cross-examination.
Mr. Kavanagh: No questions.
Mr. Drewen: That is all.

THOMAS BLACK, sworn.

Direct examination by Mr. Drewen:

Q. Where do you live, Black? A. 254 Ninth Street.

Q. Speak up, please. A. 254 Ninth Street.

Q. Jersey City? A. Yes.

Q. On Election Day, November 6, 1928, were you at the polls in No. 2 School on Erie Street? A. No, sir.

Q. You were not? A. No, sir.

Q. You were not there all day? A. No, sir, not all day.

Q. Were you working that day? A. Working that day? No, sir, we never work on general election.

Q. At any time in the evening of November 6th, were you on the corner of Fourth and Erie Streets, Jersey City? A. No, I was down on Fourth and Grove.

Q. After you were at Fourth and Grove, were you at any time on the corner of Fourth and Erie? A. Some fellow came down, and he was stewed——

Q. Please, just answer my questions. At any time you were on Fourth and Grove Streets did you go to Fourth and Erie Streets, yes or no? A. No, not until the fellow came down.

Q. You were on Fourth and Grove Streets and in response to some information you got from

somebody you went somewhere else, is that right? A. Yes.

Q. Where did you go? A. I went up to Fourth and Erie Streets.

Q. I show you photograph S-2 in evidence and ask you if you recognize that as a picture of the southeast corner of Fourth and Erie Streets? A. Yes.

Q. Is that the corner to which you went after you got some information on the corner of Fourth and Grove Streets? A. Yes.

Q. That was in the evening, wasn't it? A. Yes.

Q. Do you know what time it was? A. I could not tell you the exact time.

Q. When you come to that corner of Fourth and Erie Street, shown on the photograph S-2, what happened; what did you see? A. As I came up to Fourth and Erie Street there, I was on the corner. I was about 15 feet away from the store, from the National Grocery Store, and I heard some fellow holler, "Come on, Vince," and the car went around the corner.

Mr. Kavanagh: I object to it as not binding on the defendants and not evidential against them, and as hearsay, and ask that it be stricken out.

The Court: It will be allowed.

Mr. Kavanagh: Exception.

(Exception allowed and signed and sealed accordingly.)

THOMAS H. BROWN,
Judge.

Q. When you got to the corner of Fourth and Erie Streets, after you had left the corner of Fourth and Grove Streets, were there many peo-

ple on the corner of Fourth and Erie? A. I could not tell.

Q. Was there one or more or none or a great many? A. Well, I could not tell the exact amount of people there.

Q. Were there some people there? A. Yes.

Q. At any time while you were there on the occasion I am now speaking of, did you see another automobile turn the corner? A. Yes.

Q. Where did it go, into Fourth Street? A. It turned down Fourth Street, toward Henderson Street.

Q. Which side of the street? A. Well, it was about nearer to the left hand side of the street, turning.

Q. Did you see from what street that automobile came? A. From Erie.

Q. Do you know where Number Two School is? A. Yes, sir.

Q. Did it turn from the direction of No. Two School? A. It turned from around that direction there.

Q. When this car came from the direction of No. Two School turned Fourth Street what did you see happen, if anything? A. As I was standing there, a couple of fellows jumped out.

Q. Jumped out of what? A. Out of the car.

Q. Which car? A. The car that turned Fourth Street.

Q. Yes. A. And they ran over toward the corner and made a swing at Whalen and it seemed as if a slight——

Mr. Kavanagh: I object.

Mr. Drewen: I consent that the word seemed may be eliminated.

Q. They made a swing at Whalen? A. Yes, sir. It seemed to be a slight glaze that passed Whalen and struck the girl.

Q. It struck the gril where? A. I could not see where it struck the girl.

Q. Then what happened? A. Then they hopped in the car and beat it away.

Q. Who hopped in the car? A. I don't know the fellow.

Q. How many men got out of the car? A. A couple of men.

Q. A couple of men got out of the car? A. Yes, sir.

Q. Now step down here, Black, do you recognize this as the corner of Fourth Street and Erie? A. Yes.

Q. Here is Public School No. Two? A. Yes, sir.

Q. Here is the Chinese laundry; do you know where that is? A. Yes, sir.

Q. There is the candy store, do you know where that is? A. Yes, sir.

Q. There is the National Grocery store, do you know where that is? A. Yes, sir.

Q. All right. Now, here is the corner of Fourth and Erie. When you first saw the automobile where were you standing? A. I was standing about here.

Q. Out in the street? A. Well about a foot or two out in the street.

Q. In front of the grocery store? A. Yes, sir.

Q. Do you mean the point where I write the word Black? A. Yes, sir.

Q. That is where you stood when you first saw the automobile? A. Yes, sir.

Q. Now, while you were standing there where was the automobile? A. The automobile pulled around about here.

Q. Did you see the automobile at any time before it passed you? A. It was behind a couple of cars here.

Q. Where? A. Here.

Q. Did you see where the automobile started up from? A. Started up from Erie Street.

Q. Started up from Erie Street; did you see it start from a standing position on Erie Street or where it came from originally? A. Well, it——

Mr. Kavanagh: I object and ask that that be stricken out.

Mr. Drewen: I consent.

The Court: Strike it out.

Q. Can you tell us, Black, whether or not you know where the car started from before it went on its way toward Fourth Street? A. It was about here.

Q. Where you indicate? A. Yes, there were about three or four cars there.

Q. The place where I write the word "car"? A. Yes, sir.

Q. You say you saw that car start up from here? A. Yes, sir.

Q. Which way did it go after it left this position here? A. Toward Erie Street.

Q. You mean toward——

Mr. Kavanagh: Now, Mr. Prosecutor.

Q. Which way did it go? A. Turned into Fourth Street.

Q. It went along Erie Street? A. Yes, sir.

Q. When it got to Fourth Street which way did it go? A. Turned into Fourth Street.

Q. To the east or west? A. To the right on Fourth Street.

Q. How far had this car gone along the east of Fourth Street when yau saw the couple of men get out? A. I could not tell. It turned closer to the left.

Q. Will you just tell us again what happened as this car turned into Fourth Street, what happened with regard to the car? A. When the car turned to Fourth Street a couple of men came out.

Q. Yes. A. And they ran over to Whalen.

Q. Where was Whalen standing? A. Whalen was standing at the corner.

Q. On the sidewalk? A. No, right at the corner here.

Q. That is, the southeast corner of Fourth and Erie? A. Yes, and a fellow came over with something in his hand like a bat, more like a bannister, it was curled, and swung it at Whalen.

Q. How was he carrying it? A. Kind of like this.

Q. Like this? A. No, not over his shoulder, like that.

Q. Then how close did he get to Whalen before he struck him? A. I could not see exactly how close he got to Whalen.

Q. Where were you standing at the time you saw this man make the strike at Whalen? A. I was standing there, but when I seen the car come and the men get out I backed up.

Q. Could you still see Whalen when you backed up? A. Yes, I could still see him.

Q. Tell us again what happened when the man struck the blow at Whalen? A. When the man struck the blow at Whalen why it seemed as if it made a slight graze, then struck the child.

Q. Did you hear any sound at the time? A. No, sir.

Q. Did you see the child standing there at the time? A. Well, the child was about like passing, I guess.

Mr. Kavanagh: I object.

The Court: Don't tell us what you guess. If you saw it, tell us.

Q. Did you see the child at the time you saw the blow struck at Whalen? A. The child at the time the blow was struck at Whalen, yes.

Q. You did see the child? A. Yes, sir.

Q. All right. Now what happened to the child when the blow was struck at Whalen? A. Well, I didn't look at the child. They hopped in the car and we chased the car.

Q. Who hopped in the car? A. I don't know, I could not tell you.

Q. Was it the man who made the pass at Whalen, or not? A. Yes, sir.

Q. How long after you saw these men hop in the car, as you say, did you see the child lying there? A. I didn't take notice of the child.

Q. You did not? A. No, sir.

Q. You ran right after the car? A. Yes, sir.

Q. At no time did you see the child lying here? A. No, sir.

Q. First you saw the blow struck at Whalen and the men go back into the car, then what did you do? A. We ran after the car.

Q. Did you catch it? A. No, sir.

Q. Which way did the car go? A. It went straight down Fourth Street toward Henderson.

Q. Did you hear anything said by somebody in the car at the time the door opened and the man got out with the bannister or the bat? A. No, sir.

Q. Did you hear any names mentioned? A. No, sir.

Q. By anybody? A. At the time the car stopped?

Q. Did you hear any names mentioned while the car was there? A. No, sir.

Q. Well, after it started up? A. Well, only when it started.

Q. You mean when you started from here? A. Yes, sir.

Q. What did you hear then?

Mr. Kavanagh: I object to that, if your Honor please, on the ground that it is hearsay, incompetent, irrelevant and immaterial and cannot bind the defendant.

The Court: It is the same line of testimony as was previously admitted. The Court will make the same ruling and allow it.

Mr. Kavanagh: Exception.

(Exception allowed, signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

A. Well, that was the time the car was standing still.

Q. What did you hear? A. "Come on Vince" they hollered.

Q. That is the time the car was standing here? A. Yes.

Q. How long was that before the car started up and went toward Fourth Street? A. That was about a couple of minutes I guess, I could not tell the exact amount.

Mr. Drewen: Now take the stand.

Q. Did you notice anything in the mouth of the man who came out of the car with the bat? A. It

looked like a piece of rag around his neck, reaching to his mouth.

Q. Like this (indicating)? A. Yes, sir.

Q. Is that what you mean? A. Yes, sir.

Q. Could you tell whether it was tied around his face or whether it was just held in his mouth? A. I could not tell you; it may have been thrown around his shoulder or something.

Mr. Drewen: That is all.

Mr. Kavanagh: No questions.

Anthony Cena, sworn.

Direct examination by Mr. Drewen:

Q. Where do you live, Cena? A. 234 Railroad Avenue, Jersey City.

Q. Do you know any of these defendants? A. I only know one.

Q. Which one? A. That is Ormsby.

Q. How long have you known the defendant Ormsby? A. About ten years.

Q. On Election Day, November 6th, 1928, were you in or about public school No. Two on Erie Street, Jersey City? A. I was standing outside at the laundry.

Q. That is on Erie Street? A. Yes, sir, right adjoining the school.

Q. What time of day was that? A. That was about half past eight at night or a little earlier.

Q. Did you see Ormsby at the time? A. Well, the only time I seen Ormsby was when he came over to me and said, "I know you Tony and I am going to get your bunch". That is the only time I see him.

Q. When was that? A. That was about half-past eight.

Q. And were you standing in front of the laundry when that happened? A. About half-past eight, yes.

Q. Were you standing in front of the laundry when he came up to you and said that? A. Yes, sir.

Q. Now step down here, please. I show you Exhibit S-1, which is a sketch, a survey of Erie Street, Public School No. Two. Here is the laundry? A. Yes, sir.

Q. Where do you say you were standing at the time Ormsby spoke to you? A. Right about here.

Mr. Drewen: I will mark that Cena.

Q. Now, how long had you been in Ormsby's presence when he said that to you? A. Well, just about—that is the only thing he said to me.

Q. Where did he come from before he came up to you?

Mr. Kavanagh: If he knows.

Q. If you know, of course. A. He seemed about, I should judge——

Mr. Kavanagh: I object to that now and ask that it be struck out.

Mr. Drewen: I will withdraw it.

Q. Where did Ormsby come from, which direction did he come from when he came up to you? A. About the middle of the block.

Q. From the school? A. Yes, sir.

Q. Was anybody in your company at the time Ormsby came there and made that statement to you? A. There was a couple of young boys standing around.

Q. Now tell us again what he said when he came up to you? A. He said, "I know you, Tony, and I will get your bunch."

Q. Anything more than that? A. That is all.

Q. Had you had any trouble with Ormsby at any time that day? A. No, sir, I didn't see him at all.

Q. Did you have any fight with him? A. No, sir.

Q. Or with anybody else there that day? A. No, sir.

Q. Now, did you see Ormsby's car anywhere at the time he came up to you? A. No, I didn't see his car at all.

Q. How long was he there in your presence at the time he made that statement? A. Half a second.

Q. Just long enough to say that? A. Yes, just long enough to say those few words.

Q. Where did he go then?

Mr. Kavanagh: If he knows.

A. From there he went away and I could not tell you exactly where he went.

Q. You do not know in which direction he went? A. No, sir.

Q. Now, later was your attention called to anything that happened here on the corner of Fourth and Erie? A. I stood where I was all the while and I should judge about two minutes later I heard a scream and I walked up to the corner and just then somebody passed by with a baby in his arms.

Q. Two minutes after Ormsby spoke to you? A. Yes, sir.

Q. You heard a scream? A. Yes, sir.

Q. From which direction did the scream come? A. It came from around Fourth Street.

Q. Where did you go then? A. I walked about as far as the corner.

Q. And you saw a man coming? A. I saw a man just turning the corner—I stood on Erie Street all the while and I seen a man rushing over toward a car with the baby.

Q. That is all you saw? A. That is all I saw.

Mr. Drewen: Now take the stand.

Q. Was there an automobile out at the curb at the time Ormsby spoke to you, or don't you know? A. Well, I seen an automobile there, but I could not exactly tell you if it was his or not.

Q. You do not know if it was his or not? A. No, sir.

Q. Where was the automobile standing at the time Ormsby made that statement to you? A. The automobile was about fifteen feet away from me.

Q. At the easterly curb of Erie Street? A. Yes, sir.

The Court: What type of car was it?

The Witness: Well, I could not exactly tell you that.

The Court: Well, you know whether it was a Mack truck, an open car or a closed car, don't you?

The Witness: Well, to me it looked like a sedan.

Mr. Kavanagh: I object to that and ask to have it stricken out.

The Court: Do you know whether it was a sedan or not?

The Witness: A sedan, yes, sir.

The Court: Well, why don't you say so.

Q. And you say the car was standing about fifteen feet from where you were standing? A. Yes, sir.

Q. In which direction, toward the school side of you? A. It was toward the school, yes, sir.

Q. And that is the direction you say that Ormsby came from? A. Yes, sir.

Mr. Drewen: Cross-examine.

Mr. Kavanagh: No questions.

WILLIAM HOFFMAN, sworn.

Direct examination by Mr. Drewen:

Q. You are a Lieutenant of Police of the City of Jersey City? A. Yes, sir.

Q. And you have been with the Police Department how long? A. Thirty-one and one-half years.

Q. Do you know these defendants? A. Yes, sir.

Q. All of them? A. Yes, sir.

Q. Did you on the 9th day of November, 1928, take a statement from the defendant Frank Donato relative to the charge against him that is now being tried? A. I did.

Q. Was that statement reduced to writing? A. Yes, sir.

Q. By whom? A. By me.

Q. I show you a paper writing purporting to be such a statement and ask you if that is the statement you refer to? A. Yes, sir.

Mr. Drewen: I offer it in evidence.

Mr. Kavanagh: I object, if your Honor please. I would like to have a chance to examine it.

Mr. Drewen: I have no objection. You can examine the witness and examine the statement.

The Court: This is just an alleged confession of Donato?

Mr. Drewen: Yes.

Mr. Kavanagh: I object to the statement on the ground that there is no signature of the man, Frank Donato, who is alleged to have made the statement, here.

Mr. Drewen: I should like to ask counsel, through your Honor, if that is his only objection?

The Court: I assume it is. I am waiting to hear if he has anything further to say.

Mr. Kavanagh: I also object to the admission of the statement on the ground that it is not shown that this alleged statement —I don't say it is a statement in the full sense of the word—was made by Donato at the time he is alleged to have been charged with any crime by Lieutenant Hoffman or any other police officer of the City of Jersey City, and it has not been shown by the Prosecutor that before this election statement—which I claim is not a statement for the reason that there is no signature to it whatsoever—was taken that he was warned by Lieutenant Hoffman respecting his rights. He did not have to make any statement unless he wanted, and any statement he made would have to be voluntary and free on his part and with knowledge that it might be used against him at his trial. There is no evidence on the part of the State that those facts took place, that those circumstances were gone

into by the police, by Lieutenant Hoffman, before this alleged statement was made.

Mr. Drewen: The statement will cure that defect.

Mr. Kavanagh: I object most strenuously to the statement, because on the face of the paper it cannot be a statement of this man Frank Donato, who is alleged to have made a statement, when there is no signature to the paper.

If your Honor please, how can a mere scrap of paper, with certain writing and printing on it, whatever it may be, be charged against any defendant in any wise, whether it be for murder or the simplest kind of an assault? How can that paper be charged against him. It is not shown first that it was made by his free and voluntary act under the circumstances that the law requires it, and then that he comes as a defendant charged with some particular crime. I most strenuously object to this statement, and ask that it be taken out of evidence altogether.

Mr. Drewen: At this time I withdraw the offer, reserving to myself the right to resume the offer.

Q. I asked you whether on November 9, 1928, you took a statement from the defendant Donato relative to the present charge against him? A. I did.

Q. Where was that statement taken? A. In the back room of the Second Precinct.

Q. In Jersey City? A. Yes, sir.

Q. Did you at that time address to Donato questions concerning the charge against him? A. I read the precaution.

Q. No; did you address questions to him concerning this charge? A. I did.

Q. Are those questions set forth in the paper which I show you?

The Court: Yes or no.

The Witness: Yes, sir.

Q. Such answers as the prisoner made to those questions, were they reduced to writing? A. Yes, sir.

Q. Was that writing made on the paper that I show you? A. Yes.

Q. Was the statement signed by——

Mr. Kavanagh: I object to the word "statement", if your Honor please.

Q. Was the statement signed by the prisoner after the answers were reduced to writing? A. It was not.

Q. Did he make any statement to you for his refusal to sign it? A. On advice of counsel he would not sign that statement.

Q. All right. Now, before you put any questions to him and before the answers that he made to those questions were recorded by you on this paper, did you warn him as to his rights as a prisoner? A. I did, by reason of the caution on the head of that blank.

Q. All right. Will you please read it now? A. Jersey City, New Jersey, November 9, Statement of Frank Donato.

Mr. Kavanagh: I object to the word statement.

Q. Just read the cautionary lines. A. "I am William Hoffman, Lieutenant of the Jersey City

Police Department. I am going to ask you some questions in reference to the crime for which you are arrested. You may answer them or not, just as you wish, but what you do say must be a voluntary statement, to be taken down in writing and used at your trial."

Q. You read that to him, did you? A. I did.

Q. Did you in any way exercise force or threats or influence on this man to tell you anything concerning this job? A. Not at all.

Mr. Drewen: I offer the paper in evidence.

Mr. Kavanagh: I object to it for the reasons that I have stated before and I say this at this time, that the Prosecutor has not by his examination of Mr. Hoffman up to this time shown the statutory requirements or an alleged voluntary statement or alleged voluntary answers to questions propounded to a defendant at the time he was under arrest.

The Court: Under the well established law in this State confessions need only be voluntary, and as for my authority for that statement I would refer you to the case of Roselle *vs.* the State, 62 New Jersey Law, page 216, where the question of the admissibility of statements is discussed at great length; also the case of the State *vs.* John Young, recorded in 67 Law, page 223; also the State *vs.* Hand, 71 New Jersey Law, 137, in which among other things the Court says: The failure to caution a prisoner when he appears before a Magistrate and makes incriminatory statements in answer to questions is no bar to their admission as evidence so long as it appears that the state-

ments were voluntary and not the product of fear or hope incited by some word or act of those in authority.

In this case at bar, which is the statement now offered in evidence, it is even stronger than the case of the State vs. Hand, recorded in 71 New Jersey Law, to which I am referring you, because in the statement or in the alleged confession which is now being offered in evidence, it appears that the prisoner was cautioned as to his rights and there is nothing appearing before me affirmatively to show that the prisoner at the bar was in any wise intimidated nor was he led to believe by any blandishments or any hope of any indulgence on the part of the State or that anything would be done in his favor to secure that confession. This case does not come within the category of the cases where it is set up as a defense that the confession was secured by or what is well known in police circles as the third degree method, and this motion is not addressed to that character of confession. So that in the present position of the case, your motion will be denied and the confession received.

Mr. Kavanagh: May I be heard before your Honor denies that motion?

The Court: I will indulge you to that extent.

Mr. Kavanagh: I am absolutely familiar with the case of the State against Roselle, which is the leading case in this State respecting alleged confessions and respecting alleged admissions against interest, by a prisoner when arrested for an alleged

crime, and I am also minutely conversant with the statement in the case of the State against James K. Brown, or James K. Brown against the State, and in the matter of Roselle against the State the question of confessions is discussed at very great length, and also the case of the State against James K. Brown, the matter of confessions and admissions against interest by the defendant arrested for an alleged crime is discussed at very great length. Now, your Honor used the word confession in respect of the alleged confessions, which was a confession under the decision of the Court of Errors and Appeals after the case of the State against Roselle went up, and your Honor used the word confession in respect to the case that your Honor cited, the case of the State against Young. Now, in both of those cases, the State against Roselle and the State against Young, there were written documents offered in evidence by the Prosecutors of the pleas at the trial of both Roselle and Young, but both of those statement were signed by the respective prisoners. They were signed by the respective defendants Roselle and Young and Brown who were brought to trial for those charges against them; in the case of Roselle, murder, and in the case of Brown, murder, but here we have a paper and I object to the word "statement" in this paper and I think Mr. Drewen, my friend the Prosecutor, will admit that. There is no confession in that paper. There are no self-incriminatory statements of this man Frank Donato. The paper is not signed.

It is not a confession at all. It is not a confession unto the law; it is not a statement under the law. It is not a self-incriminatory statement under the law. It is not signed by Frank Donato and, good Heavens, how can it be made a statement against him? How can your Honor admit it in evidence when his signature is not there at the end of it to show that he signed it? That he admitted that he said what was in there, when there is no signature whatever? It is like my going in and endorsing a note for somebody, or your Honor endorsing a note for somebody—you are asked to endorse a note and you say you cannot do it and you have lost too much money on endorsing notes, and then some one who wants to get money on it signs my name or your name to the notes, then when the note comes to maturity the maker does not pay and the bank tries to hold your Honor. Can they legally hold your Honor? No, they can not. Supposing some one writes a slanderous letter or a libelous letter to some one and forges my name or your name to the letter. Are we to be held because some one falsified our name? Because somebody forged our names to a document of that kind? I don't think we can be held under the law and under the decision.

I submit, although your Honor has referred to the State against Roselle and the State against Young, and I mentioned the State against Brown, they refer to signed confessions by those defendants. The State against Young is a signed confession. Here there is no confession, nothing but a paper

not signed by the defendant. It contains simply a few questions that Mr. Hoffman propounded to him answered by Donato in a truthful manner, then he does not put any signature to it. How can your Honor say that this is a confession? How can your Honor say that it is a statement made by the defendant against himself?

I submit to you in all sincerity, that under the law and under the decisions this alleged paper, called a confession and a statement, made by this man Donato, can not be received in evidence under the decisions of this State and the decisions of the United States and the decisions of every State in this Union.

The Court: The Court is determined to lay this alleged statement or confession, or whatever its purpose be, to be admitted in evidence, because the only requisite required by law is that it appear affirmatively to have been made voluntarily, and for your enlightenment, counsellor, if I have referred to the document as a statement or confession, I want to say that I do not know anything about the document. It has not been submitted to me. I won't have a chance to look at it until after it is officially and judicially received in evidence, and if I have referred to it as a confession or statement I want the Jury to understand that I thought I had, as I have very cautiously throughout this trial, used the prefix alleged, and I particularly at this time want to refer to it as an alleged statement or alleged confession, or whatever the paper writing purports to be. If, as you

say, the statement that has been made is provable, if it is proved as you say, that it contains no admission against interest, why then surely no harm can be done.

Mr. Kavanagh: Your Honor, the State is attempting to have it admitted as a confession.

The Court: The Court has already ruled and the Court has allowed it to go into evidence.

Mr. Kavanagh: I take an exception.

(Exception allowed and signed and sealed accordingly.)

THOMAS H. BROWN,
Judge.

(Statement received in evidence and marked F-6.)

Mr. Drewen (reading): "Police Department, Jersey City, November 9th, 1928. Statement of Frank Donato. Residence 59 Terhune Avenue, Jersey City. Made to William Hoffmann. I am William Hoffmann, Lieutenant of the Jersey City Police Department, and I am going to ask you some questions in reference to the crime for which you are arrested, you may answer them or not, just as you see fit, but what you do say must be of your own free will a voluntary statement, as it will be taken down in writing and used at your trial.

"Q. What is your name? A. Frank Donato.
Q. Where do you live? A. 59 Terhune Avenue.
Q. How old are you? A. 25 years.
Q. What is your occupation? A. Laborer, not working at present.

Q. You are charged with murder inasmuch as you did with James McNally and George Ormsby and an unknown man cause the death of one Catherine McGee, age eight years, on November 6, 1928, about 8:30 p. m., by striking her with a baseball bat, from which injury she died at St. Francis Hospital at 9 o'clock in the morning on November 7, 1928; what have you to say to the charge? A. I was in the car sitting in the back seat and I do not know what happened.

Q. Who was with you? A. I do not know.

Q. Why don't you know who was in the seat with you? A. I was drinking and don't remember.

Q. Did you see any baseball bats in the car? A. No."

Prisoner refuses to sign the statement.
Witness: Detective Kennelly.

"Q. Who was driving the car? A. I do not know who was driving the car.

"Q. Did you hear of a little girl being injured at Fourth Street and Erie Street at about 8:30 p. m. November 6, 1928? A. No."

Prisoner refused to sign statement.
Witness: Detective Kennelly.

Q. Will you please identify the defendant Donato by whom that statement just read was given to you? A. He is the second man next to O'Keefe.

Q. This man here? A. Yes.

Mr. Drewen: Let the record show that he indicates the defendant Donato. Cross-examine.

Mr. Kavanagh: No questions.

CHARLES BALLARENE, sworn.

Direct examination by Mr. Drewen:

Q. You are a Lieutenant of Police of the City of Jersey City? A. Yes.

Q. You held that rank of the—well, how long have you been a Lieutenant of Police? A. About eight years.

Q. Lieutenant, do you know these defendants who are on trial? A. I know three of them, yes.

Q. Which three do you know? A. I know Ormsby by sight, and I know McNally and Donato and the other defendants the first time I saw him was when I came to Court here yesterday.

Q. On the 8th day of November, 1928, did you take a statement from the defendant Ormsby relative to the charge against him that is now being tried? A. After warning him of his rights.

Q. Did you do it? A. Yes.

Q. Where was that statement taken, Lieutenant? A. In Inspector Casey's office in the Second Precinct, Jersey City.

Q. Was he at that time a prisoner? A. He was.

Q. Before you took any statement from him did you give him any warning of any kind? A. I warned him as to his rights by reading the top of the statement, the printed part.

Q. I show you a paper writing and ask you if that is the statement you referred to? A. That is the statement.

Q. Will you read to us what you say you read to him, from that statement, by way of warning? A. I am Lieutenant C. Barone of the Jersey City Police Department. I am going to ask you some questions in reference to the crime for which you are arrested, you may answer them or not just as you wish, but what you do must be of your own

free will a voluntary statement, as it will be taken down in writing and used at your trial.

Q. Did you read that to him? A. I did.

Q. Did you thereupon put questions to him, the prisoner Ormsby? A. I did.

Q. Relative to the charge that is now being made? A. Yes.

Q. Did he give answers to those questions? A. He answered the questions.

Q. Were those questions and answers reduced to writing on the paper I show you? A. They were, by me.

Q. At any time, Officer, in connection with the giving of this statement by Ormsby, did you exercise threats or coercion of any kind upon the prisoner? A. I did not.

Q. Did the prisoner sign this statement? A. Yes.

Q. The prisoner did sign the statement? A. Both pages, I think.

Mr. Kavanagh: What was that last answer. (Repeating last answer.)

Mr. Drewen: Yes, both pages, he said.

Q. That is right? A. He signed both pages, yes.

Mr. Drewen: I offer the statement in evidence.

Mr. Kavanagh: I object to it. I object to it at this time, and I ask the right to examine the statement.

The Court: You may have leave to cross-examine, if that is the purpose to which your motion is addressed.

Mr. Kavanagh: I ask leave to examine the statement and also to cross-examine

Mr. Ballarene and I object at this time to the admission of the alleged statement.

The Court: I will permit you to cross-examine on it.

Mr. Kavanagh: May I see the statement?

The Witness: Certain.

The Court: Yes.

Mr. Drewen: I have no objection in the world to Mr. Kavanagh seeing this statement, but I do not know what the contents of this will have to do with this admissibility. However, you may have it.

Cross-examination by Mr. Kavanagh:

Q. Did you arrest Ormsby? A. No, sir.

Q. Who arrested him, do you know? A. I don't know.

Q. You did not have anything to do or did not participate in his arrest, did you? A. No, sir.

Q. And you don't know who did? A. No, sir.

Q. Do you know when he was arrested?

Mr. Drewen: Of course, if your Honor pleases, in the interest of saving time, I must object to this. This has nothing to do with the further inquiry. He is examining him as to the character of this statement.

The Court: He must be limited to the document that is about to be offered.

Mr. Kavanagh: Well, all right, I will withdraw further questions antecedent to the time in question.

Q. When did you first see Ormsby? A. On the date of that statement. I think it was November 7th.

Q. Are you sure? A. Positive.

Q. You are positive of it. Will you look at the statement and tell after examining it if you are still positive? A. Well, it must have been the eighth. I am wrong.

Q. You are wrong. It was on the eighth. And where were you when you first saw Ormsby? A. In Inspector Casy's office, in the Second Precinct.

Q. On November 8th? A. That is right.

Q. And that is two days after the election day? A. That is right.

Q. What time of the day did you see Ormsby? A. Sometime in the afternoon, around three or 4 o'clock.

Q. Are you sure what time it was? A. I am not.

Q. Had he been just arrested at that time? A. I don't know.

Q. Anyway, you were ordered to do what, to examine him? A. To take this statement.

Q. Who ordered you to take a statement from him? A. Inspector Casy.

Q. Was Inspector Casy present at the time the statement was taken? A. I do not think he was.

Q. Well, now, have you any doubt as to whether he was or not? A. I have not any doubt whether he was or was not.

Q. Don't you know who was present when this alleged statement was taken from Ormsby? A. The witness present and Detective O'Neil, I think. Them I am positive of.

Q. You are positive about O'Neil and you are positive about yourself being present? A. Right.

Q. But you are not positive as to whether anybody else was present? A. I am not.

Q. Now, you say this was in the afternoon? A. Some time in the afternoon.

Q. Who brought Ormsby in? A. I don't know.

Q. Well, was he in the room before you came in? A. Sure.

Q. He was in there? A. Yes.

Q. And you questioned him, did you? A. Yes.

Q. You warned him of his rights? A. Yes.

Q. What did you say to him? A. I read the top of that statement to him.

Q. All right, without looking at the statement you remember what you said, don't you? A. In which way?

Q. Well, I mean warning the defendant Ormsby, the prisoner Ormsby, of his rights? A. I did.

Q. What did you say to him? A. I warned him that I was going to ask him some questions in reference to the crime with which he was arrested and he could answer them or not just as he saw fit, but it would be a voluntary statement and would be used at his trial.

Q. What else did you say to him? A. I asked him the questions that is written on that paper.

Q. Outside of the questions what else did you say to him? A. I do not remember saying anything else to him.

Q. Did you tell him the crime that he charged with? A. According to that statement, yes.

Q. I am asking you. Never mind that alleged statement at this time. Did you tell him that he was charged with any crime? A. Don't it state there that he is charged with murder?

Q. I am not referring to the statement at all.

The Court: The witness will please refrain from arguing with counsel and will answer the questions as propounded.

(Question repeated as recorded.)

A. Yes.

Q. What did you tell him he was charged with? A. He was charged with murder.

Q. Did you tell him that? A. Yes.

Q. Tell us the circumstances and the facts that you set forth to him.

Mr. Drewen: If your Honor please, there is only one thing that is happily the subject of this inquiry and that is the voluntary statement that he made.

The Court: That is true, but Mr. Kavanagh desires to question him. I will allow the question.

A. I stated he was charged with murder and I was going to take his statement and took it.

Q. What did you say to him? A. Anything I said to him is on that paper.

Q. Don't you remember what you said to him? A. It is on that paper. I could remember it by reading it.

Q. You can not remember it except by referring to the paper, can you? A. Certainly not.

Q. And that is only a few months ago, about six or seven months ago? A. More like eight months or nine months.

Q. Well, eight months. You cannot remember that? A. No.

Q. Did you promise him any benefits? A. I did not.

Q. Or advantages if he would make a statement? A. I did not.

Q. Against anybody? A. I did not.

Q. Did you threaten him in any way? A. Never.

Q. Did you use any threatening words to him of any kind? A. No.

Q. Did you menace him in any way? A. No, sir.

Q. You are sure of that? A. Positive.

Q. Did any one present threaten him? A. No.

Q. Did any one present promise him with any advantages or gains if he made the statement? A. No, sir.

Q. You are sure of that? A. Positive.

Mr. Kavanagh: Now, if your Honor pleases, before that statement is read, which I presume the Prosecutor is going to do, I move your Honor that anything in that alleged statement, if there be anything—I have not read the statement through——

The Court: You mean your point is that it can only bind Ormsby?

Mr. Kavanagh: Yes.

The Court: I will so instruct the jury specifically at this time.

Mr. Drewen: The State understands that perfectly.

The Court: The statement may be received and marked in evidence and I will state to the jury at this time that anything contained in that statement can only have a binding effect upon the defendant Ormsby and you must as a matter of law erase from your minds and obliterate anything said by Ormsby or alleged to have been said by Ormsby in that statement so far as it affects the other three defendants. In other words, anything that Ormsby may say in the presence of the other three men cannot bind anybody but the defendant Ormsby. The State will now proceed to read the statement into the record.

Mr. Drewen (reading): "Exhibit F-7, Police Department, Jersey City, N. J., No-

vember 8, 1929. Statement of George Ormsby. Residence 714 Jersey Avenue, Jersey City. Made to Lieutenant C. Ballarene. I am Lieutenant Ballarene of the Jersey City Police Department. I am going to ask you some questions in reference to the crime for which you are arrested, you may answer them or not just as you wish, but what you do say must be of your own free will, a voluntary statement, as it will be taken down in writing and used at your trial.

"Q. What is your name? A. George Ormsby.

"Q. Where do you live? A. 714 Jersey Avenue.

"Q. How old are you? A. 27.

"Q. What is your occupation? A. Chauffeur.

"Q. How long have you worked there? A. Seven years.

"Q. You are charged with murder in that at 8:40 p. m. at Fourth and Erie Streets on November 6, 1928, you were in a fight in which a baseball bat was used, causing the death of one Catherine McGee, aged eight; what have you to say? A. From 6 p. m. Election Day I was standing outside of Public School No. 2. I was standing alongside a man and he was hit by two men at the same time two other men hit me. It turned into a general mix-up, so I decided to beat it. As I got into the car three men jumped on the car. As I turned Fourth Street I saw the child laying on the corner, and kept going. When I started from Fourth Street, Zince was in the car, Slim, and I don't know the other fellow's name."

Signed GEORGE ORMSBY.

Witness: John O'Neill, Detective 55. "A. (Continuing) When the car got around on Fourth Street, Slim, Zince and the other man jumped out. His first name is Jim, and they had bats in their hands. The next thing I know the child was laying in the street. There was a fight and I could not see what happened, and the three of them came running back to the car and got in, and I looked at them. I see the child lying back on the corner. I said to them, "What happened?" "What did you fellows do there? There is a child laying on the corner." And they said, "Take us away from here." I said to Zince, who was sitting along side of me, "Did youse hit that child?" Zince said no, that the child was knocked over in a rush in the fight. I believed what he said until I was told later that the child was hit with a bat.

"Q. Where did the bat come from? A. Between 5:30 p. m. and 6 p. m. my car was taken away, while I was in the school house, and I think the bat was put in there then.

"Q. Where did you drive to? A. To the Grove Bakery.

"Q. Who owns the car? A. I do, a company with Danny Reiley."

(Signed) GEORGE ORMSBY.

Witness: John G. O'Neill, Detective 55.

By Mr. Drewen:

Q. By the way, Officer, which of these defendants is the defendant Ormsby by whom the statement just read was made? A. Which one is it?

Q. Yes. A. The one on the right, on my right.

Q. The defendant sitting— A. With his finger up to his eye now.

Mr. Drewen: Indicating the defendant Ormsby. Cross-examine if you wish.

Mr. Kavanagh: No questions.

DETECTIVE PATRICK J. WALTON, sworn.

Direct examination by Mr. Drewen:

Q. You are a Lieutenant of the Police Department of the City of New Jersey? A. Not a Lieutenant, a detective.

Q. How long have you been a detective? A. About 17 years.

Q. And do you know any of these defendants? A. I have took a statement from O'Keefe.

Q. Which defendant is O'Keefe? A. I believe the one right in here.

Q. The one on this end? A. Yes.

Q. Next to the officer? A. I think so.

Mr. Drewen: Indicating the defendant Vincent O'Keefe, alias Brasch.

Q. Did you take a statement from him relative to the charge against him that is now being made? A. I did.

Q. Where was that statement taken, Officer? A. At the Second Precinct.

Q. Jersey City? A. Yes.

Q. At that time was he a prisoner? A. He was a prisoner and taken to the Station House, where I took the statement.

Q. He was a prisoner? A. He was a prisoner, yes.

Q. At the time? A. Yes.

Q. At that time, did you direct questions to him relative to the charge now being tried? A. I did.

Q. Did he make answers to those questions? A. He made answers to those questions.

Q. Were the questions that you put to him and the answers he gave reduced by you to writing? A. They were reduced by me to writing, yes; I put them down in writing, what he said.

Q. Did you write them? A. I did write them.

Q. I show you a little writing purporting to be such a writing that you just mentioned, and ask you if that is the writing you made at the time? A. Yes.

Q. At any time before or at any time during your questioning of O'Keefe and his answering the questions, did you threaten him in any way? A. No, sir.

Q. Did you offer him any promises of help in this charge? A. No, sir.

Q. Did you exercise any force or threats or coercion of any kind upon him? A. No, sir.

Mr. Drewen: I offer the statement in evidence.

Mr. Kavanagh: I object to it at this time.

The Court: Do you desire to cross-examine? If so, the Court will give you that permission.

Mr. Kavanagh: Yes, your Honor.

Cross-examination by Mr. Kavanagh:

Q. Did you arrest O'Keefe? A. No, sir, I did not.

Q. Do you know who arrested him? A. I believe he was taken to the Station House by Detective Dillen and Callahan.

Q. When? A. About two or three days later after the accident.

Q. Two or three days later? A. Something like that, I believe.

Q. It might have been longer? A. Yes, whatever date is on the statement.

Q. And did you question Mr. O'Keefe? A. Lieutenant Hoffman questioned him.

Q. You did not do any questioning? A. I did not do any questioning. Lieutenant Hoffman did the questioning and I wrote it down.

Q. And you say you warned him of his rights? A. I warned him of his rights before.

Q. Who did, you or Mr. Hoffman? A. I did.

Q. Did Mr. Hoffman say anything to him? A. No, I have read the top of that statement and told him of his rights, and whatever——

Q. Did Hoffman say anything to him? A. After I got through reading the top of that statement and telling him of his rights, that he could answer or not just as he wished.

Q. Speak up. A. I told him what was on the top of that statement, telling him the reading that was on it, and I warned him of his rights, that whatever he said was of his own free will a voluntary statement and taken down in writing and to be used at his trial. Then, after that, Lieutenant Hoffman asked the questions.

Mr. Kavanagh: That is all. I object to the same, urging the same grounds that I set forth as to the alleged statement of Donato, embracing all of my arguments that I made in that case.

The Court: The alleged confession will be received and marked in evidence.

(Exception allowed, signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

(Statement received in evidence and marked F-8.)

By Mr. Drewen:

Q. Referring to Exhibit 8, which is the statement which you have just identified as having been made to you, is that in your handwriting? A. Yes.

Q. And the questions that are there set forth were asked, as I understand it, by Lieutenant Hoffman? A. Yes.

Q. Did you write down the questions as Lieutenant Hoffman asked them? A. I did.

Q. Of the prisoner at the time? A. I did.

Q. Did you write down the answers as they were given? A. I did.

Mr. Drewen: Reading Exhibit F-8. Police Department, Jersey City, November 12, 1928. Statement of Vincent O'Keefe, alias Brasch. Residence 174 Academy Street, Jersey City. Made to Detective Patrick Walton. I am Detective Patrick Walton, Detective of the Jersey City Police Department. I am going to ask you some questions in reference to the crime for which you are arrested, you may answer them or not, just as you wish, but what you do say must be of your own free will, a voluntary statement, as it will be taken down in writing and used at your trial.

"Q. What is your name? A. Vincent O'Keefe, alias Vincent Black.

"Q. Where do you live? A. 174 Academy Street, Jersey City.

"Q. How old are you? A. 21.

"Q. What is your occupation? A. Longshoreman.

"Q. How long have you worked there? A. Not working at the present time.

"Q. You are charged with murder inasmuch as you did at about 8:30 p. m. November 6, with others, strike one Catherine McGee, aged eight, with a baseball bat at Fourth and Erie Streets, and from which injury she died at St. Francis Hospital at 9 a. m. on November 7th. What have you to say to the charge? A. I went to No. 2 School at about 2 p. m. and stayed there all the afternoon and the evening, until sometime after 7 p. m. Then there was a fight started in the front of the school, when I was struck and knocked out. Then we all got in the car and rode out to Bayonne, and from there went to Easton, Pennsylvania, and came back the afternoon of November 7th, and I went home."

Prisoner refuses to sign statement until he sees his counsel.

Witness: William Hoffman, Lieutenant of the Police.

"Q. Who was in the car when you started from the school house for Bayonne? A. Ormsby, Slim Donato and myself.

"Q. Who owns the car that you were in? A. I hear that there is four partners in owning the car, but don't know who the owners are.

"Q. Who was driving the car? A. Ormsby drove the car and some of the time I drove the car.

"Q. What seat were you sitting in, the front or the rear? A. The front seat, along side of Ormsby.

"Q. When the auto started from in front of the school, when turning around the corner at Fourth and Erie Streets, going toward Grove

Street, who jumped out of the car? A. I fell out of the car as I was dizzy from the blow that I got in front of the school.

"Q. Did you see any baseball bats in the car? A. I did.

"Q. Where did them baseball bats come from? A. They come from candy store.

"Q. Where did you buy them? A. I bought them in some candy stores on Erie Street, but I do not know exactly where.

"Q. How many bats did you buy? A. Three bats.

"Q. What were you going to do with them? A. We heard that they were a crowd looking for us with blackjacks and we bought them to protect ourselves.

"Q. Are all the answers in this statement the truth? A. They are all the truth in the statement."

The prisoner refuses to sign the statement until he has counsel.

Witness: William Hoffman, Lieutenant of the Police Department, City of New Jersey."

Now, I am ready to call Dr. Hasking, but the Doctor told me this morning he would be called away and it is now five minutes to one.

The Court: Will he be your last witness?

Mr. Drewen: The last or very nearly so. I would like to call Dr. Hasking now——

The Court: Is he here?

Mr. Drewen: No, I am going to ask your Honor to adjourn now.

The Court: Do you desire to cross-examine, Mr. Kavanagh?

Mr. Kavanagh: No questions.

Mr. Drewen: There is one Police Officer, your Honor, whom I would call now, but he was called to Court in another part of the building. He is probably under subpoena. He will be back here at two.

Mr. Kavanagh: Have you finished?

Mr. Drewen: Yes.

Mr. Kavanagh: I want to call your Honor's attention to the fact that there are alleged allegations contained in that paper writing that Mr. Drewen has just read to the jury, mentioning other people outside of the alleged man who is alleged to have——

The Court: In other words, your insistment is that O'Keefe, by his alleged statement or alleged confession, can not surcharge any of the other defendants by anything he may have said not in their presence?

Mr. Kavanagh: Right, sir.

The Court: I will specifically instruct the jury at this time that in the reading of the alleged statement or alleged confession that is alleged to have been made by O'Keefe to the officer who is on the stand, that the jury will only receive that alleged statement or alleged confession in evidence, only in so far as it may affect the defendant O'Keefe who said it. In other words, in plain English, O'Keefe's alleged statement or alleged confession can not, standing by itself, bind any of his co-defendants, in view of the fact that the alleged statement or alleged confession was not made by him in the presence of the others.

After Recess.

Walter Yeiser, sworn.

Direct examination by Mr. Drewen:

Q. Where do you live? A. 317 Varrick Street, Jersey City.

Q. How old are you? A. 17.

Q. You remember Election Day, November 6, 1928? A. Yes.

Q. At any time on the evening of that day were you on the corner of Fourth and Erie Streets? A. At around ten to eight.

Q. You were there at that time? A. Yes.

Q. Was that the corner of the street upon which the National Grocery Store is located? A. Yes.

Q. Do you know a man called Packey Whalen, who was a witness here this morning? A. I know him, yes.

Q. Will you state whether or not he was on the corner that night while you were there, on the same corner? A. I did not take notice to him.

Q. While you were there, just tell the Court and jury what you saw, what happened, and what you saw? A. Well, at around ten to eight, and I was cleaning my nails there.

Q. What is that? A. I was cleaning my nails there, and I heard a voice—"Go get that guy".

Mr. Kavanagh: I object. I object on the ground that it is hearsay and not binding on any of these defendants, and not evidential against them.

Mr. Drewen: I withdraw the question and consent that the answer be stricken out.

Q. When you were standing on the corner there, did you see an automobile? A. Right on the corner.

Q. Yes, while you were standing on the corner there, did you see an automobile? A. No, I did not.

Q. At any time while you were there, did you see an automobile? A. Yes.

Q. Where was the automobile? A. Right on the corner of Fourth and Erie Streets.

Q. When you first saw the car, which direction was it going? A. Towards Grove Street.

Q. On Fourth Street? A. On Fourth.

Q. Do you know from which direction the car had come? A. I did not take notice.

Q. How far into Fourth Street? Here is a map. This is Fourth Street. This is Erie Street. Where is the corner on which you say you were standing? How far into Fourth Street had the car gone when you first saw it? A. About three feet away from the corner.

Q. Was it going or standing still? A. Standing still.

Q. And you saw that car standing still at the position you have mentioned. What happened? A. Well, I just seen a door open. I did not see any one get out. As I seen that door open I knew it was not safe to stand there, so I walked away.

Q. All right. Why did you walk away; what was there merely about the opening of the door that caused you to walk away? A. Well, from what I hear.

Q. What did you hear?

Mr. Kavanagh: I object to that and ask that it be stricken out.

Mr. Drewen: I withdraw the question and consent that the answer be stricken out.

Q. Did you hear anything from the automobile?

Mr. Kavanagh: I object to that.

The Court: That calls for a yes or no answer.

A. Yes.

Q. What did you hear? A. "Get that guy", is all I heard.

Q. You heard that. As you heard, coming from the automobile, the words "Get that guy", what was happening so far as the automobile was concerned? A. What happened?

Q. Was anybody getting out of it, or what?

Mr. Kavanagh: I object to that. The witness testified a few seconds ago that he did not see any one get out of it.

The Court: The question will be allowed.

Mr. Kavanagh: Exception.

(Exception allowed and signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

A. I did not see anyone get out.

Q. You saw the door open and you heard these words. Then you went away? A. I commenced to walk away.

Q. Which direction did you walk? A. Towards Third Street, on Erie Street.

Q. That is, back towards School No. 2? A. Yes.

Q. How far did you walk? A. About six or eight feet, when I heard a crash.

Q. What kind of a crash? A. I knew it could not be wood, because it was not——

Mr. Kavanagh: I object and ask that it be stricken out.

The Court: It is so ordered.

Q. Just describe the crash, if you can. That is a hard question, I know. What kind of a sound was it, if you can describe it? A. Well, it really was not a hard crash.

Q. You heard what you call a crash; I want to know what you heard? A. Well——

Q. Well, you heard a sound, did you? A. Sound.

Q. When you heard a sound, what did you do? A. I turned around.

Q. Which direction did you look when you heard a sound? A. Turned to my left.

Q. Towards the direction you came from? A. Yes.

Q. What did you see there? A. I seen the girl lying there.

Q. Did you see the automobile at that time? A. Just as I looked around the automobile started off.

Q. Did you see anybody going towards the automobile? A. There was a couple of fellows ran towards it.

Q. Did they get on it? A. No, sir.

Q. At any time did you see any one get out of the automobile? A. I did not see any one get out of the automobile.

Q. Did you see Whalen on that corner? A. I did not take notice of him at all.

Mr. Drewen: Cross-examination.

Mr. Kavanagh: No questions.

ANDREW A. BLAKE, sworn.

Direct examination by Mr. Drewen:

Q. Where do you live? A. 452 Grove Street.

Q. Do you know where Public School No. 2 is on Erie Street? A. Yes.

Q. Do you know the corner of Fourth and Erie Streets, where the National Grocery Store is located near Public School No. 2? A. Sir?

Q. Do you know the corner of Fourth and Erie Streets where the National Grocery Store is located? A. Yes.

Q. Near School No. 2? A. Yes.

Q. Were you on that corner at any time the night of election, November 6, 1928? A. Yes, around quarter after eight.

Q. Do you know what time you were there? A. About quarter after eight.

Q. While you were there did you see any automobile running into Fourth Street? A. When I went around Fourth Street I seen a car come around Erie Street, going east.

Q. That was when you were where? A. When I went around Fourth Street.

Q. Where had you been when you came to the corner of Fourth Street? A. I had been around in the doorway of the National.

Q. You mean the grocery store on the corner of Fourth and Erie Streets? A. Yes.

Q. Which doorway, the sideway on Fourth Street or the front doorway on Erie Street? A. The door facing Erie Street.

Q. The front door? A. Yes, sir.

Q. Were you standing in that said door, the front door on Erie Street when you first saw the automobile? A. No.

Q. Where were you when you first saw the automobile? A. On Fourth Street.

Q. Whereabouts on Fourth Street; how far from the corner? A. About 15 feet.

Q. From the corner of Fourth Street? A. Yes, sir.

Q. Where was the automobile going at the time you first saw it? A. It was going towards Henderson Street.

Q. That is east? A. East.

Q. On Fourth Street? A. Yes.

Q. All right. Now tell us what happened, what you saw at that time? A. I saw a car coming around Fourth Street, east.

Q. Is that the car you are talking about? A. Yes; and two men jumped out. I saw two men jump out. Each one had bats. One ran towards Whalen and the other ran towards Grove Street. I ran on the opposite side of the street.

Q. What did you run on the opposite side of the street for? A. I was all excited; I did not know what to do.

Q. You did not know what to do? A. Yes. I went on the opposite side of the street and stood behind an automobile. Then I seen two men go in the automobile again, and go down towards Henderson Street.

Q. Did the two men you saw get back into the automobile, were they the two men that had the bats? A. Yes.

Q. Which side of the automobile did they get out of? A. The one of them got out on each side of the door.

Q. One got out of each side door? A. Yes.

Q. One on the right and one on the left? A. Yes.

Q. After this automobile went on down towards Henderson Street did you come back from across the street where you were? A. Yes, I went around Erie Street.

Q. Did you see a child lying on the corner? A. No, sir.

Q. At any time? A. No, sir.

Q. How long did you stay over across the street after this automobile passed? A. About three minutes.

ARTHUR T. HASKING, sworn.

Direct examination by Mr. Drewen:

Q. Doctor, you are Assistant County Physician of this County?

Mr. Kavanagh: I admit the Doctor's qualifications, your Honor.

Q. And have been for how long, approximately? A. Unofficially since 1902; officially since 1910.

Q. Doctor, I show you photograph in evidence, Exhibit 5, which has been testified in this case to be a photograph of Catherine McGee, who suffered death in St. Francis Hospital about 9 o'clock in the morning of September 7th, 1928, and ask you if you performed an autopsy on the body of that child to determine the cause of death? A. I did.

Q. Where was that autopsy performed, Doctor? A. At Higgins Morgue, Jersey City.

Q. Will you state to the jury your findings on that autopsy and what you conclude to have been the cause of the child's death? A. The autopsy was held on November 7th last. The body was

that of a female, measuring about 4 feet in height, estimated to weigh about 70 pounds, and approximately eight years old. I found in the mid-line of the forehead, about an inch and a half above the bridge of the nose, a circular abrasion of the skin, measuring approximately an inch and a half in diameter. There were no other marks of recent violence on external examination, except a mass or a swelling on the right and rear part of the head. On turning back the scalp we found that extensive hemorrhage had taken place in the region which I have indicated, the right posterior part of the head. At this point a fracture of the skull was determined. I removed the skull cap. We found that extensive hemorrhage had taken place between—there is a membrane covering the brain. That is called the dura mater. There was a hemorrhage between the skull and this membrane and likewise there was extensive hemorrhage between this membrane and the surface of the brain itself. We found an extensive fracture of the skull had taken place. The principal depression of the skull, or principal area of comminution visible was at a point extending from the ear back to the optical protuberance, that is, the prominent part of the skull that you feel in the back of the head. It is difficult to explain this multiple fracture without using technical terms, but I will try to explain it in a clear manner. This fracture, starting at a depressed area about an inch behind the mastoid on the right side—now, the mastoid process is that prominent bone behind the ear. It is on the right; about an inch behind that was a depressed area about a half an inch in diameter. Beginning at that point and running forward a distance of four and a half inches through the base of the skull was a frac-

ture. The skull, the anterior of the skull, such as we get, would be from the upper part of the head. That is known as the vertex. Now, the base of the skull is a very irregular shaped object. It is divided into three parts, what are known as the anterior, middle and posterior facet. The anterior facet runs from the front part of the head over the nose back to about the back of the eye. The middle facet runs from that point to about the point where the ear is, and the posterior facet is from the ear back to the back part of the head. Beginning at that point it ran forward over the middle facet and inwards. There was another fracture beginning at that point, which extended downward to what is known as the foramen magnum. That is the back opening at the base of the skull through which the spinal cord goes into the backbone. There was another fracture running backwards and crossing over the ear; which joined the two previous fractures, producing a triangular fracture. The fragment or piece that was loosened by these three fractures was somewhat depressed. The brain itself was not injured by this fragment. There was another fracture extending backwards, and then to the mid line of the back of the head, extending downwards, where it again met the second fracture which I have described. This fracture, which I previously described, had three branches, which was about an inch and a half, the first; two inches the second; and nearly three inches the third one. That, meeting the fracture that went posteriorly, formed another fragment, which was rather large, measuring approximately two or three inches. The other organs were normal and in such condition as to be consistent with the continuance of life and health. Therefore, from all the facts observed I

inferred that death resulted from intra-cranial fracture, following multiple fractures of the skull.

Q. Can you further define the significance of the term multiple as you used it, by stating the number of fractures that you found in the child's skull? A. Well, it is what is called commonly a stella fracture. You have a point of star and then the fractures would go somewhat like the spoke of a wheel.

Q. Like a star? A. Yes. Radiating out from a given center like a star, and this center point, as I said, was on a line between the right mastoid and the occipital protuberance. That is that prominence back of the head. That line is situated about an inch back of the mastoid process.

Q. Will you please, on your head, Doctor, kindly demonstrate to the jury just where this point of depression was? A. An inch on a line between this prominent side of the ear and this nib at the back of the head, a line drawn on that about an inch from that. There was a general depression there, through here (indicating), this line of fracture running back, but the sharp depression which is about an inch in back, was at that point, and then the fracture went back, and then the other three fractures went forward, and the other deep down into the base of the skull. And there was another one starting at this line of fracture and went down almost in the middle line, joining the other two. That gave you the two fragments which produced the depression.

Q. Did you find fragments of the skull cap? A. Yes. There were two fragments brought about by the intersection of these fractures. It gave two pieces. One was comparatively small; the other was a larger one, because that was the one back here. That was the larger fragment.

Q. Were these fragments entirely detached from their place in the skull cap, so that they could be removed? A. The tissues held them, but the boney continuity was severed. They were held by the tissues, of course.

Mr. Drewen: Cross-examination.

Mr. Kavanagh: No cross-examination.

Mr. Drewen: The State rests.

Mr. Kavanagh: Now, if your Honor pleases, I move for a direction of a verdict of not guilty in favor of the defendants Frank Donato, Frank McNally, George Ormsby, Vincent O'Keefe, alias Brasch, on the ground that the allegations contained in this indictment that I now hold in my hand are without any proof whatsoever in respect to the testimony and in respect to the evidence adduced by the State. In other words, I say, and I say to your Honor very positively, that there is an absolute and direct variance between these allegations, alleged in the first, second and third counts of the indictment, and the proof adduced by the State to attempt to sustain the allegations contained in these three counts of the indictment. The first count alleges that Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe, alias Brasch, late of the City of Jersey City, in the said County of Hudson, on the 6th day of November in the year of our Lord, 1928, with force and arms at the City of Jersey City aforesaid, in the County aforesaid, and within the jurisdiction of this Court, one Catherine McGee in the peace of God and

of this State, then and there being did wilfully, feloniously and of his malice aforethought, kill and murder, contrary to the form of the Statute in such State herein provided, and against the peace of this State, the government and the dignity of the same. I say to your Honor in respect to that count, that there is not one scintilla, not one scintilla of evidence adduced by all these numerous witnesses who were sworn here yesterday, this morning and this afternoon on the part of the State, to sustain this count. There is not one scintilla or particle of evidence adduced by any of them that in any wise shows that these four defendants named, did wilfully, feloniously and of his malice aforethought kill and murder Catherine McGee. In fact, I say to your Honor there is not a particle of evidence, there was not a particle of evidence adduced before your Honor and the gentlemen of this jury on behalf of the State in respect to this count of the indictment and in respect to the sustaining of the allegations in the indictment against any of these defendants. So, therefore, I say to your Honor in all sincerity that that being the fact, that being proved, that being the fact that I now allege being absolutely incontrovertible under the evidence adduced by the State, this first count for murder in the first degree, accusing wilfullness, feloniousness and malice aforethought, must fall by its own weight to the ground. So, therefore, I respectfully ask your Honor to direct a verdict of not guilty against all four of these defendants on the ground stated

before, that there is not a particle or scintilla of evidence adduced by the State to support this allegation.

In respect to the second count in the indictment, which is a count for manslaughter, and I will read the count: And the Grand Inquest aforesaid upon their oath aforesaid do further present that the said Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe, alias Brasch, on the 6th day of November in the year of our Lord, One Thousand Nine Hundred and Twenty-eight, at the City of Jersey City aforesaid, in the County of Hudson aforesaid, and within the jurisdiction of this Court, did feloniously kill and slay one Catherine McGee, 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.

That is the count for manslaughter and in respect to that count also I most especially ask your Honor to direct a verdict in favor of all four of these defendants, on the ground that the allegations contained in that count for manslaughter against these four defendants is in no wise sustained by any proof, any particular proof, any scintilla of proof, even the slightest particle of proof by the State, yesterday and today, and for that reason I ask that a verdict of not guilty be directed as against all of these defendants, and on the third count of the indictment, which is a count for assault and battery which is as follows: And the Grand Inquest aforesaid upon their oath, do further present that the said Frank

Donato, Frank McNally and George Ormsby and Vincent O'Keefe, alias Brasch, on the 6th day of November, in the year of Our Lord, One Thousand Nine Hundred and Twenty-eight, at the city of Jersey City, aforesaid, in the County of Hudson aforesaid, and within the jurisdiction of this Court, in and upon one Catherine McGee in the peace of God and of this State, then and there being, an assault did make, and her, the said Catherine McGee, then and there did beat, wound and ill treat and other wrongs, to the said Catherine McGee then and there did to the said damage of the said Catherine McGee, 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. I say in respect to that count for assault and battery, the third and last count of this indictment against all of these four defendants there is not a particle of evidence adduced or sworn to on the part of any witness that was brought by the State, either directly or indirectly, to intimidate or inculpate any of those four defendants of the crime that is alleged in that count, and for that reason I respectfully invoke your Honor's direction and state to your Honor that in respect to these defendants there should be a verdict of not guilty directed for all of them, because there is not a particle of evidence to sustain any of the counts in this indictment, and further I say to your Honor that there is not a particle of evidence adduced by the State either yesterday or today to in any wise sustain

the allegations that the State has attempted to sustain in this indictment. I say to your Honor under the law it is incumbent upon the State to make out a *prima facie* case against any defendant, be he charged with murder or with the slightest degree of crime in this State or any other State of the Union, and before, under our decisions, under our law, any defendant can be made to answer for the allegations against him or her or them in any indictment, a *prima facie* case must be made out, and if there is no *prima facie* case made out against a defendant or against any defendant in respect to any crime or crimes with which they are charged, under our law and under our decisions the indictment and the count contained therein must fall to the ground by their own weight, because there is an absolute variance between the proof and the allegations contained therein. And I say in this case, notwithstanding all the witnesses that were brought by the State who appeared here before your Honor and this jury and who were sworn under oath to tell the truth, the whole truth and nothing but the truth in respect to the charge against these defendants, not one single solitary witness came before this jury and in any wise incriminated or showed that any of these men here had any connection whatsoever or had a hand in anything that led to or caused or brought about the death of this young girl. There is not a particle or scintilla of evidence adduced before your Honor, and that being the case, I say to your Honor in all sincerity, and I say to you positively,

your Honor, under the law that no *prima facie* case has been made out. And with respect to one of the defendants, McNally, there is no evidence at all. As respects the other three defendants, there is absolutely no evidence of any connection in respect to McNally or in respect to Donato or in respect to O'Keefe or in respect to Ormsby, making the stated blow or handling any weapon that brought about an assault upon this young girl, Catherine McGee, as a result of which her death was brought about. There I go a little further, your Honor? I will say further from all the witnesses that were brought here on the stand yesterday and today, my friend, the Prosecutor, not one single one of them put either McNally, Donato or O'Keefe or this man Ormsby there at the time that this little girl was struck. Not one single witness, your Honor, and I say that being the fact, the evidence is incontrovertible—I use the term evidence because it is not evidence under our Law. It is is not evidence under our decisions. It is not evidence under the great common law of England, for which our law and Statutes to a very considerable extent respecting criminal charges are brought. There is not one single bit of evidence to charge any of these men with the crime charged, and I say in respect to that, before these men can be obliged to go on the stand and disprove any allegation contained in this indictment it is absolutely incumbent upon the State under the law to make out a *prima facie* case, and I must respectfully submit to your Honor that that

prima facie case has been made out, that there is no particle of evidence adduced by the State to all these witnesses, and they were numerous, 16, 17, 18, probably 20 witnesses, to connect any of these young men with the murder or the slaying or the assault to this young girl, Catherine McGee; and for those reasons, your Honor, inasmuch as what I have said is open and clear to your Honor under the testimony, open and clear and can not be contradicted by my friend, the prosecutor, Mr. Drewen, inasmuch as no *prima facie* case has been made out against any of these defendants I must respectfully and sincerely charge your Honor that there must be a direction by your Honor to this jury in behalf of all of these four defendants that they be acquitted of the alleged charges made against them.

The Court: Mr. Prosecutor, I will see you as to McNally first.

Mr. Drewen: If your Honor pleases, I first want to make response to Mr. Kavanagh by making a paraphrase or contradiction of Shakespeare to the effect that the law is not an ass. This is homicide. It is a serious charge, and, of course, it has got to be sustained. I would call your Honor's attention to the fact that the State has proved that an automobile standing in front of Public School No. 2, started off with four people in the car. It moves towards Fourth Street. After transactions that at least to the defendant Ormsby caused him to make a sort of reprisal, and at the point of starting the witness Casy, and one other whose

name I do not for the moment recall, placed in that car McNally and the defendant Donato in the rear seat. Who the other two are the witnesses do not know. Now, later in the case the State produces a witness Black, who accounts for the passage of that car from the moment it started out from in front of Public School No. 2, when these four men, one who had a handkerchief over his mouth, as the witnesses say, got into the car, after the dispersing of the crowd by the police. At this moment two of the occupants of the car are accounted for, McNally and Donato, and I say to you now in the light of subsequent events it is a fair and reasonable inference that the occupants of that car were bent upon murder when they left the front of that school.

Mr. Kavanagh: Oh, I object to that. I do not like to interrupt my friend, Mr. Drewen, but I must in the interest of justice, and I must in respect to our duty to our clients, to these four defendants, absolutely——

The Court: Well, I will request the Prosecutor to refrain from the use of that word.

Mr. Drewen: I say, advisedly that is what the proof is. Your Honor has asked the State to vindicate its proof, and that is what I am doing.

Mr. Kavanagh: There is absolutely no——

The Court: Proceed, Mr. Drewen.

Mr. Drewen: This car with two of the defendants accounted for at the moment of its leaving proceeds north on Erie Street

and turns into Fourth Street, and then the car stops, and when it stops, what occurs? Two at least of the occupants leave the car and what do they do? With deadly instruments, with buldgeons, they immediately pass from the car to the sidewalk in an effort to strike a deadly blow to the man Whelan, and they cause a multiple fracture of the skull of Catherine McGee from which she dies. Who was in that car from the time it passed from Public School No. 2 until it came into Fourth Street? The defendant Ormsby. Who says Ormsby was there? Ormsby says so. Who else was in the car? Did you say O'Keefe? Who says O'Keefe was in the car? The defendant O'Keefe says so. Who else was in the car? Donato. Who says Donato was in the car? Donato himself says so, in the proved admissions made to the Police authorities. So far as McNally's presence in the car is concerned, it is uncontroverted that the police account for him positively sitting on the rear seat of the car with the defendant Donato at the time it left from in front of Public School No. 2 and turned into Fourth Street to the scene of the homicide.

Now, were there any changes in the occupants of that car? No. The witness Blake says that he took a position out in the street a short distance, some three feet from the curb, when he saw this car start from its position in front of the school. It goes north on Erie Street, turns into Fourth Street. He sees it all the time, and when it gets into Fourth Street it conveniently stops. The driver is Ormsby, and when it

has conveniently stopped or slowed down, bent upon homicide, leaves the car. He there has already been shown, and when these men flee back to the means of their escape, the automobile, the car conveniently starts up, gets under way, so that those who pursue it can not reach it. Now, your Honor has asked what I have to say with regard to the defendant McNally. The defendant McNally was there. He was there present, aiding, assisting and abetting in the commission of this offence. He was there in the position in which the State finds him and in which the State proves him to have been. Under the laws of England and under the laws of the United States he is a principal at least in the second degree, unless he can by his proof in some way explain his position there upon the basis of his innocence.

The Court: The motion is denied.

Mr. Kavanagh: I object, if your Honor pleases. Now, I want to answer Mr. Drewen. I object at this time——

The Court: If you are replying to me—just a moment. If you are applying to me for leave to reply to Mr. Drewen, why, I will give you that permission.

Mr. Kavanagh: I most respectfully ask your Honor——

The Court: If you are objecting to my ruling—now, wait a minute. I say, if your request is that you be given an opportunity to reply, I will be glad to give you that opportunity.

Mr. Kavanagh: Thank you, sir.

The Court: But if you are objecting to

my ruling, why, I will rule and that will settle it once and for all.

Mr. Kavanagh: I respectfully request your Honor to give me the opportunity to answer Mr. Drewen's argument.

The Court: All right, I will give you that opportunity. Direct your argument particularly to McNally, as my mind is made up on the others.

Mr. Kavanagh: I do not think I can in proper duty to all of these defendants, your Honor, at this time.

The Court: All right, address your remarks to all of them.

Mr. Kavanagh: Now, Mr. Drewen is assuming that these four defendants were in that car at the time the car was alleged to be at Fourth and Erie Streets. There is not a particle of proof on the part of any of the State's witnesses that any of these defendants were in that car at that time, and surely, your Honor, in justice to men and in consideration of the various decisions laid down by our Court of Errors and Appeals, and in consideration of the numerous decisions laid down by our State Courts and the United States Supreme Court, how can a defendant or defendants when there is no evidence, no demonstrative evidence to show that they were present at the scene of the crime, how can your Honor by suspicion, by surmises or by implication that they were there, send them in to defend themselves, when there is no evidence to sustain the indictment. There was not a particle of proof on the part of these witnesses that these four defendants

were in that car got out of the car at the time this little girl is alleged to have been struck. My friend Mr. Drewen says that participation—that McNally participated in it. That he aided and abetted it. Those are Mr. Drewen's words. I ask you to scan the testimony of the witnesses of the State, and let Mr. Drewen tell you what man or men who testified for the State, testified that McNally was there. Not a one, your Honor. There was not a particle of proof that McNally was there. Yet Mr. Drewen said that he was there aiding and abetting and participating in what? There is no evidence that any of these men were there. There is not a bit of evidence. Now, what is the case of the State against Fox in 70 Law, page 375? What does that case say? Mere presence at the scene of the perpetration of a crime does not render a party ex-criminus to constitute him a party to the criminal act. There must not only be presence upon the scene, but an actual participation and aiding and abetting in the crime committed. Nor, does the failure of a spectator to interfere, make him a participant in the crime. I say to your Honor against that Mr. Drewen's remarks in respect to McNally and in respect to, for that matter, any of the other three defendants were absolutely erroneous. Why? Because there was no foundation in fact for them. There was no evidence whatsoever testified by any of the witnesses for the State that McNally or any of the other three defendants were there perpetrating a crime, and that McNally was there aiding and abetting.

Motion for a Direction of Verdict.

Your Honor, I want you to understand that in this argument, in the excitement of this motion, I do not mean any disrespect to your Honor or any disrespect to the prosecutor, who is my friend. But your Honor, Mr. Hart and I are chargeable with the solemn duty, namely, the protection of these four defendants under the law for the alleged crime that is alleged against them, and if we are not in every way possible to take advantage of our duty and to do our duty in every respect, why, the finger might be pointed at us in respect to the fact that we were not protecting the interests of these four men who are charged with this most serious crime, if we did not object to any erroneous statements, to any alleged evidence that was alleged to have been admitted or to have been adduced, when it was not adduced. I say to your Honor, and I think your Honor will agree with me that it is incumbent upon us, from our sworn duty under the law, and from our assignment by this Court, to protect the interests of these two defendants that in respect to the motion that I am now making when Mr. Drewen alleges facts that were not proven, it is incumbent upon us in every manner, shape and form to protect the interest of these defendants, so that, if your Honor pleases, and I say it advisedly, so that no judicial crime be committed in this Court before your Honor and the gentlemen of this jury in respect to the rights of these defendants that were given to them by this State and by the Constitution of this State and the laws of this country, and I reiter-

ate again, in answer to Mr. Drewen, that there is no evidence to make out a prima facie case. There has not been a scintilla of evidence to warrant these men going on the stand to defend themselves against these alleged charges against them, because there is no evidence, and inasmuch as Mr. Drewen said that Mr. McNally was aiding and abetting—oh, where is the proof that McNally was there, where is the proof that any of these defendants were there in the commission of this crime? Where is the proof that they were connected with it in any wise? Your Honor, I most solemnly say again that under all of the evidence and upon and after a consideration of all the evidence adduced on the part of the State, there must be a direction of a verdict in favor of all four of these defendants.

The Court: At the outset I want to say to counsel that the Court has never felt, knowing you as I do, that you intended any affront in your remarks. I know you too well. You know the attitude of the Court towards you. I have no word of criticism to offer for your zealous defense of your clients. You are doing your duty and your proper duty. With regard to the evidence, the defendant McNally, let me refer to the typewritten record as prepared last night in respect to Casey. You have a copy of it. I would refer you to page 184.

(Reading): "Q. Do you know this defendant McNally? A. Yes.

"Q. How long have you known McNally? A. Well, all of his life, practically.

"Q. Do you know the defendant Donato? A. Yes.

"Q. How long have you known Donato?—Page 185 at the top. A. The same time.

"Q. At any time about 8:30 did you see Donato and McNally at our about School No. 2 on Erie Street? A. Yes.

"Q. Tell us where, and what they were doing, and what you observed? A. They were sitting in the back of a car. It was a sedan parked about 25 feet from the entrance, going north on No. 2 School, towards Fourth Street. There was four men in that car. The two men in the rear were Donato and McNally."

Now, in view of that testimony the Court feels that a motion at this time will have to be denied. I have borne in mind the case that you have cited, and I am thoroughly familiar with it.

Mr. Kavanagh: May I say to your Honor that that testimony in respect to what Witness Casey said about their being in a car in front of the school is not at the time of this alleged occurrence, where the young girl was thrown down or knocked down, at Fourth and Erie Streets. There is no testimony to that effect and I say under this Fox case and numerous other cases that I can not cite, that before McNally can be held or any of these other four defendants can be held, it must be shown beyond any peradventure whatever, beyond any doubt whatsoever, that McNally was there with the other three defendants and that the other three defendants were there at Fourth and Erie Streets at the time the girl was struck, if she was struck, and there is no

evidence to that effect. Inspector Casey's evidence is out altogether. There is no evidence of Mr. Casey that he saw McNally at Fourth and Erie Streets when the girl was struck. There is no evidence of that kind at all. There is evidence the Inspector was, oh, yes. He said he saw McNally and Donato in the car some minutes before, outside the school, your Honor, but the accident or misadventure or whatever you may call it to the little girl did not occur at that time outside of the school when Donato and McNally were alleged to have been in that car. It occurred some time later up at Fourth and Erie Streets, some distance beyond. There is no testimony of Inspector Casey respecting that fact. I say to your Honor most sincerely and most persistently, if I may so use that word, that there is no evidence to warrant your Honor to put McNally on his defense, or no evidence at all, in fact, respecting the four defendants, warranting their going on with their defense.

The Court: The motion is denied.

Mr. Kavanagh: Exception.

(Exception allowed and signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

DEFENDANT'S TESTIMONY.

MR. KAVANAGH: May it please the Court and you Gentlemen of the Jury. These four defendants are indicted by the Grand Jury of Hudson County on the indictment for murder of the September Term of the Hudson County Court of Oyer and Terminer, 1928. This indictment, you may have heard the reading before in moving his Honor for a direction of his verdict, contains three counts. A count for murder, that is, that these four defendants, Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe, alias Brasch, in the year of our Lord, One Thousand Nineteen Hundred and Twenty-eight, forced and armed at the City of Jersey City aforesaid, in the County aforesaid, and within the jurisdiction of this Court, one Catherine McGee in the peace of God and of this State, then and there being, did wilfully, feloniously and of his malice aforethought, kill and murder, contrary to the form of the Statute in such case made and provided, and against the peace of this State, the Government and the dignity of the same. The second count of the indictment is the count for manslaughter, namely, that the four defendants, Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe, alias Brasch, on the 6th day of November, in the year of Our Lord, Nineteen Hundred and Twenty-eight in the City of Jersey City aforesaid, in the County of Hudson aforesaid, and within the jurisdiction of this Court, did feloniously kill and slay one Catherine McGee, 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. And the third count is the count for assault and battery. Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe, alias Brasch, on

the 6th day of November in the year of our Lord One Thousand Nine Hundred and Twenty-eight, at the City of Jersey City aforesaid, in the County of Hudson aforesaid, and within the jurisdiction of this Court, in and upon one Catherine McGee, in the peace of God and of this State, then and there being, an assault did make, upon the said Catherine McGee and then and there did beat, wound and ill treat and other wrongs to the said Catherine McGee then and there did, to the great damage to the said Catherine McGee, 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.

Gentlemen of the Jury, I am not going to take up any time in opening to you. Our defense in this case, the defense of all these four defendants, Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe, alias Brasch, is that they were not present on the 6th day of November at or about 8:25 or 8:30 o'clock in the evening of that day or thereabouts at that time at the corner of Fourth Street and Erie Streets in the city of Jersey City; neither did they in any wise participate in the assaulting, killing or slaying of this unfortunate little girl, Catherine McGee, nor did they participate by their actual presence or aid or abetting in any wise in the assault, slaying and killing of this little girl.

FRANK DONATO, sworn.

Direct examination by Mr. Kavanagh:

Q. Where do you live, Donato? A. 59 Terhune Avenue.

Q. How old are you? A. Twenty-five.

Q. Are you married? A. Yes.
Q. Is your wife living? A. Yes.

Mr. Drewen: I object to that as immaterial, irrelevant and incompetent.
Mr. Kavanagh: I withdraw it.

Q. On the 6th day of November, 1928, at about 8:25 or 8:30 did you strike, kill, slay or participate in, or aid and abet any other parties in the assaulting, slaying or killing of the little girl Catherine McGee? A. No, sir.

Mr. Kavanagh: Cross-examine.

Cross-examination by Mr. Drewen:

Q. What do you work at, Donato?

Mr. Kavanagh: I object to that, if your Honor please, on the ground that it is improper cross-examination and immaterial, irrelevant and incompetent.
The Court: The question is allowed.
Mr. Kavanagh: Exception.

(Exception allowed and signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

Mr. Drewen: I say respectfully, to your Honor——
The Court: I am allowing the question. I understand the tenor of the question perfectly. There is no question in my mind about its admissibility.
Mr. Drewen: I should like to remind my adversary right now that any defendant is charged with committing an offense is of-

fered as a witness, he is open for cross-examination on every aspect of the case.

Mr. Kavanagh: I deny that, if your Honor pleases and I object again. Your Honor allows it and I take an exception.

The Court: I allow it from the general angle that it is a question attacking his credibility.

Mr. Kavanagh: I ask an exception to that, if your Honor pleases, to your Honor's remark about attacking this witness's credibility.

(Exception allowed and signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

Q. Where do you work Donato? A. Grocer.

Q. Where? A. At John Loori's.

Q. How long have you been a grocer? A. Fifteen years.

Q. What were you working at on the 6th day of November, 1928?

Mr. Kavanagh: I object to that, for the same reasons that I have advanced to your Honor before.

The Court: The question is allowed.

Mr. Kavanagh: Exception.

(Exception allowed and signed and sealed accordingly.)

THOMAS H. BROWN,
Judge.

Q. What were you working at on the 6th day of November, 1928? A. I was not working that day.

Q. Where were you that day?

Mr. Kavanagh: I object to that on the grounds that I have urged to your Honor before.

The Court: I allow it.

Mr. Kavanagh: Exception.

(Exception allowed and signed and sealed accordingly.)

THOMAS H. BROWN,
Judge.

Q. Where were you that day? A. Where was I?

Q. Yes. A. At what time?

Q. Where were you during the day; account for your whereabouts on the day of November 6, 1928?

Mr. Kavanagh: I object to that, if your Honor pleases. I respectfully submit to your Honor that there are twenty-four hours in this day, and I object to the form and the tenor of the question on the part of the Prosecutor, as being improper cross-examination, irrelevant, incompetent and immaterial.

The Court: The question is allowed.

Mr. Kavanagh: Exception.

(Exception allowed and signed and sealed accordingly.)

THOMAS H. BROWN,
Judge.

A. At that time.

Q. All day; where were you all day? A. Well, I left the house about 1 o'clock.

Q. Yes. A. I went to New York.

Q. Yes. A. Came back again about five or six.

Q. Where did you go at five or six? A. I was down to the barber shop for a while.

Q. What barber shop? A. On Grove Street.

Q. All right; where did you go after you got through with the barber shop? A. Got in my car and I drove over to the School.

Q. What school? A. No. 2 School.

Q. What time did you get there? A. Around six or half-past six.

Q. All right, what did you go there for? A. Just went over to see how the election was going.

Q. How were you interested in the election then?

Mr. Kavanagh: I object to that as improper cross-examination absolutely, and it is incompetent, irrelevant and immaterial to this issue, and I ask that it be not allowed.

The Court: The question is allowed.

Mr. Kavanagh: Exception.

(Exception allowed and signed and sealed accordingly.)

THOMAS H. BROWN,
Judge.

Q. Go ahead. What interest did you have in the election then? A. I had no interest in it.

Q. Do you live in Greenville, do you not? A. Positively.

Q. And you lived there at that time? A. Positively.

Q. All right. For what did you go to No. 2 School for, if you had no interest in the election? A. I just took a ride from the barber shop over to No. 2 School.

Q. Why did you stop at No. 2 School?

Mr. Kavanagh: I object to that as improper cross-examination and irrelevant,

incompetent and immaterial for the purposes of this issue. The law and the decisions are plain in matters of this kind, and I am surprised at Mr. Drewen in attempting to ask questions of this kind. Mr. Drewen, the Prosecutor, is confined on his cross-examination to a cross-examination on the direct examination of this witness, and any other question outside of the purview of the direct evidence adduced by this defendant is absolutely improper cross-examination and irrelevant, incompetent and immaterial under the State against Russell.

The Court: Question allowed.

Mr. Kavanagh: Exception.

(Exception allowed and signed and sealed accordingly.)

THOMAS H. BROWN,
Judge.

(Question repeated.) A. To see how the election was going on.

Q. You said you had no interest in the election. Now, I ask you why you went to No. 2 School? A. I just went over to see how they were doing, to see if they were done.

Q. Did you see any of your friends there? A. Did I see any of my friends?

Q. Yes. A. Yes.

Q. Who were they? A. Who were they?

Mr. Kavanagh: I make the same objection.

The Court: I will allow you the benefit of the same objection on the same grounds,

in order to save time. The Court will overrule your objection.

Mr. Kavanagh: I may have other grounds.

The Court: If you have other grounds, why urge them.

Mr. Kavanagh: Exception.

(Exception allowed and signed and sealed accordingly.)

THOMAS H. BROWN,
Judge.

Q. Who did you meet there? A. Mike Sullivan.

Q. Who else? A. That is all I met there.

Q. Did you meet Frank Donato there? A. No.

Q. Did you meet Vincent O'Keefe alias Brasch there? A. No.

Q. Did you meet Frank McNally? A. No.

Q. Did you see these men at any time during election day? A. No.

Q. During the evening of election day did you see them? A. No.

Q. How long did you stay at No. 2 School? A. I did not stay there over five minutes.

Q. Where did you go then?

Mr. Kavanagh: I ask your Honor at this time to request the distinguished Prosecutor of this County not to propound to his questions to his witness so quickly. In other words, give the witness a chance to answer before propounding the following questions.

Mr. Drewen: The witness has not complained about it.

Mr. Kavanagh: Well, I am here to protect the witness.

Q. Where did you go after you left No. 2 School? A. I went down to the Grove Bakery.

Q. Back again to the Grove Bakery? A. Yes.

Q. How long did you stay there? A. I had a bite to eat.

Q. How long did you stay there? A. About an hour, or an hour and a quarter.

Q. Where did you go then? A. I went home.

Q. To Terhune Avenue. What time did you get home to Terhune Avenue? A. A little after eight.

Q. Who was there? A. My wife and two kids, and her sister and some company.

Q. You spent the evening home with them? A. Yes.

Q. You were perfectly all right? A. Yes.

Q. There was nothing the matter with you at all? A. No.

Q. What did you tell the Police you were drunk for? A. I told the Police?

Q. Yes. A. I did not tell no Police I was drunk.

Q. You made a statement to the Police, did you not?

Mr. Kavanagh: I object to that on the grounds that I have urged this morning, that that is not a statement in the sense that Mr. Drewen is assuming to show it is. It is not a statement, a confession or admission of any kind. There is no significance to that statement. It is a mere blank piece of paper, worth nothing in this Court at this trial. I am surprised that Mr. Drewen refers to it and I object to this question for the reasons that I have urged not only this morning, but that I am urging upon your Honor now.

The Court: The Prosecutor may interrogate the witness fully on that alleged

statement, for the purpose of impeaching his credibility.

Mr. Kavanagh: Exception.

(Exception allowed and signed and sealed accordingly.)

THOMAS H. BROWN,
Judge.

Q. Now, I ask you again why did you tell the police on November 9th that you were drunk on November 6th and did not know what happened when you were in the automobile? A. I did not tell the police at all I was drunk.

Q. What? A. I did not tell the police.

Q. Did you tell the police you had been drinking and could not tell who was in the car with you? A. I did not.

Q. On November 9th, Donato? A. Yes.

Q. You were questioned in the Second Precinct Station House, Jersey City, were you not? A. Yes.

Q. By the police with regard to this charge against you?

Mr. Kavanagh: I object to that as absolutely improper cross-examination and incompetent for this issue, and it is immaterial and irrelevant.

The Court: The question is allowed.

Mr. Kavanagh: Exception.

(Exception allowed, signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

(Question repeated.)

A. No, sir.

Q. Didn't you tell the police that your name was Frank Donato? A. Yes, they knew it.

Q. So you did tell the police your name was Frank Donato, right? A. They knew my name was Frank Donato.

Q. Did you tell the police your name was Frank Donato? A. I did not tell them.

Q. You said a moment ago that you did. Did you not? A. They knew my name. That is what I meant to say.

Q. Did you tell the police that you lived at 59 Terhune Avenue? A. No, sir.

Q. Where did you live? A. I lived at 59 Terhune Avenue.

Q. You did not tell the police that? A. No.

Q. How old are you? A. Twenty-five.

Q. Did you tell the police you were twenty-five years old? A. No.

Q. Were you working at that time? A. Yes.

Q. Where were you working? A. Sam Loori.

Q. You said a moment ago you were not working. A. That day I was off.

Q. Oh, you were not working that day? A. Positively not.

Q. Did you tell the police that you were not working at present when they asked you those questions? A. I did not tell the police nothing.

Q. Were you in the Second Precinct Station House on the 9th day of November? A. Yes.

Q. You know Lieutenant Hoffman, don't you? A. Yes.

Q. Lieutenant Hoffman spoke to you about this case, did he not? A. He did not speak to me about no case.

Q. Did any police officer speak to you when you were in the Second Precinct Station House on the night in November in question? A. No.

Q. You say you made no statement to anybody about it? A. No.

Q. Have you ever been convicted of crime, Donato? A. No.

Q. You have never been convicted of crime? A. No.

Q. In the year 1927 weren't you placed on probation for a criminal conviction in this county?

Mr. Kavanagh: I object to that. The fact that a man was——

The Court: The objection is sustained.

Mr. Drewen: I ask this man if he went on probation for a criminal conviction in this county.

The Court: The question first was directed to the question as to whether he was convicted of crime?

Mr. Drewen: Yes.

The Court: The witness answered no.

Mr. Drewen: Yes.

The Court: The Prosecutor of the Pleas has the right to ask the question were you not on such and such a date convicted of such and such a crime, directing his attention to that particular conviction.

Q. Weren't you in 1927 convicted of the crime of larceny and placed on probation? A. I was placed on probation.

Q. For what? A. Taking money under false pretense.

Q. What do you mean when you say you were not convicted of crime? A. I was put on probation.

Q. You were convicted, weren't you; you were found guilty? A. I pleaded guilty.

Q. What do you mean when you say you were

never convicted of crime, when you pleaded guilty to obtaining money under false pretenses?

Mr. Kavanagh: There is a difference where a man comes in and pleads guilty to a crime and where a man pleads not guilty and is tried and found guilty.

The Court: Are you making a statement to me of your understanding of the law or are you making an objection?

Mr. Kavanagh: I am making an objection to the purport of the question.

The Court: The objection is overruled.

Mr. Kavanagh: Exception.

(Exception allowed, signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

Q. I ask you now why you stated under oath here that you were never convicted of crime, if you pleaded guilty to a crime? A. I pleaded guilty and was put on probation.

Q. That is the best answer you can make? A. Positively.

Q. That was in December, 1927, that you pleaded guilty? A. Yes.

Q. Where were you on the 7th day of November?

Mr. Kavanagh: I object to that as improper cross-examination and immaterial, irrelevant and incompetent. The indictment reads the 6th day of November.

The Court: The question is allowed.

Mr. Kavanagh: Exception.

(Exception allowed, signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

Q. Will you answer the question? A. The 7th day?

Q. Yes. A. I was home.

Q. The day after the election? A. In the morning, yes.

Q. Home how long? A. I did not hear that.

Q. Home how long that morning? A. That morning two officers come up and took me out in the morning.

Q. On the 7th? A. Yes.

Q. Don't you know, Donato, that you went to Easton, Pennsylvania, in this automobile after the slaying of the girl, and did not come back until the night?

Mr. Kavanagh: I object, and I ask that that be stricken from the record as absolutely improper in fact as respects the language and absolutely improper cross-examination and absolutely irrelevant, incompetent and immaterial, an attempt by the Prosecutor to attribute by innuendo and indication and suggestion some trap or some charge against this man that is not part and parcel of the indictment and on which there has been no evidence whatsoever adduced by the State. I say that it is absolutely improper in every respect, and I ask——

The Court: The question is allowed.

Mr. Kavanagh: Exception.

(Exception allowed, signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

(Question repeated.)

A. I didn't go to Easton. I was home in my own home.

Q. When were you in your own home? A. On the 7th day of November.

FRANK McNALLY, sworn.

Direct examination by Mr. Kavanagh:

Q. How old are you? A. Thirty-two.

Q. Where do you live? A. 420 York Street, Jersey City.

Q. Have you been convicted of crime? A. Yes.

Mr. Drewen: I object to that. The State will do that.

The Court: The objection is sustained.

Q. Mr. NcNally, on the 6th day of November, 1928, about 8:25, 8:30 or 8:35 or thereabouts or at any other time on that day or on that night did you assault, slay or kill or participate in any wise by aiding or abetting others in the assaulting, slaying or killing of this little girl, Catherine McGee, at the corner of Fourth and Erie Street, in the City of Jersey City? A. No, sir.

Mr. Kavanagh: Cross-examine.

Cross-examination by Mr. Drewen:

Q. On the 6th of November, 1928, where did you live?

Mr. Kavanagh: I object to that.

The Court: The question is allowed.

Mr. Kavanagh: Exception.

Q. Where did you live? A. 26 Jones Street.

Q. What part of the city is that? A. Right at the Plaza Hotel.

Q. Were you on the evening of November 6th, 1928, in Number Two School also, Jersey City?

Mr. Kavanagh: I object to that on the ground that it is improper cross-examination, incompetent, irrelevant and immaterial on our direct examination of this witness.

The Court: The question is allowed.

Mr. Kavanagh: Exception.

(Exception allowed, signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

Q. Were you at the school? A. Yes.

Q. Number Two School on Erie Street, Jersey City? A. Yes, sir.

Q. You were there from the hours of seven or earlier on to about half past eight, weren't you? A. I was there at half past six.

Q. When did you leave there? A. Quarter to seven.

Q. In whose company were you when you were there? A. Nobody's company.

Q. You were alone? A. Yes.

Q. Did you go back there after you left at quarter after seven? A. No.

Q. Where did you go at? A. Down and had something to eat, and went home.

Q. Where? A. Down to the Grove Bakery.

Q. That is the same place where Donato said he went, is that right? A. Yes.

Mr. Kavanagh: I object.

Mr. Drewen: I withdraw the question.

Q. Did you see Donato, the last witness, at any time that night, the last preceding witness? A. No, sir.

Q. You did not see him in front of School Number Two? A. No.

Q. You were not seated in an automobile with him? A. No.

Q. I show you a paper writing purporting to be a statement made by you to the police and ask you if that is your signature, Frank McNally? Will you look at it?

Mr. Kavanagh: I object to that as improper cross-examination in respect to the direct evidence of this witness and incompetent, irrelevant and immaterial on this man's denial as set forth in his direct testimony. It is clearly improper cross-examination. The Prosecutor is limited in a matter of this kind to the direct examination of the witness, and I think Mr. Drewen knows that.

The Court: Ordinarily speaking you would be correct, but this goes to the question of the credibility of the witness.

Mr. Kavanagh: I object to it in that respect too, your Honor, because I think it is highly improper. It is absolutely illegal and it certainly should not be allowed in respect to a matter of this kind, in respect to the evidence that was adduced by the State where there was no evidence incriminating or connecting in any wise these men with the allegations in this indictment. I say to your Honor that it is highly improper

and it is absolutely injurious under our law and under our decisions to this defendant, and I make my objections very strenuously to it.

The Court: The question is allowed.

Mr. Kavanagh: Exception.

(Exception allowed, signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

Q. I will repeat the question. I call your attention to the signature, Frank McGee, to a paper purporting to be a statement made to the police, and ask you if you signed that name? A. That is my name, yes.

Q. Is it your signature? A. Yes.

Q. It is, right? A. Yes.

Mr. Drewen: I ask that the paper be marked for identification.

(Paper marked for identification S-9.)

Q. You made a statement to the police, did you not, on November 8th, relative to the charge against you?

Mr. Kavanagh: I object.

The Court: That calls for a yes or no answer.

The Witness: No, sir.

Q. You say that you signed this paper that I showed you, S-9 for identification? A. I signed a paper.

Q. Where did you sign the paper? A. I signed it in the Second Precinct.

Q. What kind of a paper was it you signed?

Mr. Kavanagh: I object to that. The paper speaks for itself now.

Q. What kind of a paper was it you signed?

Mr. Kavanagh: I object to it, your Honor.

The Court: The question is allowed.

Mr. Kavanagh: Exception.

(Exception allowed, signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

Q. What kind of a paper did you sign? A. A plain piece of paper.

Q. It had nothing on it at all? A. No.

Q. What did you sign it for? A. The officer brought it to me, brought it out for me to sign it.

Q. How many papers of that sort did you sign? A. Two.

Q. You signed the one I showed you and the one under it? A. Yes.

Q. When you signed those papers you say they were blank pieces of paper, had nothing on them, and you put your name on them? A. Yes.

Q. Just because the police officer told you to? A. Yes, sir.

Q. How old are you, McNally? A. Thirty-two.

Q. Did you say to the police that you were thirty-two when you signed this paper? A. Yes.

Q. Was that on the paper that you signed that you were thirty-two years of age? A. I did not see it on the paper.

Q. Did you read the paper? A. No.

Q. Why not? A. They did not ask me to read it.

Q. Did you look at the paper carefully? A. Only on the desk.

Q. Did you look at the paper carefully to see what was on it? A. No.

Q. How did you know the sheet you signed was blank? A. It was blank all but the printing on it.

Q. What was the printing on it? A. I don't know.

Q. Did you say to the police that you lived at 25 Jones Street? A. They knew I lived at 25 Jones Street.

Q. Did you state to the police that you lived at 25 Jones Street? A. No, sir.

Q. How do you know they knew you lived at 25 Jones Street? A. Because they came up there looking for me.

Q. What was your business at the time? A. The peddling business.

Q. You were a produce dealer? A. Yes, sir.

Q. Did you say to the police that you were a produce dealer? A. They knew it.

Q. You did not have to state that to them? A. No.

Q. How long had you worked as a produce dealer? A. All my life.

Q. About eighteen years? A. Yes, sir.

Q. Did you state to the police that you had worked as a produce dealer for about eighteen years? A. No.

Q. Do you know how the police learned it, to put it on this paper?

Mr. Kavanagh: I object to that on the ground that it is assuming a fact not within this man's mind, not within the purview of things in respect to the question propounded.

The Court: Objection sustained.

Q. I call to your attention this question contained in Exhibit S-9 for identification, which you say is your signature, you are charged with murder in that at 8:40 p. m. at Fourth and Erie Streets, Jersey City, on November 6th, 1928, you were in a fight in which a baseball bat was used, causing the death of one Catherine McGee, age eight; what have you to say; was that question asked you?

Mr. Kavanagh: I object, for the reasons I set forth before, that it is not proper cross-examination.

The Court: For the same reasons as previously urged?

Mr. Kavanagh: Yes.

The Court: I will give you the benefit of an exception. The question is allowed.

Mr. Kavanagh: Exception.

(Exception allowed, signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

Mr. Kavanagh: The same reasons as previously urged are now urged; also in addition to that, that there is no evidence——

The Court: No what?

Mr. Kavanagh: Just let me think a second, your Honor. All right, your Honor, I was just a little bit in doubt whether Mr. Drewen attempted by any police officer to prove any alleged paper that Mr. McNally wrote or any statement that he wrote or anything of that kind.

The Court: No, he is not taking that procedure at this time. He has two methods

of proof open to him. One is to prove a statement made as a matter of direct evidence on the State's case, and the second is to reserve the statement until the defense goes into its defense. In this particular instance he is using it for the purpose of contradiction, and he is now proceeding to lay the basis, to lay the foundation for the purpose of contradiction. I will allow the question.

Mr. Kavanagh: I object to it for the purpose of cross-examination.

The Court: The objection is overruled.

Mr. Kavanagh: Exception.

(Exception allowed, signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

Q. Do you remember the last question I asked you? A. No, sir.

Q. I will ask it again. I read to you a question contained in the paper which you say bears your signature, the paper being S-9 for identification. This is the question purporting to be directed to you by Lieutenant Ballarene. You are charged with murder in that at 8:40 p. m. at Fourth and Grove Streets on November 6th, 1928, you were in a fight in which a baseball bat was used, causing the death of one Catherine McGee, age eight; what have you to say, was that question asked you?

Mr. Kavanagh: I object.

Mr. Drewen: Your Honor has already ruled on it. The State has a right to proceed with its case.

Mr. Kavanagh: I have the right to object to this question. This is a question purporting to be asked by Lieutenant Ballarene. There is no testimony to that effect.

Mr. Drewen: I am asking this witness if he was asked the question by Lieutenant Ballarene.

Mr. Kavanagh: I object to it.

The Court: The question is allowed. You may have the benefit of an exception.

Mr. Kavanagh: Exception.

(Exception allowed, signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

Q. Were you asked that question by Lieutenant Ballarene? A. No, sir.

Q. I call your attention to a question contained in the paper S-9 for identification, which you say bears your signature, in answer to the question just read: Some time before seven p. m. on November 6th I was at the polling place on Erie Street, Number Two School, after the polls closed. I went outside to get some cigarettes, and I saw the man Vince lying on the sidewalk. A cop picked him up, and there was about forty men fighting. I went and sat down in a sedan car owned by Ormsby and Johnny Reilly. At that time I was the only one in the car. Then Slim Donato, Vincent and Ormsby and Tony Reilly came and got in the car. I got out of the car, and they drove away. Ormsby was driving. Did you say that? A. No, sir.

Q. Is that true? A. No, sir.

Q. I call your attention to the question on the second sheet, which you say is your signature, as follows: Did you see any baseball bat? Were you asked such a question by Lieutenant Ballerene? A. No, sir.

Q. I call your attention to this answer appearing after the question just read: Yes, there was some bats in the back rear seat and on the floor. Did you state that to the police?

Mr. Kavanagh: I object to that.

The Court: On the same grounds?

Mr. Kavanagh: No, on different grounds. The witness has stated that no question of the sort that Mr. Drewen read to him was propounded to him or asked him by Ballarene. Secondly, I object on the ground that if there was no question of that kind, this witness cannot testify to any answer that he is alleged to have made, because he denies absolutely that any question of that kind was propounded to him by Mr. Ballarene. For that reason, I object.

The Court: The question is allowed.

Mr. Kavanagh: Exception.

(Exception allowed, signed and sealed accordingly.)

THOMAS H. BROWN,
Judge.

Q. You say you did not make that answer? A. No.

Q. I call your attention to the next question, the second sheet of S-9 for identification: Who did you see with a bat in hands at any time? Were you asked such a question? A. No, sir.

Q. I call your attention to the answer that follows it: Ormsby was the only one that I saw with

a bat in his hand. Did you state that to the police? A. No.

Q. I call your attention to the next question, in Exhibit S-9 for identification: Did you see Wykoff in the car? Were you asked such a question? A. No.

Q. Did you answer: I am not sure whether he was in the car or not. I know that he was around the polls. Did you answer that? A. No.

Q. Was this question asked you: "Where were you sitting in that car? A. In the back seat." Were you so asked and did you so answer? A. No.

Q. "What kind of a car were you sitting in, you were asked. A. A Chandler sedan." Were you so asked and did you so answer? A. No.

Q. Now, you say, as I understand it, that the signature Frank McNally, that the name Frank McNally on the second sheet is your handwriting, is that correct? A. Yes.

Q. And also on the first sheet of Exhibit S-9, the Frank McNally is in your handwriting? A. Yes.

Q. Were you ever convicted of crime? A. Yes.

Q. What crime? A. Petty larceny.

Q. When? A. 1916.

Q. In what court? A. A low court.

Q. Were there any convictions after that? A. Yes.

Q. Of what crime? A. Narcotics.

Q. For having drugs in your possession? A. Yes.

Q. When was that? A. 1922.

Q. In what court were you convicted for having drugs in your possession? A. I pleaded guilty, right here.

Q. In this building, in the County Court of Quarter Sessions in this building? A. Yes.

Q. What were your convictions after 1922? A. Drugs in my possession, I guess.

Q. A second conviction for having drugs in your possession? A. Yes.

Q. When was the second conviction as purveying drugs had?

Mr. Kavaangh: I object to the word "purvey".

Mr. Drewen: I withdraw it.

Q. When was the second conviction for having drugs in your possession had? A. I am not sure what year it was.

Q. How long after the first conviction in 1922? A. I cannot remember.

Q. You cannot tell us at all? A. No.

Q. And were you convicted a second time for having drugs in your possession, in the Hudson County Quarter Sessions Court too, the same as the first conviction of that kind? A. No, sir.

Q. Where were you convicted the second time? A. Hoboken.

Q. You pleaded guilty to that second charge of having narcotics in your possession in this building too? A. Yes.

Q. You were arrested in Hoboken the second time for that? A. Yes.

Q. What was the next conviction after the second conviction for having drugs in your possession? A. I cannot remember.

Q. Were you not convicted in New York County and did you not serve a term in the New York County Penitentiary in December, 1916, for receiving stolen goods? A. Yes.

Q. That is true, isn't it; you don't remember that? A. No, sir; I was convicted in New York, yes.

Q. For receiving stolen goods? A. Yes.

Q. Were you not convicted of the crime of burglary on the 12th day of April, 1921, and sentenced to the New Jersey Reformatory by Judge McCarthy? A. No.

Q. Were you sent to the New Jersey Reformatory in 1921? A. No.

Q. Were you ever in the New Jersey Reformatory? A. No.

Q. Were you convicted of burglary in 1921? A. No.

Q. Were you ever convicted of burglary? A. No.

Q. Were you ever convicted of entering and larceny? A. No.

Q. How many convictions have you had against you in New York State? A. Two.

Q. What was the other conviction besides the one for which you served time in the New York Penitentiary that I have already asked you about? A. Petty larceny.

Q. When were you convicted of that in New York? A. In 1926.

Q. In New York City? A. Yes.

Q. Do you know this defendant Ormsby? A. I know him, yes.

Q. How long have you known him? A. About a year.

Q. Do you know the defendant Donato? A. Yes.

Q. How long have you known him? A. I know him quite a while.

Q. Do you know the defendant Brasch? A. No, sir.

Q. Do you know the defendant O'Keefe? A. No.

Q. Do you know Vincent? A. No.

Q. Who is the Vince that is referred to in this paper that I read to you, S-9 for identification? A. I do not know Vince, only since the time this thing happened.

Q. Who is the Vince that you know only since the time this thing happened, who is that Vince? A. The Vincent that is with us now.

Q. That is Vincent O'Keefe, the defendant? A. Yes.

VINCENT O'KEEFE, sworn.

Direct examination by Mr. Kavanagh:

Q. O'Keefe, you are sometimes called by the name of Brasch, aren't you? A. Yes.

Q. Will you kindly explain to the court and jury what is the reason for that double appellation? A. My first father's name was O'Keefe and my second father's name was Brasch.

Q. Your father's name was— A. Was O'Keefe.

Q. And your stepfather's name was what? A. Brasch.

Q. That is, your mother married, re-married, of course? A. Yes.

Q. How old are you? A. Twenty-one.

Q. When were you twenty-one? A. Last November, 26th.

Q. What is your business? A. Longshoreman.

Q. You work along shore, do you? A. Yes.

Q. Now, O'Keefe, did you on November 6th, 1928, assault, slay or kill one Catherine McGee or participate or aid or abet in any wise in the assaulting, slaying or killing of the little girl, Catherine McGee? A. No, sir.

Q. At about 8:25 or 8:30 or thereabouts or any other time on November 6th, 1928, at Fourth and Erie Street in the City of Jersey City? A. No, sir.

Q. What is your answer? A. I was not out.

Mr. Drewen: What is the answer?

The Witness: I was not out of the house.

Cross-examination by Mr. Drewen:

Q. How old did you say you are? A. Twenty-one.

Q. You say your occupation is longshoreman? A. Yes.

Q. Where were you employed on the 6th of November, 1928, were you working that day? A. No.

Q. You were out of work, weren't you? A. No.

Q. Do you live at 174 Academy Street, Jersey City, then? A. I do.

Q. You lived there then and you live there now? A. I live there now.

Q. On November 6th, 1928, Election Day, you were not sick, were you? A. Yes.

Q. Oh, you were. What was the matter with you? A. Asthma.

Q. You were down to School Number Two that day, were you not? A. No, sir.

Q. Weren't you there at all? A. No.

Q. And you never left the house? A. No, sir, I was in the house for a week.

Q. Do you know? A. I do not.

Q. Relative to the charge against you in this case? A. No, sir.

Q. Were you in the Second Precinct Station on November 12th, 1928? A. I do not know what date it was, but it was on a Monday morning.

Q. Where were you arrested? A. At the house.

Q. At your house? A. Yes.

Q. You were arrested in Hoboken, weren't you? A. No.

Q. And you were taken to the Second Precinct Station? A. No, I was taken up on Montgomery Street.

Q. To the Second Precinct Station? A. No, I was taken up on Montgomery Street.

Q. The Seventh Precinct? A. I do not know what one.

Q. From there where were you taken? A. I stood there for about an hour, and then I got taken down to Seventh Street.

Q. Did you see Detective Walton there? A. In the morning.

The Court: Of what day?

The Witness: Monday morning.

The Court: What day of the month?

The Witness: I do not know what day it was.

Q. That is the same day you made a statement? A. It was a Monday morning. I did not make a statement.

Q. It was on Monday morning, the day you made the statement? A. I did not make any statement.

Q. Did you talk to Walton? A. No.

Q. Did he talk to you? A. He said some words to me, but I did not say nothing to him.

Q. What words did he say to you? A. He just says to me, "do you know what you are locked up for?" I says, "when I got locked up this morning they told me I was held for murder with the other three fellows."

Q. What else? A. That is all he said to me.

Q. That is all the conversation you had with Walton? A. Yes.

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

Q. None whatever? A. No.

Q. How long were you down at the Seventh Street station in all? A. Until that afternoon, until Monday afternoon.

Q. Where were you taken then? A. To the Hudson County Jail.

Q. Do you know Detective Kenelly? A. No, sir.

Q. You do not? A. No, sir.

Q. Did you say to Detective Walton and to Detective Sullivan that you lived at 174 Academy Street, Jersey City? A. When I got back that morning.

Q. Did you say that you were twenty-one years old? A. They asked me that at the desk.

Q. And you told him? A. Yes.

Q. You stated that you were a longshoreman? A. Yes.

Q. They asked you what your occupation was and you said you were a longshoreman? A. Yes.

Q. They asked you how long you had been working and you said you were not working at present, is that right? A. Yes.

Q. How long do you know Ormsby? A. I do not know Ormsby.

Q. You do not know him at all? A. No.

Q. You never saw him before? A. Only in the Hudson County Jail.

Q. How long do you know Donato? A. I know Donato about four months.

Q. Did you know him in November, 1928? A. Only in the Hudson County Jail.

Q. You never saw him before you met him in the jail? A. No.

Q. You did not know him at all? A. No.

Q. Do you know the defendant McNally? A. No.

Q. You never knew him. Where did you first meet him? A. I met them all in the Hudson County Jail.

Q. Were you ever convicted of crime? A. Yes.

Q. By the way, you are also known by the name of Ryan, are you not? A. No.

Q. Isn't it a fact that you are on the records of the Commission office of this County by the name of Ryan? A. I did not give no name as Ryan.

Q. What crime have you been convicted of? A. Breaking and entering.

Q. When were you convicted of breaking and entering? A. In the Bergen County Jail.

Q. In the Bergen County Jail, what do you mean? A. In Bergen County.

Q. When, I say? A. In 1925.

Q. You have been convicted before that, have you not? A. Not that I know of.

Q. What? A. Not that I know of.

Q. What do you mean, you have forgotten something? A. No, sir; I was locked up a few times, but that is the only conviction.

Q. Weren't you convicted of larceny on the third day of October, 1924, in Jersey City? A. No, sir.

Q. Whereabouts in Bergen County was this crime of breaking and entering and larceny committed? A. In a saloon.

Q. Where in Bergen County? A. I think it was Cliffside.

GEORGE ORMSBY, sworn.

Direct examination by Mr. Kavanagh:

Q. How old are you? A. Twenty-eight.

Q. Are you married? A. Yes.

Q. Where do you live? A. 714 Jersey Avenue, Jersey City.

Q. What is your business? A. Chauffeur and boatman. I work on the boats at times.

Q. What boat do you work on? A. Arbuckle Brothers, in Brooklyn.

Q. The Arbuckle Brothers in Brooklyn? A. Yes, sir.

Q. Did you, Ormsby, on November 6th, 1928, assault, slay or kill or participate in any wise in the slaying, assaulting or killing a little girl known as Catherine McGee, or aid or abet in any wise in the assaulting, killing or slaying of Catherine McGee, at or about the corner of Fourth and Grove Streets in the City of Jersey City at around 8:25 or 8:30, in the evening of that day, or at any other time during that day or evening? A. No, sir.

Mr. Kavanagh: Cross-examine.

Cross-examination by Mr. Drewen:

Q. Where do you live? A. 714 Jersey Avenue.

Q. You lived there on November 6th, 1928? A. Yes.

Q. How old are you? A. Twenty-eight.

Q. When were you twenty-eight? A. April 13th.

Q. So you were twenty-seven in November; November last year you were twenty-seven? A. Yes.

Q. What was your occupation in November, 1928? A. I was a boatman then.

Q. You were also a chauffeur? A. I was at that time a chauffeur. Well, I get odd jobs.

Q. Working at odd jobs as a chauffeur? A. Yes.

Q. How long had you worked as a chauffeur in November, 1928, seven years? A. Not exactly seven years.

Q. About seven years? A. Well, I take those jobs on and off, although seven years.

Q. On and off you worked as a chauffeur for seven years? A. Whenever I could get a job.

Q. And that had been going on for about seven years? A. Yes.

Q. I show you paper S-7 in evidence and ask you if the name "George Ormsby" appended to the first sheet is your signature?

Mr. Kavanagh: I object to the question, to the form of the question and to the tenor of the question and to the question itself, on the grounds that it is improper cross-examination and it is incompetent, irrelevant and immaterial to this issue. It is not directed to any direct examination that was testified to by this witness. For that reason it is absolutely improper, and I must strenuously object to it, your Honor.

The Court: The question is allowed.

Mr. Kavanagh: Exception.

(Exception allowed, signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

Q. Is that your signature, Ormsby? A. Yes.

Q. I call your attention to the name "George Ormsby" written on the second sheet of Exhibit

S-7 in evidence, and ask you if that is your signature? A. Yes.

Q. Both those signatures were written by you? A. Yes.

Q. When did you sign these papers that I show you? A. Second Precinct, Jersey City.

Q. When? A. I believe it was——

Q. Oh, speak up, please. A. The morning of the 8th of November.

Q. 1928? A. 1928.

Q. Did you read the papers before you signed them? A. No, sir, there was nothing on the papers.

Q. Did you read the paper before you signed it? A. Yes, sir.

Q. Did you tell the police that you lived at 714 Jersey Avenue? A. No.

Q. Did you tell them you were twenty-seven years old? A. No.

Q. Did you tell them you were a chauffeur? A. No.

Q. Did you tell them you had been a chauffeur for seven years? A. They knew that, I guess; they asked that once before.

Q. When did they ask it once before? A. Inspector Casey asked me that coming over on Jersey Avenue.

Q. At the time this paper was made, at the time you were in the Station House of the Second Precinct on November 8th, did you state to Lieutenant Ballarene that you had been a chauffeur for seven years? A. No.

Q. You knew Lieutenant Ballarene, didn't you? A. No.

Q. Did you see him on the witness stand this morning here? A. Yes, sir.

Q. He was in the station house, was he not, when you were brought down there? A. No, not that I know of.

Q. He was present when you signed this paper? A. No, all I see was Inspector Casey and Lieutenant Hoffman.

Q. On November 7th were you part owner of an automobile? A. Yes.

Q. A Chandler sedan, was it? A. Yes.

Q. The other part owner was Dan Reilly, wasn't it? A. Yes.

Q. Did you tell that to the police at the time you made a statement on November 8th? A. No.

Q. Do you know how the police know it—you don't, do you? A. No.

Q. Do you know a chap named Vince? A. No, sir.

Q. You do not know Vince O'Keefe at all? A. Only for the last few months. I saw him in jail.

Q. You did not know him at the time you were in the Police Headquarters or in the police station on November 8th, did you? A. No.

Q. By the way, on Election Day, November 6th, 1928, were you at any time in Grove's Bakery? A. No.

Q. You frequent the Grove Bakery, occasionally, don't you? A. Very seldom.

Q. But you do go there?

Mr. Kavanagh: I object to that.

Mr. Drewen: I withdraw the question.

Q. Do you know a man who you called Slim? A. No.

Q. You do not know Slim Donato, do you? A. I did not know Slim Donato. I know Frank Donato for the last four months.

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Q. This Donato. You never knew him to be called "Slim"? A. No.

Q. Where were you on this evening of the 6th of November, 1928, Election Day? A. I was home.

Q. All evening? A. After six o'clock, yes.

Q. You were home after six o'clock? A. Yes.

Q. You never came out again? A. No.

Q. Where were you before six? A. Before six I stood by the school for about half an hour.

Q. What school? A. Number Two School.

Q. Did you have the car with you? A. I had the car.

Q. You had the Chandler sedan with you? A. Yes.

Q. Did you see Frank Donato there? A. No.

Q. Did you see Vincent O'Keefe there? A. No.

Q. Did you see Frank McNally there? A. I saw Frank McNally.

Q. You knew Frank McNally, didn't you? A. No—just a little.

Q. Was he in the car? A. He was sitting in the car.

Q. He was sitting in your car as it stood in front of School Number Two? A. It was not in front of School Number Two.

Q. Where was it? A. On the corner of Third and Erie.

Q. That is to the south of Number Two School? A. Yes.

Q. So Frank was in the car then, wasn't he? A. Yes.

Q. What were you using the car for down there? A. I was not using it at all all afternoon. I just left it there, because a friend of mine worked for the polls and he goes to the houses and brings the voters to the polls and takes them back after voting.

Q. When you came back to your car at 1:05 on that afternoon, you found some baseball bats in it, didn't you? A. No.

Q. You did not know anything about them until you found them there? A. I did not find any there.

Q. You did not tell the police, that somebody, while you were absent had gotten bats and put them in that car, did you? A. No.

Q. How does Frank McNally come to get in the car that afternoon? A. I do not know. I just came from the house. I left the car there; I just came from the house, and I was sitting there and spoke to him for a while. Then he got up and I drove on my way.

Q. What were you talking about? A. The time of the day, that is all.

Q. You sat in the car and were talking with him? A. Yes, sir.

Q. And you say you knew him just slightly? A. Slightly.

Q. He sat in the car while you were away and you came and saw him there and then you started the conversation? A. Yes.

Q. You have been convicted of crime? A. Yes.

Q. You were convicted in Millville, New Jersey, in August, 1920? A. Yes.

Q. Of what crime? A. Stealing a watch from my father.

Q. I suppose that is no crime; is that the fact?

Mr. Kavanagh: Oh, no.

Q. What other convictions have you had? A. Forgery. I believe that is what it was; I don't know.

Q. When were you convicted of forgery? A.

Last year, I believe, or the year before; I am not sure.

Q. Your mind isn't certain now when you were convicted of forgery, whether it was a year or two years ago? A. Last year or the year before.

Q. You are not quite certain? A. I believe it was last year.

Q. Where were you convicted, in this County? A. Yes.

Q. You were convicted in the Hudson County for the crime of forgery in 1928? A. Yes.

Q. What other convictions? A. I was convicted of petty larceny in Passaic County.

Q. Convicted in the City of Paterson, were you? A. No, Passaic.

Q. What year were you convicted of petty larceny? A. I believe it was 1927.

Q. What month, if you remember? A. Around September or October.

Q. You were convicted of larceny back in June, 1918, eleven years ago, were you not? A. No, sir, not that I know of.

Q. The complainant against you was Officer Curry of the Jersey City Police Department? A. No.

Q. You served thirty days in the County Jail—don't you remember that? A. No; I never served thirty days in the County Jail.

Q. You deserted from the Navy in August, 1919, did you not? A. Not deserted, no, sir.

Q. What did you do? A. I was ten days over leave.

Q. And again in October of 1919, you deserted from the Navy? A. No, sir, I was over leave again.

Q. You were delivered to the Naval authorities by the police of Jersey City in 1920? A. Yes, my father turned me over.

Mr. Kavanagh: I object; that surely is not any crime.

Mr. Drewen: I have a right to test his accuracy and veracity.

Mr. Kavanagh: As to convictions, not as to arrests.

The Court: As long as the objection is made, the Court will sustain you on your objection, that the State must be limited to previous convictions own time.

Mr. Kavanagh: We subpoena, if your Honor pleases, the records of a Jersey City Hospital, of one of the ambulances in charge of Dr. Cohen, and other records respecting visits of Dr. Cohen to the house of——

Mr. Drewen: I do not want Mr. Kavanagh to——

Mr. Kavanagh: All right, I won't state it.

The Court: Do I understand you have subpoenaed a Dr. Cohen?

Mr. Kavanagh: No; I have been just informed today that it was Dr. Cohen on several ambulance visits to his house——

The Court: What I am trying to get at is this, and the Court is ready to assist you: Do I understand you to say you have subpoenaed a certain individual who has not responded to the processes of this Court?

Mr. Kavanagh: No, your Honor.

The Court: If you have, this Court will dispatch a Sergeant at Arms and a Constable to bring up here, in order that you may have an opportunity to fully present your case. If that happens, of course if they have not been subpoenaed, the Court is powerless.

Mr. Kavanagh: They were subpoenaed yesterday and I think there was some mishap in notifying them.

The Court: This Court particularly instructed all witnesses in behalf of both the defense and the State yesterday to appear here today without further subpoena.

Mr. Hart: The subpoena was left at the home of the Doctor on last Saturday, directing him to be here. It was left with him personally.

Mr. Kavanagh: Well, we won't press it.

The Court: I will call him if you want me to. If you want me to I will direct the Sergeant-at-Arms to telephone him immediately.

Mr. Kavanagh: Maybe the Prosecutor will agree with me as to what both of the Doctors would testify.

Mr. Drewin: I think you had better submit your proof, Mr. Kavanagh. That is the only way to do it. I am sorry. I want to be courteous.

The Court: If you want the Doctor, I will have him telephoned for, if you say you subpoenaed him.

Mr. Kavanagh: He was subpoenaed on Saturday, your Honor, yes, your Honor, we would like to have him. Will your Honor call a little recess?

The Court: No, no. We will go right on, but we will telephone for the Doctor.

Mr. Kavanagh: I am informed that the hospital was subpoenaed for the record, not Dr. Cohen.

Mr. Drewen: Well, who do you want at the hospital?

Mr. Kavanagh: Dr. Cohen, if he is here, your Honor, and also——

The Court: I will tell you what I will do and you probably will be better satisfied: I will take a recess at this moment for ten minutes to give you an opportunity to telephone the Doctor or whoever you desire to have at the hospital.

(Recess taken for ten minutes.)

After Recess.

Samuel A. Cohen, sworn.

Direct examination by Mr. Kavanagh:

Q. Doctor, are you a regularly licensed physician and surgeon of the State of New Jersey? A. No, sir.

Q. What are you, an intern attached to the Jersey City Hospital? A. Yes, sir.

Q. And have you finished your medical education yet? A. Yes, sir.

Q. And you are a graduate of what Medical College? A. New York Homeopathic Medical College and Flower Hospital.

Q. Flower Hospital, New York City? A. Yes, sir.

Q. How long have you been serving as an intern in the Jersey City Hospital? A. Thirteen months.

Q. Will you tell the Court and Jury what your duties are as intern in that hospital?

Mr. Drewen: Do I understand that Dr. Cohen is not a licensed physician in any State?

The Witness: I have a New York license.

Mr. Drewen: To practice medicine in New York?

The Witness: Yes, sir.

Q. Will you tell the Court and Jury what your duties are as intern in that hospital? A. That would be quite lengthy. Do you want me to go right into detail?

Q. If you please. A. Well, the duties of an intern are divided into about ten services. You work on surgery, medicine, ambulance, children's diseases, women's diseases, and so on, and I don't know if you want any more detail than that?

Q. All right. Have you worked on the ambulance? A. I have.

Q. Accompanying the ambulance around different places where you are sent? A. Yes, sir.

Q. Emergency calls, and so forth? A. Yes, sir, I have.

Q. And do you prescribe for persons that the ambulance goes to and whom you are to treat? A. I have done so.

Q. How long have you been on duty on one of the ambulances in the Jersey City Hospital? A. Two months and two days.

Mr. Drewen: Last half?

Q. Last half? A. I don't understand.

Mr. Drewen: For the last two months and two days?

The Witness: No, sir. I rode in November and December last year and also August of last year.

Q. And now, Doctor, do you know Vincent O'Keefe?

Mr. Kavanagh: Stand up, Mr. O'Keefe.

A. No, sir, I do not.

Q. You do not know him? A. I do not recall him.

Q. Do you know where 174 Academy Street is? A. I know where Academy Street is but I don't know where 174 is.

Q. Have you your records with you, the records of the Jersey City Hospital? A. No, sir.

Q. Didn't you bring them with you? A. No, sir.

Q. Why not? A. Well, I was in the midst of an operation, assisting in an operation when the Medical Director called me and said I was wanted in Court immediately, and I went down and he said, "You are wanted in Court immediately", and would I go over? I said, "I don't recall anything about the case, I have to look my records up, the records in the ambulance book, in the record room." So he sent me up to the room and we went into the room and started to look through the records and then he said, "I guess you had better not wait because they took all the records to Court the other day and if you get down, they will have them there. You had better go right over."

Q. Then who took the hospital records to Court? A. He mentioned some third person; I don't know who it is.

Mr. Kavanagh: At this time may I ask Mr. Drewen, the Prosecutor, if in answer to a subpoena served by me on Doctor Edward J. O'Hanlon, Superintendent of the Jersey City Hospital, in the case of the State against Vincent O'Keefe, Frank Donato and others, a subpoena *duces tecum* to bring

certain records over here respecting ambulance calls to 174 Academy Street, Jersey City, and the records of treatment given by the ambulance surgeons who called on the ambulance at 174 Academy Street, Jersey City, to one Vincent O'Keefe?

Mr. Drewen: What is your question?

Mr. Kavanagh: My question is, were those records brought to the Prosecutor's office?

Mr. Drewen: Those records were not brought to the Prosecutor's office. I never saw them in my life, never knew of the existence of any such records, and haven't and never had the slightest interest in them.

Mr. Kavanagh: All right. That is all I wanted to ask.

The Court: Now, Mr. Kavanagh, if you desire those records, the Court will take a recess. I might say this: I sat in a Civil case the other day in which some were subpoenaed, some of the hospital records, and they were brought by a nurse and the lawyer promised to see that the records were returned. That is what Dr. O'Hanlon probably refers to. They get them over to the Court House and never return them. That has nothing to do with this case. That was a Civil suit and I turned them over to this lawyer, whom we all know very well, and I guess he has forgotten all about it.

Mr. Drewen: That has nothing to do with this case.

The Court: No. There is another Doctor outside. He has the record. The witness may be excused if you want to have him bring back the records.

Mr. Kavanagh: I want to further examine him, if your Honor please.

The Court: All right.

By Mr. Kavanagh:

Q. You say that you do not know Vincent O'Keefe? A. I do not recall Vincent O'Keefe.

Q. Do you recall on several occasions while——

The Court: Maybe if you direct his mind right to a particular thing, maybe that will enable him to reflect and remember.

Q. Do you recall at any time during the month of October, November or December, 1928, being sent on an ambulance to attend a man named Vincent O'Keefe, residing at 174 Academy Street, Jersey City, for asthma, treatment for asthma?

Mr. Drewen: Objected to as incompetent, irrelevant and immaterial, and having no bearing whatever on the issue.

The Court: He can say whether he remembers it or not. That may be dispositive of the whole thing.

A. I don't recall.

Mr. Kavanagh: Would you come up here, Mr. O'Keefe, please. Step up to where the Doctor is.

Q. Now, do you recall treating this young man for asthma, giving him a prescription for asthma at 174 Academy Street, in the month of November?

Mr. Drewen: I object unless the time is fixed.

Q. All right. On some occasions during some days in the month of November, 1928?

Mr. Drewen: Objected to unless a date is fixed.

The Court: What is the purpose of this line of testimony? Is it for the purpose of proving an alibi?

Mr. Kavanagh: Not only that, if your Honor please, but also for the purpose of showing that on the cross-examination of O'Keefe by the Prosecutor, Mr. Drewen, that this man was actually suffering from asthma during the week of November 5, 1928, and that he was attended by this Doctor and some other Doctors from the hospital and was given a prescription by this Doctor who now sits in front of him.

Mr. Drewen: All of which is of no probative force whatever. Nothing that Mr. Kavanagh has referred to militates against the State's proof in this case. If it does, of course, I must consent to have it go in and I won't object to it, but I do object to this line of immaterial and irrelevant testimony.

The Court: I will allow the question.

The Witness: Do you live in the corner house?

The Court: Don't ask him any questions. You are asked if you remember.

The Witness: I remember treating a case as asthma on Academy Street in the corner house. I don't know the number.

Q. Speak up. What is that again? A. I remember treating one case of asthma in the corner house; I don't remember the name or the face. I don't remember this gentleman.

Q. Do you remember the house where you treated the man? A. I remember that it was a corner house.

Q. Was it a wooden house? A. Yes, sir.

Q. On the corner of Academy Street, near Baldwin Avenue? A. I believe it is near Baldwin Avenue; I know it is the corner.

Q. How many flights up? A. I could not be sure of that.

Mr. Kavanagh: Now, if your Honor please, I think in view of the turn that this case has taken, that we ought to have the records of the Jersey City Hospital with respect to this treatment.

Mr. Drewen: Mr. Kavanagh talks about the record as if somebody else was responsible for their not being here.

Mr. Kavanagh: Oh, no, Mr. Drewen.

The Court: Do you want to ask Dr. Cohen any questions, Mr. Prosecutor?

Mr. Drewen: Just one question.

The Court: I will reserve you the right to cross-examine him when he returns. You want this man to return with the records?

Mr. Kavanagh: If you please.

The Court: I will order you to produce the records and request Dr. O'Hanlon to come over here.

The Witness: When?

The Court: At 8 o'clock tonight. Tell him to drop any and all business he may have, I don't care how important it is. You follow that up with a subpoena.

Mr. Kavanagh: Yes, sir. May I ask your Honor to call Dr. O'Hanlon's attention, by Dr. Cohen, that a subpoena was served upon him Saturday afternoon at approxi-

mately 3 o'clock by the defendants in this case?

The Court: All right, the Doctor will do it.

GEORGE EDWARD MEEHAN, sworn.

Direct examination by Mr. Kavanagh:

Q. You are a regular licensed physician and surgeon of the State of New Jersey? A. I am.

Q. And where do you practice Medicine and Surgery? A. 117 Mercer Street, Jersey City.

Q. How long have you been practicing Medicine and Surgery here in Jersey City? A. Eight years.

Q. Do you know this defendant Vincent O'Keefe, alias Brasch? A. Yes, I do.

Q. And did you ever treat him at any time during the months of November, October and December, 1928?

Mr. Drewen: I object.

A. I did.

The Court: The objection is sustained. Strike out the answer.

Mr. Drewen: My objection is that it is too wide in scope and point of time.

The Court: I will say to you, Mr. Kavanagh, if you have any proof to offer to support the theory of an alibi, the Court will receive it, but any proof you put in must be limited to the period of time of your alibi.

Mr. Kavanagh: I realize that, your Honor, that is what I am attempting to do.

The Court: You cannot float all over October, November and December.

Mr. Kavanagh: I think I have a right to show by the Doctor, without first going to the exact date, that there was continuous treatment in respect to a time prior to November 6th, then couple it up. I think I have a right to question the Doctor to ascertain if he has attended——

The Court: I will allow you to prove the whereabouts of O'Keefe on November 6th, if the Doctor knows. I will allow you to prove where O'Keefe was on November 7th, 8th or 9th, any time up to the period of time that he was arrested, because then his testimony will be directed first to the purpose of corroborating the alibi thus sought to be established and second, it will contradict any evidence there may be in this case of flight.

Mr. Kavanagh: Yes, sir.

Q. Now, Doctor, in reply to the statements of his Honor, do you recall any time in November, beginning with the week of the 5th of November, 1928, when you attended the defendant O'Keefe?

Mr. Drewen: Same objection.

The Court: I will allow that. Do you remember?

The Witness: I remember treating this man in November, but the exact date I cannot accurately state.

Q. You have no record? A. I have no record of the exact date.

Q. What did you treat him for, Doctor?

Mr. Drewen: I object, incompetent, irrelevant and immaterial.

The Court: Sustain the objection.

Mr. Kavanagh: Exception.

The Court: You may have it.

(Exception allowed and signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

Q. Did you prescribe for him?

Mr. Drewen: Same objection.

The Court: Sustain the objection.

Mr. Kavanagh: Exception.

(Exception allowed and signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

Mr. Kavanagh: That is all.

Mr. Drewen: I ask that the testimony of this witness be stricken from the record on the ground that in its entirety it is incompetent, irrelevant and immaterial.

The Court: The Court will allow it to stand as is for what it is worth.

Mr. Drewen: No questions.

JOSEPHINE DONATO, sworn.

Direct examination by Mr. Kavanagh:

Q. Mrs. Donato, you are the wife of one of the defendants, Frank Donato? A. Yes, sir.

Q. How long have you been married? A. I have been married five years.

Q. And where are you living now? A. 59 Terhune Avenue.

Q. Where were you living on November 6th, 1928? A. The same place.

Q. How long prior to November 6, 1928, did you reside at that address? A. I don't remember.

Q. But on that date, November 6, 1928, you and your husband and your family, your children, were residing there; is that right? A. Yes, sir.

Q. Do you remember what day November 6, 1928, was? A. Do I remember what day?

Q. Yes, what day that was, was it a holiday or otherwise? A. Election Day.

Q. And where was your husband, Frank Donato, on that day, if you recall? A. Well, he was at home——

Q. Was he at home all day? A. No, he left at one, and was back, I don't know what time it was, a little after eight.

Q. Did he go out of the house after 8 o'clock? A. No, sir.

Q. On the evening of that day? A. No, sir.

Q. What did he do that night? A. Well, I had company and I asked him to stay home, and he did.

Q. He stayed at home? A. Yes, sir.

Q. Did he go to bed in your home that night? A. Yes, sir.

Q. And did he sleep in your home all night long? A. Yes, sir.

Mr. Drewen: Please don't lead him.

Mr. Kavanagh: I am sorry; I am guilty of leading, but I won't do it again.

Q. Where was he on the morning of November 7th, 1928, when certain police officers came to your house? A. Right in bed.

Q. What happened to him at that time? A. Well, the police officers came in and they took him right out.

Q. Did they say anything to you? A. No, sir. I asked him where they were taking him and they said that they came up on account of the car.

Q. On account of the car? A. Yes, sir.

Q. What car? A. The car he owned.

Q. What did they say about the car? A. They said that the car was stolen and I said it is not. He said, well, he will return in a few minutes if the car is not stolen.

The Court: What day is this?

Mr. Kavanagh: The 7th.

Q. What did they say? A. They said he would return in a short time if the car was not stolen.

Q. That he would return to your home? A. Yes, but I didn't see him return.

The Court: That is to say, the police officers took your husband away?

The Witness: Yes, sir.

The Court: What time of the day or night was that?

The Witness: That was the morning of November 7th, about 11 o'clock.

Josephine Donato—Cross.

Mr. Kavanagh: Cross-examine.

Cross-examination by Mr. Drewen:

Q. How long had your husband been living at home prior to election day, 1928? A. A little after eight.

Q. No. How long, how many weeks, how many days had your husband been living with you at Terhune Avenue before November 6, 1928? A. Well, he has been living with me for the last five years.

Q. Steadily? A. Yes.

Q. Right along? A. Yes, sir.

Q. You never had any trouble with him at all? A. No, sir.

Q. And he lived with you and supported you regularly, right along? A. Yes, sir.

Q. Never ran away from you? A. No, sir.

Q. Mrs. Donato, don't you remember having your husband arrested and placed on probation for desertion and non-support in May, 1928? A. No, sir.

Q. And you complained to the Probation Officer that you had trouble with your husband, he would not work and he was not at home living with you? A. No, sir.

Q. You say that is not true? A. No, sir.

Q. You remember you are under oath, you realize that, don't you? A. Yes, sir.

Q. And don't you know that on July 20th, 1928, you caused a warrant for his arrest to be issued out of the Courts of this County and applied for it through the Probation Officer for desertion?

Mr. Kavanagh: One minute. I object to that, if your Honor please, on the ground that it is not competent cross-examination. It is not competent, material or relevant to

this issue. How can it be? I submit that it is absolutely improper cross-examination of a witness.

The Court: The question will be allowed with this instruction by the Court to the Jury: That the Jury are not to conclude that the answers that this witness makes, shall in any way be dispositive of the guilt or innocence of the defendant Donato, that it simply goes to the question of the credibility or reliability of the evidence or testimony that the witness Mrs. Josephine Donato, who is now on the stand, is giving.

Mr. Kavanagh: Exception.

(Exception allowed and signed and sealed accordingly.)

THOMAS H. BROWN,
Judge.

(Question repeated by the stenographer as follows: "Q. And don't you know that on July 20th, 1928, you caused a warrant for his arrest to be issued out of the Courts of this County and applied for it through the Probation Office for desertion?") A. No, sir.

Q. Don't you know that he was arrested on your warrant, charged with desertion, and that that arrest was made October 11, 1928?

Mr. Kavanagh: Same objection.
The Court: Same ruling.
Mr. Kavanagh: Exception.

(Exception allowed and signed and sealed accordingly.)

THOMAS H. BROWN,
Judge.

A. I don't recall it.

Q. You say you do not recall it or that it didn't happen? A. I don't remember that. I know that I didn't have him arrested at no time.

Q. You do not remember? A. No.

Q. You never made any complaint in any Court for failing to provide for you? A. No, sir.

Q. Do you remember that on the 25th of October he was arraigned on a charge of desertion before Judge O'Regan in the Hudson County Court of Sessions?

Mr. Kavanagh: I object to that for the same reasons as I stated before.

The Court: Same ruling and the same instructions to the jury.

Mr. Kavanagh: Exception.

(Exception allowed and signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

A. No, sir.

Q. How do you know that it was on the 6th of November that your husband came home a little after 8 o'clock? A. Well, I always put my children to bed at 8 o'clock and he didn't—he came in a little after 8 o'clock.

Q. How do you know it was the 6th of November? A. Well, for a fact they always go to bed at 8 o'clock, not only on November 6th.

Q. That is your real reason, because you go to bed every night, or put the children to bed every night at a certain hour, that you say it was on November 6th, 1928, that your husband came home a little after 8?

Mr. Kavanagh: I object.

A. I had company that day.

Q. How do you know it was the 6th that you had company? A. How do I know?

Q. Yes. A. Well, the 7th, the detective came in and took him out.

Q. How do you know it was the 7th? A. How do I know?

Q. What fixes the date in your mind? A. What fixes it?

Q. Yes. A. I do not know.

Q. How long after 8 o'clock was it that your husband came in on November 6th? A. I don't recall.

Q. Might it have been half-past eight? A. No, sir, it was a little after eight.

Q. How do you know? A. Because all the little ones were put to bed at 8 o'clock.

Q. Well, you said a moment ago that you did not know how long after 8 o'clock it was? A. I have said I put them to bed at 8 o'clock and I know he came in a little after 8.

Q. The only reason for your saying that he came in a little after 8 is because you say every night you put them to bed at 8 o'clock? A. Yes, sir.

Q. How do you know that on the night your husband came home a little after 8 that that was November 6th? That is what I want to get at. Can you tell me? A. No, sir.

Mr. Drewen: That is all.

By the Court:

Q. What were the names of the friends who were visiting you on the night of November 6th? A. Viola Martin, my sister.

Q. Is she here in Court? A. Yes, sir.

Q. Who else? A. My brother and his wife.

Q. Are they both here? A. No, sir.

Q. How long did they stay that night? A. Well, I don't remember how long they stayed that night.

Q. What did you do at home that night? A. What did I do at home that night?

Q. Yes. A. I kept them company.

Q. What did you do to entertain them, if you did anything to entertain them? A. Well, I made up something to eat for them and they sat down and listened to the radio.

The Court: That is all.

Mr. Drewen: I want to ask your Honor to direct this witness to remain in Court for a brief time. I may have some more questions to ask her.

The Court: All right. At this time we will take a recess, in order to give the defense an opportunity to get the Doctor and secure the records from the Jersey City Hospital. We will take a recess until 8 p. m.

(Recess until 8 p. m.)

After Recess—8 P. M.

June 25, 1929.

Samuel A. Cohen recalled.

Direct examination by Mr. Kavanagh:

Q. You testified this afternoon in respect to the treatment of Vincent O'Keefe for asthma at 174 Academy Street, City of Jersey City, on at least

one occasion without particularly mentioning any date.

Mr. Kavanagh: Now stand up, Mr. O'Keefe.

Q. Do you recognize Mr. O'Keefe now as the man that you treated for asthma? A. No, sir.

Q. Well, you said earlier today that you treated a man for asthma on Academy Street in the last house near Baldwin Avenue?

Mr. Drewen: The witness did not say that.

Mr. Kavanagh: I withdraw it.

Q. Where was it, Dr. Cohen? A. Well, it was—I am not sure whether it was on the corner or near the corner, but I know it had something to do with the corner.

Q. And you were on the ambulance at the time you treated this man, weren't you? A. Meaning I was on ambulance service?

Q. Yes. You were the ambulance Surgeon? A. I was.

Q. Did you report back to the hospital the result of your treatment at the time you arrived there, the name of the man you treated? A. I did.

Q. Do you recall any other remarks in the record respecting the treatment you gave this man?

Mr. Drewen: Objected to on the ground that it is incompetent.

The Court: I will allow it.

A. I did just what is on the slip.

Q. Now, when you came here this afternoon in response to my subpoena of last Saturday, a subpoena *duces tecum,* to bring to this Court, before this Court and jury, the records of the Jersey

City Hospital respecting treatment for asthma that you gave to Vincent O'Keefe, naming him in the subpoena, and naming the address at which you gave him treatment for asthma, you came here without the records of the hospital? A. I had no——

Q. Did you or did you not?

The Court: Let him answer the question fully. Answer it in your own way.

A. I had no knowledge of any subpoena.

Q. You had no knowledge of any subpoena? A. That is right.

Q. When did you first have knowledge that a subpoena was served on the director or Superintendent of the Jersey City Hospital to produce these records of treatment of Vincent O'Keefe for asthma? A. At 5 o'clock today.

Q. Then, when a telephone call was made from His Honor's Chambers to the Jersey City Hospital, is that right? A. That is right.

Q. And you mean to tell the Court and Jury that that was the first time you had any knowledge any subpoena had been served? A. I do.

Mr. Drewen: That is objected to.

The Court: He said it is. That ends it.

Q. You did not obey that subpoena to bring the records here, did you? A. I didn't, because I didn't get any subpoena.

Mr. Kavanagh: All right. That is all.

The Court: This slip you have produced is part of the hospital records.

The Witness: Yes, sir.

The Court: You may take it along with you. It has not been offered in evidence.

(Addressing Counsel.) Do you desire Dr. O'Hanlon or Dr. Cohen any longer?

Mr. Drewen: No.

Mr. Kavanagh: No, your Honor.

The Court: You are both excused with the thanks of the Court.

Mr. Kavanagh: The defense rests.

CHARLES BALLERENE, recalled.

Direct examination by Mr. Drewen:

Q. Lieutenant, do you know the defendant Frank McNally? A. Yes, sir.

Q. Which defendant is that? A. He is the second from that end.

Q. From your right? A. Yes, sir.

Mr. Drewen: I would like the record to show that he indicates the defendant McNally.

Q. Did you on the 8th day of November, Lieutenant, question the defendant McNally? A. I did.

Q. As to the charge against him for which he is now being tried? A. Yes, sir.

Q. Where did that occur? A. In Inspector Casy's office, Second Precinct, Jersey City.

Q. The questions you put to him, were they reduced to writing? A. They were.

Q. By whom? A. By myself.

Q. The answers given to your questions by McNally, were they reduced to writing? A. They were.

Q. By whom? A. By me.

Q. I show you Exhibit S-9 for Identification and ask you if that is the paper writing which you made of the questions and answers just referred to? A. That is the paper.

Q. I call your attention to the name Frank McNally appearing at the end of the first sheet and the name Frank McNally appearing at the end of the writing on the second sheet, and ask you by whom that name was written, if you know? A. By the defendant, Frank McNally.

Q. Was the writing of his name by Frank McNally put on those two sheets Exhibit S-9 for Identification before or after the writing that now appears on those sheets was placed there by you? A. After the writing was put down there.

Q. At any time before or at any time during the questioning by you of the defendant McNally, did you make any threats to him? A. I did not.

Q. Did you offer him any hope or promise of help or relief in this case? A. None.

Q. Did you in any way threaten or menace him? A. I did not.

Mr. Drewen: I offer Exhibit S-9 for Identification in evidence.

Mr. Kavanagh: I object to it if the Court please, and ask leave at this time——

The Court: If you desire to cross-examine you may have that privilege.

Cross-examination by Mr. Kavanagh:

Q. Who were in the room when you examined McNally, as you say you did, Mr. Ballerene? A. I think Detective——

Q. Not what you think. I want to know who were there? A. Detective O'Neil and Lieutenant Hoffman.

Q. Was anybody else there? A. That I could not remember. I know they were there.

Q. And you were there and you were examining McNally? A. That is right.

Q. Do you mean to tell this Court and Jury that you do not recall, who in addition to yourself and O'Neil, and the other gentleman you mentioned were present? A. There may not have been anybody else there.

Q. Well now, you were there, weren't you? A. I was.

Q. You say you took statements, some alleged statements from McNally? A. That is right.

Q. And when did you take statements from him? A. On the 8th day of November.

Q. Are you sure it was the 8th day of November? A. Well, positive.

Q. You are positive of it? A. Yes, sir.

Q. There is no mistake about that? A. I don't think so.

Q. What time of the day was it, morning, afternoon or night? A. About the evening, say 7:30 or 8, something about that time.

Q. Did you arrest Mr. McNally? A. No, sir.

Q. Who arrested him? A. I don't know.

Q. Where was Mr. McNally at the time you took these alleged statements? A. In Inspector Casy's office.

Q. Who directed you to go into Inspector Casy's office? A. Who directed me to go in?

Q. Yes. A. I knew the way in.

Q. Of course you knew the way in, being in that Precinct for a number of years, but who told you to go in there and interview McNally? A. Inspector Casy.

Q. Then there was Inspector Casy there at the time? A. Why, he was sometime that evening. I

don't know whether he was there while I took the statement or not.

Q. Then was he there while you took this alleged statement of McNally or not? A. I told you Detective O'Neil and Lieutenant Hoffman were there.

Q. O'Neil and Hoffman? A. Yes, sir, that is it.

Q. Anybody else there? A. I don't know.

Q. Are you sure of that? A. I was not interested in anybody else being in the room.

Q. You were interested in knowing what police officers, your co-workers, were there with you? A. Yes.

Q. Now can you tell us all that were in that room at that time? A. I can tell you all I remember, yes. I remember O'Neil and Hoffman.

Q. You cannot remember anybody else being there? A. I don't know that there was anybody else there.

Q. It was between 7 and 8 on the night of the 8th of November? A. 7 or 8, something like that.

Q. And you went in there? A. Yes, sir.

Q. Where were you when Inspector Casy directed you to take an alleged statement from McNally? A. In his office.

Q. Where is his office located? A. The second floor of the Second Precinct on Seventh Street, Jersey City.

Q. Where was McNally at the time? A. The same place.

Q. In his office? A. Yes, sir.

Q. And was he in the same room where Inspector Casy was? A. I guess he was, yes.

Q. Not what you guess? A. Yes, he was.

Q. And at the time that Inspector Casy told you to take this alleged statement he was not present in the same room with you, McNally,

O'Neil and the other men you mentioned? A. He may have been present there. There is two rooms; he may have told me in the other room.

Q. Which is it? Did he tell you in his own room? A. I don't know, either one of them.

Q. Where was the statement taken? In Inspector Casy's room, wasn't it? A. That is it.

Q. You said that, didn't you? A. Yes, sir.

Q. And Inspector Casy's desk is in that room, isn't it? A. Yes, sir.

Q. And were you all around his desk when the alleged statement was taken? A. I was sitting there.

Q. You were sitting at his desk? A. On the side of his desk.

Q. And where was Inspector Casy at the time? A. He might have been there; he might have been in the other room.

Q. Not what he might have been. I want to know where he was from your knowledge of being there and being directed by the Inspector to take his alleged statement. You know where he was, don't you? A. No, I don't remember just where he was.

Q. Didn't Inspector Casy question him at all that night? A. I don't know. He may have previous to my coming in.

Q. And you were there all the time, weren't you? A. Most of the time.

Q. You were there during the time this alleged statement was taken by you, weren't you? A. I must have been. I took the statement.

Q. And Inspector Casy was present? A. As to that I won't say.

Q. Do you mean to tell this Court and jury that you don't know whether Inspector Casy made any statement to this young man McNally or

asked him any questions? A. The questions I asked him.

Q. The questions you asked him? A. Yes, sir.

Q. Did you do the writing? A. Yes, sir.

Q. Did Inspector Casy ask him any questions? A. He may have. I don't remember him asking any questions.

Q. You were there, Mr. Ballerene? A. Yes, sir.

Q. You heard everything that went on? A. I probably didn't hear everything that went on.

Q. Well, what distance was there between you and McNally at the time you say you took the alleged statement? A. Sitting right alongside of him.

Q. At Inspector Casy's desk? A. Yes, sir.

Q. No other officers from any other outside precinct around at the time, were there? A. I don't know.

Q. You knew who was in the room, didn't you, outside of the men you say were there? A. Those are the only men I remember being in the room, these two I mentioned.

Q. Only the two you mentioned? A. Yes, sir.

Q. And you did not mention Inspector Casy? A. Casy may have been there or he may not; I am not Casy's keeper.

Q. I am not asking you whose keeper you are. You did not arrest McNally, did you? A. No, sir.

Q. Where was he arrested, if you know? A. I don't know.

Q. When was he arrested, if you know? A. I don't know.

Q. Do you know that he was arrested in Hoboken? A. I did not even know that.

Q. Didn't you know he was arrested in Hoboken in the early hours of the morning of the day subsequent to this election day? A. No, sir.

Q. You do not know that, do you? A. No, sir.

Q. Did you inquire where he was arrested? A. No, sir.

Q. You did not ask him anything about his arrest, did you? A. No, sir.

Q. You did not tell him anything about any charge being made against him, did you? A. Yes, sir, I did.

Q. Did any one else tell him anything else outside of any charge being made against him? A. I don't know.

Q. Or cajole him in any manner? A. Not in my presence.

Q. Not in your presence? A. No, sir.

Q. Was he beaten up in that room in your presence? A. Never.

Q. Were you present at the time the other people were examined?

Mr. Drewen: I object. This is incompetent.

Mr. Kavanagh: I will withdraw it at this time.

The Court: I will allow it so far as the Court is concerned. Of course I will expect counsel, if he makes wild statements of that character to submit proof.

Mr. Kavanagh: Well, I will tell you, if your Honor please——

Mr. Drewen: Please don't tell anything.

Mr. Kavanagh: I am telling the Court in respect to the statement the Court made, Mr. Drewen, I think I have a right to do that, and I am going to do it. There is a lot of things I could have alleged in respect to these alleged statements which I won't do and I won't do for certain specific reasons.

Mr. Drewen: If your Honor please—Have you done, Mr. Kavanagh?

Mr. Kavanagh: I have finished.

Mr. Drewen: Might I ask your Honor at this time to exercise his judicial power to control this proceeding to such an extent as to administer a rebuke to Mr. Kavanagh for any such statement as that here in this proceeding? It is improper, it is illegal and it is unfair.

The Court: The Court is not going to do that, Mr. Prosecutor, for the simple reason that I am not going to do anything that might in the slightest degree be misinterpreted by the jury in so far as the rights of these defendants are concerned. Of course, counsel, I assume, in the conduct of his trial, when he sets forth with a certain line of cross-examination to prove certain facts, naturally I expect those facts to be either established or at least an attempt made to establish them. In the event that counsel does not make that effort, of course the responsibility must be his.

Mr. Kavanagh: Yes, and I do it for certain specific reasons, if your Honor please.

The Court: We won't go into that. That is sufficient.

Mr. Kavanagh: I object to that statement on the grounds that I have already set forth in respect to the time that Mr. Drewen attempted to introduce it in evidence before.

The Court: You had better give your objections on the record to this specific statement; it has never been offered before.

Mr. Kavanagh: It was offered for identification.

The Court: Yes, but there were no objections to that.

Mr. Kavanagh: I objected at the time.

The Court: Well, what is your objection for the record?

Mr. Kavanagh: My objections, then, were that there was no evidence that Mr. McNally had been warned of his rights respecting the alleged charge against him. There are a number of others that are in the record in respect to that.

The Court: I will give you the benefit of it and the Court will allow the alleged confession to be admitted into evidence.

Mr. Kavanagh: Exception.

(Exception allowed and signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

(Statement marked Exhibit S-9 in evidence.)

Mr. Kavanagh: Further, your Honor, I don't want your Honor to interpret me in any wise as being disrespectful in this matter——

The Court: I don't, Mr. Kavanagh.

Mr. Kavanagh: But I object absolutely to the word confession as used by the Court. As I said before, there is absolutely no evidence in this case at all to connect Mr. McNally or any of the other three defendants with this crime, and this afternoon I objected to the use by your Honor, and I objected to the use of the word admission, which under our de-

cisions and under our law in cases of this kind should not be used, and I say at this time that there is no evidence in this case that there is any confession or any admission——

The Court: May I ask you then what you characterize this document to be?

Mr. Kavanagh: An ordinary piece of paper, if your Honor please.

The Court: An ordinary piece of paper?

Mr. Kavanagh: Absolutely, without any force or effect in law whatever.

The Court: You can argue that to the jury.

Mr. Kavanagh: All right, but I except to your Honor's ruling, and I except to the use of the word admission and the word confession.

(Exception allowed and signed and sealed accordingly.)

THOMAS H. BROWN,
Judge.

The Court: The Court will direct the Prosecutor to read the alleged statement or the alleged confession or the paper writing to the jury.

Mr. Drewen: I will read into the record the contents of Exhibit S-9 in evidence:

Police Department, Jersey City, N. J., November 8th, 1928. Statement of Frank J. McNally, residence 25 Jones Street, Jersey City, made to Lieutenant C. Ballerene.

I am Lieutenant C. Ballerene of the Jersey City Police Department. I am going to ask you some questions in reference to the crime for which you

were arrested. You may answer them or not, just as you wish, but what you do say must be of your own free will, a voluntary statement, as it will be taken down in writing and used at your trial.

"Q. What is your name? A. Frank A. McNally.

Q. Where do you live? A. 25 Jones Street.

Q. How old are you? A. Thirty-two.

Q. What is your occupation? A. Produce dealer.

Q. How long have you worked at that? A. 18 years.

Q. You are charged with murder in that at 8:40 p. m. at Fourth and Erie Streets, Jersey City, on November 6th, 1928, you were in a fight in which a baseball bat was used, causing the death of one Catherine McGee, age eight. What have you to say? A. Sometime before 7 p. m. on November 6th I was at the polling place on Erie Street, at No. 2 School. After the polls closed I went outside to get some cigarettes and I saw the man then lying on the sidewalk. A cop picked him up and there was about forty men fighting. I went and sat in a sedan car owned by Ormsby and Danny Reilly. At that time I was the only one in the car. Then Slim Donato, Vincent Ormsby, Danny Reilly came and got in the car. I got out of the car and they drove away. Ormsby was driving."

Mr. Drewen: That is the end of the first page. Then appears "Frank A. McNally; Witness: Lieutenant William Hoffman, Lieutenant of Police." The second page reads:

"Q. Did you see any baseball bats? A. Yes. There were some bats in the back rear seat and on the floor.

Q. Who did you see with a bat in hand at that time? A. Ormsby was the only one I saw with a bat in his hand.

Q. Did you see Wycoff in this car? A. I am not sure whether he was in the car or not, but I know he was around the polls.

Q. Where were you sitting in this car? A. In the back seat.

Q. What kind of a car were you sitting in? A. A Chandler Sedan.

(Signed) Frank McNally.

Witness: William Hoffman,
Lieutenant of Police."

Mr. Kavanagh: Now I submit to your Honor from the reading of this alleged statement or piece of paper, or document, or whatever name my friend Prosecutor Drewen may call it—where is there a confession in that statement by Mr. McNally? None whatever.

The Court: That is a debatable question at this time. The Court has ruled. The Court has admitted it in evidence and further comment is unnecessary.

Mr. Drewen: I at this time ask the Court's permission to recall Mrs. Donato to the stand for just a question or two.

The Court: Yes.

JOSEPHINE DONATO recalled.

Further cross-examination by Mr Drewen:

Q. Mrs. Donato, do you know where the Probation Office is at the Five Corners in Jersey City? A. Yes.

Mr. Kavanagh: I object to that as improper cross-examination and as being irrelevant, incompetent and immaterial.

The Court: I assume that the purpose of the question is simply to refresh the witness's mind and memory, inasmuch as earlier in the afternoon she seemed to have forgotten.

Mr. Kavanagh: I object to it, if your Honor pleases, as improper cross-examination.

The Court: I will allow it.

Mr. Kavanagh: Exception.

(Exception allowed and signed and sealed accordingly.)

THOMAS H. BROWN,
Judge.

Q. You answer that you do know? A. Yes.

Q. You went to the Probation Office, did you not, on October 9th, 1928, at the time that your husband was on probation?

Mr. Kavanagh: I make the same objection, for the reasons that I have heretofore set forth to your Honor.

The Court: The question is allowed.

Mr. Kavanagh: Exception.

(Exception allowed and signed and sealed accordingly

THOMAS H. BROWN,
Judge.)

Q. Did you not? A. Yes.

Q. You went there for the purpose of complaining to the Probation Officer about your husband, did you not?

Mr. Kavanagh: I object to that, if your Honor pleases, as improper cross-examination and as being incompetent, irrelevant and immaterial.

The Court: You may have the benefit of all the reasons you urge.

Mr. Kavanagh: Exception.

(Exception allowed and signed and sealed accordingly

THOMAS H. BROWN,
Judge.)

Q. Is it true? It is true, is it not? A. Yes.

Q. And you complained at that time that your husband was going around with an unmarried woman by the name of——

Mr. Kavanagh: I object to that.

Mr. Drewen: I withdraw the question.

Q. You complained at that time to the Probation Officer that your husband had not been at home for five months, didn't you? A. Yes.

Mr. Drewen: That is all.

Mr. Kavanagh: That is all.

The Court: Is there any further testimony in rebuttal by the State?

Mr. Drewen: The State rests.

The Court: Is there any sur-rebuttal by the defendants?

Mr. Kavanagh: No. We rest. Now, if your Honor pleases, at the close of the entire case I renew my motion for the direction of a verdict in favor of all these defendants, specifying again and reiterating more particularly in every respect and in every wise the reasons that I advanced at the close of the State's case for the direction of a verdict in favor of all these defendants. At that time I submitted to your Honor that there was not a particle of testimony, that there was not a scintilla of evidence adduced by the State through all its witnesses, some 15 or 16, to in any wise sustain the allegations in this indictment, not a particle or scintilla of evidence to sustain the allegations of the first count in the indictment, which is a count for murder in the first degree; not a single scintilla of evidence. Now, if your Honor pleases, as I said before, at the end of the State's case, there has been no prima facie case made out, absolutely no prima facie case made out, under the decisions and under the law, and I say that it is an uncontrovertible fact on a thorough review and on a thorough glimpsing over of all the evidence adduced by the State, that it is impossible to attempt to sustain the allegations in this indictment against the four defendants. It is evident beyond any question whatsoever that the State has not adduced one scintilla or particle of evidence to connect or to couple Donato, O'Keefe, Ormsby or McNally with the assault, slaying or killing of this young girl at that time, that is, around 8:25 or 8:30 o'clock of the evening of November 6th, 1928. I say that there has not been one scintilla of evidence adduced by any of the witnesses on the part of the State to show that these men were there at that time when this alleged fatal blow was struck

on this young girl, knocking her down. The evidence was all the other way, if your Honor pleases. The State brought numerous witnesses who were present on the corner of Fourth and Erie Streets at the time that this girl is alleged to have fallen to the sidewalk. The State brought numerous witnesses who were within five or ten feet of this little girl when she fell to the sidewalk, but not one of these witnesses, not one of the witnesses brought by the State to sustain the allegations in this indictment, brought one bit of evidence, one jot and one tittle of evidence to show that these young men were there at the time that the alleged assault occurred.

Mr. Drewen, the Prosecutor of this County, a gentleman for whom I have the very greatest respect and admiration, questioned each one of these eye witnesses, the eye witnesses to the assault, most minutely, and they were his own witnesses, and not a single witness brought here before your Honor and this jury to attempt to sustain the allegations of this indictment, although they were present at that time that the assault occurred upon little Catherine McGee, identified or could identify any of these four defendants.

Now, I say that those facts having been established, with that testimony in the record, that testimony which is absolutely undisputable, which is absolutely incontrovertible, I say, at the end of the State's case, that there is no *prima facie* case made out against these defendants, and I say doubly now when the defendants' case is in—they denied it positively under oath that they participated in, that they aided or abetted in any assault or any slaying or any killing of little Catherine McGee at that time, and I say there is double proof, there is double proof that the alle-

gations in this indictment are not sustained by the evidence adduced by the State. Double proof where? Double proof on the part of the State's witnesses themselves, men and boys who were present at the time of the assault and proof on the part of the defendants that they were not there, and had no participation in the assault on this little girl at that time.

Now, I say to your Honor there is no evidence whatsoever, no *prima facie* case made out against any of these defendants. There is no *prima facie* case at the close of the State's case and there is no *prima facie* case now at the close of the whole case, at the close of the State's case and at the close of the defendants' case.

I said to your Honor at the time that I moved at the end of the State's case to direct a verdict in behalf of these defendants, that a *prima facie* case could not be made out on suspicion, on implication, on suggestions, on anything that was plucked out of the air in the way of a suspicion to charge these defendants with a crime which they had not committed and which was not proved against them, and I say to your Honor at this time in all sincerity and I say it with the positive and absolute assurance that I am right and that I am backed up by the decisions of the upper Courts of this State, that no *prima facie* case can be made out by suggestions or innuendos or suspicions or surmises on the part of any of the complaining witnesses in respect to charges in an indictment against any of the defendants or defendant. I say at this stage of the case, at the close of the whole case, as it was at the close of the State's case, the evidence of the State is absolutely devoid of any evidence connecting these defendants. There is absolutely no proof what-

ever connecting them with this alleged crime, and I say to your Honor in all sincerity, under the decisions of this State and under the law that when any allegations are made in an indictment against any defendant or defendants, be that indictment for murder or the smallest offense under the law, if the State does not sustain the allegations of proof by some kind of evidence worthy of taking the case to the jury and worthy of putting these defendants or any defendant on his or their defense, if that be true that the State does not do these things, then I submit to your Honor that no *prima facie* case has been made out and there must be as a matter of law, as a matter of right, as a matter of justice, open, clean and even-handed justice as between the State and the defendant or defendants charged with crime—there must necessarily be a direction of a verdict, for the reason that the State has not sustained by any proof, by any evidence whatsoever the allegations in the indictment, and I move more strenuously this time, if your Honor pleases, that with all due respect to my friend the Prosecutor, and in the most respectful manner to your Honor, and under the law, under the decisions of this Court, under the testimony adduced on behalf of the States in this case, a *prima facie* case has not been made out either at the close of the State's case and more especially at the close of the whole case, and therefore I respectfully ask, I respectfully demand, I respectfully solicit and importune your Honor for the reasons that I have heretofore given, that there should be at this time a direction of a verdict of not guilty in behalf of all these defendants.

Motion for a Direction of Verdict.

The Court: Motion denied.
Mr. Kavanagh: Exception.

(Exception allowed and signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

Mr. Kavanagh: Do I understand that your Honor is not going to subject the Prosecutor to the necessity of answering all my allegations and statements in the renewal of my motion for a verdict?

The Court: No, sir.

BOTH SIDES SUM UP.

THIRD DAY.

HUDSON COUNTY COURT OF OYER AND TERMINER.

STATE OF NEW JERSEY

vs.

FRANK DONATO, GEORGE ORMSBY, VINCENT O'KEEFE and FRANK McNALLY,

Defendants.

Before:

Hon. THOMAS H. BROWN, J.,
and a Jury.

Jersey City, N. J., June 26, 1929.

Appearances:

JOHN DREWEN, Esq., Prosecutor of the Pleas, for the State.

WILLIAM A. KAVANAGH, Esq., EDWARD J. HART, Esq., for Defendants.

Mr. Drewen: If your Honor please, the State at this point wishes to announce that it abandons the count of assault and battery in view of the fact that the proof here is that the assault resulted in practically instant death and that therefore the State's case is, according to the State's contention, one of homicide and the count for assault and battery is abandoned.

Mr. Kavanagh: I object at this time to any abandonment by the State of the count for assault and battery. If any abandonment were made, it should have been made before this time. I say to your Honor now that the motion of the Prosecutor comes too late, and if your Honor grants that I ask an exception to your Honor's rule.

The Court: For the purpose of the record, this motion is addressed to the sound judicial discretion of the Court. The Court, for the purpose of entertaining the motion of the State consenting to the abandonment of the assault and battery count in the indictment, will re-open the case to permit the Prosecutor to make his motion, and it is so ordered. You may have an exception if you are entitled to one.

Mr. Kavanagh: I ask an exception.

(Exception allowed, signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

I also desire to say to your Honor, in respect to my objection to your Honor's allowing the request of the Prosecutor, asking your Honor to permit him to withdraw the third count in the indictment, that is, the count for assault and battery, on both of my motions, one at the close of the State's case and also at the close of the whole case for directions of verdicts of acquittal for these four defendants, I specifically set forth at that time, on both occasions, namely at the end of the State's case and at the end of the entire case, that the evidence adduced on the part of the State did not warrant and could not, under the law, warrant a conviction of these four defendants of any count of that indictment, namely: the count

for murder, the first count; the count for manslaughter, the second count; and the count for assault and battery, the third count.

At that time your Honor denied both of my motions. The Prosecutor, Mr. Drewen, during the time the case was on trial, stood idly by and did not request your Honor to be permitted to abandon the third count for assault and battery.

Now, after the entire case is closed—I mean the case so far as the adduction of evidence on the part of the State and on the part of the defense is closed and after counsel for the defense and the Prosecutor for the State is summed up and at about the time that your Honor is going to charge this jury—the Prosecutor steps up and requests your Honor or says that he would like to have permission of your Honor to abandon the third count, for assault and battery. I submit that the time when he should have abandoned it, when he should have asked your Honor to abandon it, or told your Honor he desired to abandon it, was at the time I made my motion first at the close of the State's case and then again at the close of the entire case.

I submit to your Honor that the request of the Prosecutor comes too late to drop this count for assault and battery because the whole case is in, and I don't believe your Honor has any right at this late hour in the proceedings to permit him to withdraw that third count.

Mr. Drewen: The State wishes to say just a word with respect to the count in the indictment for assault and battery. It is not a matter of the State's application nor of permission to be given by the Court to abandon it. It is a matter of the necessities of the case, resulting from its logic and its common sense. At this posture of affairs

it becomes the Court's peculiar duty, as your Honor just a few moments ago indicated, to control the case, and when I made the statement that I did with respect to the withdrawal of the count for assault and battery, I did so because I was acting in consonance, with what I believe to be the fair and judicial necessity in the present posture of the proof that has been adduced in the trial.

The Court: You may have the benefit of an exception. I doubt whether you are entitled to one on a motion addressed to the judicial discretion of the Court, but if you have any such right the Court is willing to accord it to you.

(Exception allowed, signed and sealed, accordingly.

THOMAS H. BROWN,
Judge.)

Charge.

The Court thereupon charged the Jury as follows:

The Court: Gentlemen of the Jury: At the outset the Court is desirous of thanking you for the careful attention and consideration which you have given to this case during these three hot days that this case has been on trial. It is most gratifying to the Court to have noticed that you have been very attentive not only to the various witnesses who have been called by the State and by the Defense, as well as to the argument of counsel and as to the rulings of the Court in this case. The Court is fully cognizant of the fact that this has been a trying ordeal for you and as business men in this community it has meant a considerable sacrifice to you.

Charge.

You are to act in harmony with the law and without prejudice of any kind, because jurors and judges do not make the law. That duty rests on others, but judges and jurors are controlled by the law and by the oath that they take which binds their consciences.

The first thing I want to direct your attention to is the Court's duty.

The function of the Court is to instruct the jury with reference to the principles of law governing this case.

The next thing I want to instruct you upon is the jury's duty.

You are the sole judges of the facts, the weight of the testimony, the credibility of the witnesses, the inferences to be drawn from the evidence and the ultimate conclusions to be reached from all the facts.

In considering the evidence in this case you are not to be controlled by statements made by either counsel for the State or by counsel for the Defendants as to their recollection of the testimony. You are to be guided entirely by your own recollection of the sworn testimony that has been given and the mute testimony that has been introduced in evidence in the cause.

The State has abandoned the third count in the indictment in this cause for assault and battery, so that in the discussion of the indictment which I will presently read to you, it will not be necessary for you to consider in this indictment any further than the first two counts, that is, the count that refers to murder and the second count for manslaughter.

The grand inquest of this County at the September Term, 1928, have returned an indictment into the Hudson Oyer and Terminer, charging

Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe, alias Brasch, the defendants at the bar, with the crime of murder.

The Court is going to read that indictment to you:

The Grand Inquest of the State of New Jersey in and for the body and County of Hudson upon their respective oaths presents: That Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe, alias Brasch, late of the city of Jersey City, and the County of Hudson, on the 6th day of November in the year of our Lord Nineteen Hundred and Twenty-eight with force and arms at the City of Jersey City aforesaid, in the County aforesaid, and within the jurisdiction of this Court, one Catherine McGee, in the peace of God and of this State then and there being, did wilfully, feloniously and of their malice aforethought, kill and murder, contrary to the form of the Statute in such case made and provided, and against the peace of this State, the Government and the dignity of the same.

"And the Grand Inquest aforesaid, upon their oath aforesaid, do further present that said Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe, alias Brasch, on the 6th day of November, in the year of our Lord Nineteen Hundred and Twenty-eight, at the City of Jersey City aforesaid, in the County aforesaid, and within the jurisdiction of this Court, did feloniously kill and slay one Catherine McGee, contrary to the form of the Statute in such case made and provided and against the peace of this State and the Government and dignity of the same."

Now, gentlemen, the crime of murder in this State is defined by Statute. It is as follows:

"Any person who in committing or attempting to commit any unlawful act against the peace of

the State of which the probable consequence may be bloodshed, shall kill another, shall be guilty of murder." In this State murder is divided into two separate degrees, murder of the first degree and murder of the second degree. Murder of the first degree is the more grievous form of murder. It is that form which is perpetrated by means of poison or by lying in wait or by any other kind of wilful, deliberate and premeditated killing, and all other kinds of murder are declared to be murder of the second degree. Murder of the second degree is, of course, the lesser form of murder. It will be your duty in this case, if you find the defendants, or either or any of them guilty of murder, to indicate by your verdict whether you find him or them guilty of murder in the first degree or murder in the second degree. As to the two degrees of murder, you will bear in mind that in the definition of murder of the first degree the law prescribes as necessary elements to that degree of murder, a wilfulness, a deliberateness and a premeditation of the killing, and without those elements it falls into or becomes murder of the second degree.

An unlawful killing does not amount to murder of the first degree unless it is found by the jury that the accused contemplated the killing, that is, premeditated it; then determined upon the killing, that is, intended it; then weighed such intent before carrying it into execution, that is, deliberated upon it.

Now while I have dealt with these terms, wilful, deliberate and premeditated in such a way as to indicate to you that they signify, as they do, three separate and distinct functions or operations of the human mind engaged in the premeditation of a killing, I also charge you that the taking place

of the functions of the human mind does not require necessarily any prescribed period of time; that the mental acts to which I have referred are capable of being performed with that degree of speed with which the human mind is proverbially capable of acting. In other words, premeditation and intent to kill need not be for a day, or an hour, or even a minute, for, if you gentlemen of the jury believe that there was a desire and a premeditation to kill distinctly formed in the minds of these defendants or either of them at any moment before the time the blow was struck, which design was deliberately and with premeditation carried out, it was a wilful, deliberate and premeditated killing, and therefore murder of the first degree.

As to murder of the second degree, the law is that any person who, in committing any unlawful act against the peace of the State, of which the probable consequence may be bloodshed, shall kill another, shall be guilty of murder.

I charge you now, gentlemen, that the violent swinging of a baseball bat or similar heavy instrument at the head or body of another person with intent to do injury to that person is an act against the peace of the State, the probable consequence of which is bloodshed. And I charge you also that if as a result of such an act death ensues, the crime is murder, so that the killing here is presumed to be malicious and is therefore murder unless and until the person or persons by whom such act was committed produce the facts and circumstances from which justification, excuse or extension may arise. If all that you find in this case is that the defendants or any of them are guilty of murder only because the killing was the unlawful act of such defendant or defendants as you may find to have perpetrated it, and be-

cause you find no evidence in the case to justify, excuse or to extenuate the killing, you can only find the degree of such killing to be murder of the second degree.

The burden is upon the State to raise the degree from second to first degree by proving to you that the killing was not only the result of the intentional doing of that unlawful act of swinging the baseball bat which resulted in the death of Catherine McGee, but in addition that the swinging of the baseball bat was wilful, deliberate and premeditated and done with malice and for the purpose of killing the one at whom the bat was swung.

Now to define manslaughter.

Now we come to the count in the indictment which charges these defendants with the crime of manslaughter. For the purpose of this case it is sufficient to say to you that manslaughter exists where one or more persons kill another upon a sudden transport of passion or heat of blood upon a reasonable provocation and without notice.

I would suggest to you gentlemen that you first consider the charge of murder and should you fail to find that the defendants or any of them are guilty of either the first or second degree of murder under the rules which I have already laid down to you, that you then proceed to consider the count of manslaughter.

You will note in the definition of the crime of manslaughter which I have given to you, that the killing must have been done upon a sudden transport of passion or heat of blood, upon a reasonable provocation and without malice, for you see, gentlemen, if the elements of malice are present the crime cannot be manslaughter but is murder in

one or the other degrees thereof which I have already explained to you.

Of course if you find in your deliberation that the State has proved to you under the rules which these instructions lay down, that the defendants or any of them are guilty of murder, there will be no need on your part to give consideration to the count for manslaughter, and in this State, before you can find that the crime of killing is of that degree of homicide known as manslaughter, you must justify yourselves in concluding under these instructions that there was present in the person or persons by whom the act of bloodshed in this case was committed, a reasonable provocation for any transport of passion or heat of blood on the part of such person or persons.

At this point, gentlemen, I think I should refer to the general effect of the testimony given by the State's witnesses. Certain of the witnesses whose names you will recall, some of them police officers, gave testimony that at about 8:30 on the night of November 6th, 1928, an automobile was standing in front of School Number Two on Erie Street pointed northerly toward Fourth Street. There is evidence that seated in the car at that time, in the rear seat were the two defendants McNally and Donato. Who the other two defendants were in the car at that moment of time is not stated, but there is evidence that in addition to Donato and McNally in the rear seat, there were two other persons in the front seat.

It appears also from the State's testimony that in a very brief period of time after Donato and McNally were seen by the witnesses seated in the automobile, the automobile proceeded north and turned easterly on Fourth Street, which is but a short distance from School Number Two,

and one of the witnesses, Black, I believe he was, testified that he was at such a point off the curb near the corner of Fourth and Erie Street that he could and did see the automobile from the moment it left its position in front of Public School Number Two until it turned the corner of Fourth and Erie and passed in front of him. Now it is at the moment of time that this automobile turned the corner of Fourth and Erie Street and at that point that the crime in this case is alleged by the State to have been committed and the testimony at that juncture as given by some of the State's witnesses is that the automobile here slowed down or stopped entirely after it had turned easterly into Fourth Street from Erie and had gone a distance of a few feet; that thereupon one or more of the occupants of the automobile armed with bats, left the car and walked directly to the State's witness Whalen, who at that time was standing on the sidewalk in front of the grocery store on the southeast corner of Fourth and Erie. The testimony is that at this moment also a voice was heard from the car shouting or saying, "Get the fellow with the cap" or words to that effect; that at that moment one of the former occupants of the car, with a baseball bat, rushed toward the State's witness James Whalen and struck a violent blow at him which glanced off. A crashing sound was heard and an instant or two later the little girl, Catherine McGee, was found lying face down and unconscious at or near the place where the attempt had been made to assault Whalen.

Now I charge you gentlemen, if you find from the evidence in this case that these four defendants on trial here were the four occupants of the car at the time of the commission of this crime,

that you must consider what is known in the law as aiding and abetting.

I charge you that the four occupants of that car, whoever you find them to be, were present at the scene of the crime. Of course the burden is upon the State under the rules which I lay down to you, to show that these defendants were the occupants of that car at that time, and I charge you that such of these defendants as you find to have been in the car at the time in question were present at the scene of the killing. And it is the law in this State that all persons present, who either actually partcipate in the commission of a crime, or aid, assist or abet in its commission, are principals. Mere presence at the scene of the crime without more is not sufficient to make a person a principal. There must be some aiding, assisting or abetting on the part of the persons thus present; but I charge you in this case that you may consider the testimony that is in to the effect that two of the occupants of the car left it to go toward Whalen with baseball bats, that the defendant Ormsby is said to have admitted to the police on his arrest that he was in the car at that time acting as driver, so that you may also consider the testimony to the effect that at the time of the killing a voice was heard coming from the car urging those who left it with their weapons, to get the fellow with the cap.

If you find from the evidence that the defendant Ormsby halted or slowed the motion of that car so as to permit the assailant to leave it, that he aided and abetted the crime and is therefore a principal. And I charge you also that if you find from the evidence that the defendant McNally was the occupant of the car who uttered the words about getting the fellow with the cap, or in any

other way aided or abetted or urged the assailant on in their attack upon Whalen, that he likewise is a principal. Of course, these are matters which you and you alone must determine from all the evidence in the case. And while I have said to you that presence, of itself, is not sufficient to make one an aider or abettor, it is a circumstance which the jury may consider, together with all the evidence in the case, in concluding whether or not such person or persons thus present, as I have said, did in any way aid or abet in the commission of the crime that was perpetrated in their presence.

Now as to alleged statements: As part of its proof, the State offered in evidence, certain paper writing alleged to be statements made respectively by these defendants at the time of their arrest, relative to the facts in the crime for which they were arrested and are now being tried. These statements will go into the jury room with you for your examination. I charge you that in considering these statements, whatever they contain can be used by you only as evidence against that defendant by whom the statement was made and any one of these statements can not be considered by you as evidence against the other defendants by whom such statement was not made, and who were not present at the time of the making of the alleged statement, and particularly in view of the fact that the evidence in this case shows that the statements that were made or were alleged to have been made by the various defendants here separately and at a time when the other three were not physically or bodily present.

Now as to the flight: In a statement alleged to have been made by the defendant O'Keefe at the time of his arrest, there is contained the alleged

admission by O'Keefe that after the killing of Catherine McGee, he, with the party in the automobile, went to Easton, Pennsylvania. That admission, if you find it to have been made by the defendant O'Keefe, can be considered by you only as against the defendant O'Keefe. And in this connection I charge you, if you find the fact to be that O'Keefe did actually go to Pennsylvania as the alleged admission purports to state, that you may consider such facts as evidence of flight from the scene of the crime and as bearing upon his guilt.

As to prior convictions.

It was shown by the State in its cross-examination of these defendants that each of them has been convicted of one or more crimes. You have heard the testimony and you have heard the evidence that has been adduced as to the prior convictions and the character of the crimes that have been referred to. The testimony as to such convictions was not allowed by the Court in order that you may thereby determine that because these defendants had been convicted of crime, that therefore they or any of them would be more likely to commit the offense with which they are charged in this indictment than any other person. Such convictions are in evidence solely for the purpose of affecting the credibility of these defendants as witnesses in the case we are trying, and they must not be considered by you for any other purposes. It is for you to say whether the convictions of crimes do actually affect in your minds the extent of the belief or credence which you shall give to the testimony of these defendants or any of them.

Now as to the burden of proof and the doctrine of Reasonable Doubt.

Charge.

The law at the outset presumes that these defendants, like all defendants under our form of criminal jurisprudence, are innocent. This presumption of innocence can only be overcome by evidence showing beyond a reasonable doubt the guilt of the defendants and the defendants are entitled to the benefit of the reasonable doubt not only as to the commission and the nature of the offense, but also the degree of the offense. The State must also show all of the essential elements of the crime and of the grade of the crime of which they are charged. The burden of proving the guilt of the defendants beyond a reasonable doubt is upon the State and does not shift from the shoulders of the State throughout the whole case. But, of course, all of the testimony may be considered by you in connection with the burden of proof that is on the State. In other words, the State has a perfect right to rely on evidence which it selects, if it desires, introduced by the Defense, the same as if introduced by the State itself.

Reasonable doubt is a term often used and probably pretty well understood, but it is not easily defined. It is not a mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. The burden of proof is upon the prosecution. If upon such proof there is reasonable doubt remaining the accused are entitled to the benefit of it by an acquittal. The evidence must establish the truth of the facts to a reasonable and moral certainty. A certainty

that convinces and directs the understanding and satisfies the reason and judgment of those bound to act conscientiously upon it. This we take to be proof beyond a reasonable doubt, because, if the law should go further than this and require absolute certainty, it would exclude circumstantial evidence altogether.

Now as to the issue.

Now, gentlemen, the issue in this case I must fairly say to you is clear. These defendants are charged by indictment with the crime that I have defined to you. They have entered pleas of not guilty and they come into Court in this case with the proof on which they rely to resist the prosecution. They say they are innocent and each of them has categorically denied any degree of guilt, or complicity in the alleged crime. There is also in the case some evidence of what is known to the law as the defense of alibi.

The Court will now define an alibi. The word alibi means in plain English "elsewhere". That is to say, that the defendants claim that they were not at the scene of this crime, but they were elsewhere and consequently that they did not and could not have committed the crime charged against them.

I perhaps should say to you that whatever evidence of alibi is in this case is brought out not on direct examination by Defendants' own counsel, but in the cross-examination by the Prosecutor. The defendants Ormsby and McNally have stated in their testimony that they were not present. Further than this, as to these two defendants, there is no evidence of alibi. As to the defendant Donato, there is some testimony—you will recall what it is—given by his wife, to the effect that on the night of the killing of Catherine McGee, he

was at home, arriving there shortly after eight o'clock. You heard her direct examination and you heard the testimony which she gave on cross-examination. The weight, the credibility and the effect to be given to her testimony is a thing to be determined by you and by you alone. As to the defendant O'Keefe, there was some effort made by counsel for the defendant to show medical treatment by physicians of O'Keefe, but I charge you that there is no evidence in the case from the physician or the physicians who were called, that in any way tends to show, so far as the doctors are concerned, that they treated him or knew of his whereabouts on the 6th day of November, 1928, or at the time of the alleged commission of the crime.

I have just commented to you on the extent of the evidence of alibi, and I now charge you that credible evidence as to alibi, although it should fall short of establishing the alibi, might nevertheless be evidence which tends to break the force of the State's contention of presence and might at the same time tend to throw doubt upon the commission of the offense by these defendants or any of them where his or their presence is essential to guilt, by showing a state of facts inconsistent with the essential element of presence.

As to weight of evidence and defendants' interest. As the Court has already stated to you, gentlemen of the jury, the facts in this case are for your determination. You are to weigh the evidence and the case should be decided by you on the evidence alone. All the evidence in the case should be considered by you, including that which comes in the form of oral testimony as well as that which is in the form of exhibits. You should consider the character and the manner of

giving testimony shown by each witness who has appeared here before you. You may consider the interest of the various witnesses in the outcome of this case. These defendants are the most interested persons in the world in what your verdict is to be. It is possible that this interest has affected their testimony. It is possible that it has not. That is for you to determine. Consider also the interest that the State's witnesses may have. In other words you must weigh and weigh carefully all the evidence in the case, considering its source and its quality and the belief which it merits at your hands.

Now as to your verdict and the degrees to be defined.

Should you find as your verdict in this case under all the rules I have laid down to you that these defendants or any of them are guilty of the crime of murder, it will be your duty, and you are required under the law as a part of that verdict, to state the degree of murder of which you find the defendants or any of them guilty.

In the event that your verdict shall be one of murder of the first degree, it will be necessary for you to bear in mind a statute of the State which I shall now read to you. This statute gives you as a jury in this case, if you find the defendants or any of them guilty of murder in the first degree, power to make a recommendation to the court relative to the punishment which shall be inflicted. The statute that I refer to reads as follows:

"Every person convicted of murder in the first degree, his aiders, abettors, counsellors and procurers, shall suffer death, unless the jury shall be their verdict and as a part thereof, upon and after consideration of all the evidence, recommend im-

prisonment for life at hard labor, in which case this, and no greater punishment shall be imposed."

That, gentlemen, is the statute, so that if upon returning a verdict of murder of the first degree you make no recommendation, the penalty meted out to such defendants as you shall find to be guilty of murder of the first degree, shall be death, and if in the event of your returning a verdict of murder of the first degree you shall determine that the penalty to be imposed shall be imprisonment at hard labor for life, it will be necessary by your verdict, and as a part thereof, for you to recommend imprisonment at hard labor for life, in which case that will and must be the punishment imposed by this court.

In this connection, however, gentlemen, I deem it incumbent upon me to inform you that the Court of Pardons of this State now has the power to change or reduce or abolish or set aside whatever result you may have arrived at in this matter, whether you fix the penalty at life imprisonment or not. The Court of Pardons can reduce or change it, but it cannot make the punishment any greater than you make it.

I also at this time charge you that you may convict or acquit any or all of these defendants.

In your verdict in this case, whatever that verdict is to be, you may deal individually or collectively with these four defendants. What I mean by that is this: That all four defendants may be acquitted, all four may be convicted; or you may convict one or more of them or acquit one or more of them. This is true whether your verdict be one of murder of the first degree or of murder of the second degree or of manslaughter.

I have been requested by counsel for the defendant to make certain charges to you, and I will

charge you in compliance with those requests: In order for the jury to reach a verdict either of guilty or not guilty, each and every juror must agree to such a verdict, as the verdict must be unanimous and not by a mere majority vote of the jurors. It is the duty of each and every juror to vote to acquit——

Mr. Kavanagh: May I interrupt your Honor and——

Mr. Drewen: I object to the interruption.

Mr. Kavanagh: I request that it be noted that your Honor refuses to charge——

The Court: Please sit down. The Court will allow you exceptions after it is through. (Continuing.) It is the duty of each and every juror to vote to acquit if such juror is not convinced beyond a reasonable doubt of the defendants' guilt.

In determining the guilt or innocence of the defendants and each of them, you may take into consideration not only the evidence in the case but also the lack of such evidence as you deem to be essential in determining beyond a reasonable doubt the defendants' guilt or innocence.

Certain motions for directions of verdict of acquittal were made to the court by these defendants which the court denied, but you must not consider the rulings of the court as any determination of the facts in dispute or even as indications of the court's opinion as to the facts, the court having merely ruled that the evidence presents questions of fact for the jury rather than questions of law for the court.

In this case, the presence of these defendants at the scene of the commission of the crime must be proven beyond a reasonable doubt, and if you have a reasonable doubt as to the presence of any of the defendants at such scene of the crime, then

such defendant as you have a reasonable doubt about must be acquitted. Even if the jury could find that any particular defendant has not proven his absence from the secene of the crime or his alibi, yet if the testimony as to such alibi creates such a degree of uncertainty as to his whereabouts that the jury is not satisfied beyond a reasonable doubt of his guilt of the crime for which he is indicted, he is entitled to an acquittal.

The jury are further instructed that if, upon a fair and impartial consideration of all the evidence in the case, they find that there are two reasonable theories equally supported by the testimony in the case, and that one of such theories is consistent with the innocence of one of the defendants or all of the defendants, then it is the policy of the law, and the law makes it the duty of the jury to adopt that theory which is consistent with the innocence of the defendant or defendants, and to find the defendant or defendants not guilty.

The court declines to charge the remaining requests to charge as they have been specifically and fully covered in the court's main charge. You may have an exception.

In closing, the court wants to impress upon the jury the importance of this case. I need not call your attention to the fact that this is an important case. It is important to the State, as it represents organized society, because it strikes at the very right of human life. It is especially important to these defendants because their lives or their liberties are at stake. As I stated at the outset, you are to decide the case entirely upon the evidence as it is in the case. You are not to be swayed by passion, prejudice or sympathy. You are to consider all of the evidence in the case and to weigh

it carefully and to decide what is the truth and what is not the truth.

Mr. Kavanagh: I except to the entire charge by your Honor, I except to your Honor's refusal to charge request No. 1, that was submitted by the defense. I except to your Honor's refusal to charge request No. 2, submitted to your Honor to be charged on behalf of the defendants. I except to your Honor's refusal to charge request No. 3, which was submitted to the court.

The Court: The court charged No. 3 for you.

Mr. Kavanagh: I am excepting to the fact that your Honor did not charge it in the words of the request.

In respect to charge No. 1, that was submitted to you some several days ago.

The Court: Don't let us argue. Just say, "I except to the court's refusal to charge requests Nos. 1, 2 and 3," or whatever they may be.

Mr. Kavanagh: I except to the refusal of the court to charge requests Nos. 1, 2, 3, 5, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, where malice is asked to be defined.

I except to your Honor's refusal to charge requests Nos. 20, 21, 22 and 23, of the requests heretofore submitted to the court several days ago to charge this jury.

The Court: You may have you exceptions except that the court declines to give you a general exception to the whole charge.

(Exceptions allowed, signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

Mr. Kavanagh: I ask an exception to your Honor's exception to give me an exception to the entire charge. I think I am entitled to that by law.

The Court: If you are, you may have one.

(Exception allowed, signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

(The jury was thereupon returned. The defendants were brought to court.)

The Court: Gentlemen of the jury: The court in preparing its charge had a number of various elements to consider, and I was of the opinion that I had covered the requests to charge with regard to defining what is known as malice in the law. For fear that I have not already covered it, or at least sufficiently covered it, the court is going to read to you the definition of malice as defined by the courts of this State, and particularly in the case of The State vs. Monahan, 93 N. J. Law, in which case malice is defined to mean nothing more than an evil state of mind; the premeditated and deliberate design of a sane man to kill a human being, purposely executed without adequate legal justification, stamps such an act as the result of an evil state of mind; hence an act conceived in malice. The law implies malice from the commission of the wrongful act.

Now the jury may take the case.

Mr. Kavanagh: Now I except, if your Honor please, to your Honor's definition of the term

"malice". The definition given by your Honor is not a clear definition.

The Court: You may have your exception.

(Exception allowed, signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

DEFENDANTS REQUESTS TO CHARGE.

1. The defendants, and each of them, in this case are presumed to be innocent and the burden of proof is upon the State to prove them guilty of the charge contained in the indictment beyond a reasonable doubt, and if the evidence fails to convince you beyond a reasonable doubt of the guilt of these defendants, it is your duty to acquit.

2. It is your duty to consider the evidence as to each of the defendants and to base your verdict as to each of such defendants upon the evidence affecting such defendants respectively, and if the evidence fails to convince you beyond a reasonable doubt of the guilt of such defendants respectively, it is your duty to acquit each of such defendants as to whom you have a reasonable doubt of guilt.

3. In order for the jury to reach a verdict either of guilty or not guilty, each and every juror must agree to such verdict, as the verdict must be unanimous and not by a mere majority vote of the jurors. It is the duty of each juror to vote to acquit if such juror is not convinced beyond a reasonable doubt of the defendant's guilt.

4. In determining the guilt or innocence of the defendants and each of them, you may take into

consideration not only the evidence in the case but also the lack of such evidence as you deem to be essential in determining beyond a reasonable doubt the defendant's guilt or innocence.

5. The defense in this case of the four defendants, Vincent O'Keefe, Frank Donato, Frank McNally and George Ormsby, is that of complete innocence of the commission of the crime charged in the indictment and in conjunction therewith and in support thereof, the defendants, Vincent O'Keefe and Frank Donato, Frank McNally and George Ormsby have testified that they were not at the place where it was committed when it was committed, and this feature of the evidence is termed in law an alibi, and if a reasonable doubt of guilt is raised even by inconclusive evidence of an alibi, the defendants, Vincent O'Keefe and Frank Donato, Frank McNally and George Ormsby and each of them, are entitled to the benefit of that doubt and to an acquittal.

6. Certain motions for directions of verdict of acquittal were made to the Court by these defendants which the Court denied, but you must not consider the rulings of the Court as any determination of the facts in dispute or even as indications of the Court's opinion as to the facts, the Court having merely ruled that the evidence presents questions of fact for the jury rather than questions of law for the Court.

7. In considering the question of the guilt of each of these defendants, I charge you that you are not to take into consideration the fact that such defendants have been previously convicted of crime, except so far as this fact may affect their credibility as witnesses in this case, and under no circumstances may you take into consideration as

creating any probability that the defendants, or any of them, were guilty of the crime charged in this indictment, nor should it influence you in any way in passing upon their conduct or actions at the time mentioned in the indictment.

8. Although the four defendants are indicted and tried jointly, you must consider each defendant's case separately, allying the evidence to his case which, under this charge, is admissible against or binding upon him, and if you find that the State has not sustained the burden of proving such one or more of the defendant's guilt beyond a reasonable doubt, then such defendant or defendants is or are entitled to an acquittal.

9. In this case, the presence of these defendants at the scene of the commission of the crime must be proven beyond a reasonable doubt, and if you have a reasonable doubt as to the presence of any of the defendants at such scene of the crime, then such defendant as you have a reasonable doubt to must be acquitted. Even if the jury could find that any particular defendant has not proven his absence from the scene of the crime, or his alibi, yet if the testimony as to such alibi creates such a degree of uncertainty as to his whereabouts that the jury is not satisfied beyond a reasonable doubt of his guilt of the crime for which he is indicted, he is entitled to an acquittal.

10. The jury is instructed that the indictment in this case is of itself a mere accusation or charge against the defendants and creates no presumption whatever of their guilt and is not of itself any evidence of the guilt of the defendants who are presumed to be innocent in spite of the indictment.

11. The Court instructs the jury that the law does not require that the defendants sustain the burden of proving themselves innocent, but the law imposes upon the prosecution the burden of proving that the defendants are guilty in manner and form as charged in the indictment beyond a reasonable doubt.

12. In the investigation of all matters of fact and in the weighing of evidence, the jury has no right to assume the guilt of the defendants, and then try to reconcile the testimony with such theory, but it is the sworn duty of the jury to presume the innocence of the defendants and to give them the benefits of such presumption all through the trial and at every stage of the investigation of the evidence in the jury room until it is overcome, if it shall be overcome, by proof beyond a reasonable doubt, and the evidence in order to establish the guilt of the defendants must not only be consistent with the theory of guilt but must be inconsistent with and exclude every reasonable theory of innocence, and as long as the jury are able to reconcile the evidence with any reasonable theory of the innocence of the defendants, the law makes it their duty so to do; and if, upon a full consideration of all the facts in the case, the jury entertain a reasonable doubt as to whether these defendants are guilty of the crime charged against them in the indictment, then you should find them a "Not Guilty."

13. The court instructs the jury that it is the duty of the jury to consider the question of guilt or innocence of each of these defendants, bearing in mind that each defendant has the right to have the evidence separately applied to him, and that while the indictment charges them all jointly, the presumption as to each defendant is that he

is innocent, and he has a right to have the evidence applied to him exactly as if he came to trial alone.

14. The jury are further instructed that if, upon a fair and impartial consideration of all the evidence in the case, they find that there are two reasonable theories equally supported by the testimony in the case, and that one of such theories is consistent with the innocence of the defendants, then it is the policy of the law, and the law makes it the duty of the jury to adopt that theory which is consistent with the innocence of the defendants, and to find the defendants Not Guilty.

15. You may take into consideration in determining the credibility to be given to the testimony of any witness, probabilities and reasonableness of the truth of all of his statements in evidence, and if you find that the testimony of any witness is improbable in any essential part and is not believed by the jury, the jury has the right to reject the remainder of such witnesses' testimony if it believes him unworthy of belief.

16. The court further instructs the jury that if the jury in a prosecution for homicide, which this case is, are not satisfied beyond a reasonable doubt, upon and after a consideration of all the evidence adduced in the case, that the death of the little girl Catherine McGee was not an accident in the legal sense of that term, and was not caused and brought about by reason of some misadventure on the part of the little girl, then the jury should acquit the defendants.

17. The court further instructs the jury that it is the duty of the State to prove beyond a reasonable doubt that the intent to commit or perpetrate some unlawful act, of which the probable conse-

quence might be bloodshed, existed in the minds of the defendants at the time that the little girl Catherine McGee is alleged to have been struck, and if the State does not sustain this burden it is the duty of the jury to acquit; and moreover it is also the duty of the State to prove beyond a reasonable doubt that such alleged striking was not an accident in the legal sense of the term and also that it was not caused or brought about by some misadventure on the part of the deceased.

18. The court instructs the jury that mere presence at the scene of the perpetration of the alleged crime does not render a person *particeps criminis*. To constitute him a party to the criminal act there must be not only presence upon the scene but an actual participation; that is, an aiding and abetting in the crime committed.

19. Will the Court kindly define MALICE to the jury?

20. If the jury shall find that the prosecution has not sustained the burden of proving beyond a reasonable doubt that the defendant Frank Donato is guilty, he is entitled to an acquittal.

21. If the jury shall find that the prosecution has not sustained the burden of proving beyond a reasonable doubt that the defendant Vincent O'Keefe is guilty, he is entitled to an acquittal.

22. If the jury shall find that the prosecution has not sustained the burden of proving beyond a reasonable doubt that the defendant George Ormsby is guilty, he is entitled to an acquittal.

23. If the jury shall find that the prosecution has not sustained the burden of proving beyond a reasonable doubt that the defendant Frank McNally is guilty, he is entitled to an acquittal.

HUDSON COUNTY COURT OF OYER AND TERMINER.

STATE OF NEW JERSEY, *vs.* FRANK DONATO, GEORGE ORMSBY, VINCENT O'KEEFE and FRANK McNALLY, Defendants.	Before: Hon. Thomas H. Brown, J. and a Jury.

JERSEY CITY, N. J., June 27, 1929.

Appearances:

JOHN DREWEN, Esq., Prosecutor of the Pleas, for the State.

WILLIAM A. KAVANAGH, Esq., EDWARD J. HART, Esq., for the Defendants.

The Court: I suppose Mr. Prosecutor, in the absence of the Justice of the Supreme Court, the Court will convene the Oyer and Terminer, and the Clerk will so note it on the record.

Mr. Kavanagh has handed me up a yellow sheet containing certain objections which, Mr. Kavanagh, I will inscribe my signature on, right in your presence, on both of them, June 27, 1929, and I will note the hour of ten o'clock this morning, the time you were here. Now, is there anything further you desire to say?

Mr. Kavanagh: Yes. I desire that it appear on the record at this time that at the hour of 1

A. M., or thereabouts this morning when the jury came into the court to give its verdict, that the Official Court Stenographer was not present in court at that time, and that after the foreman of the jury gave his verdict and the verdict of the jurors, in answer to the question if he had arrived at a verdict, propounded by the clerk of the court, Mr. Ward, I objected to the taking of the verdict until the official court stenographer had arrived. My objection was overruled.

I thereupon, after the reception of the verdict by the clerk, called upon the clerk, Mr. Ward, to poll the jury, and I asked that before the jury be individually polled that the official court stenographer be present in order that he might take the answers of the different members of the jury in respect to the verdict or verdicts that they had individually found against the respective defendants. My objection was overruled and the Court proceeded to poll the jury without the official court stenographer being present, not waiting for him.

At that time when the jury was being polled, when the name of Juror No. 2 was called, in respect to the verdict that he had found, counsel for the defense called the attention of the Court to the fact that Juror No. 1, the foreman, passed a written memorandum to Juror No. 2, and Juror No. 2 questioned the foreman in respect to what verdict had been found without he, himself, Juror No. 2, individually expressing his own verdict as to what he had found on being polled. Counsel for the defense at that time also objected to the paper being passed to other members of the jury, and asked the Court that the polling of the jury be stopped until the official court stenographer was present, because counsel for the defense desired

that it appear on the record the fact that he was objecting to a certain written memorandum being passed about among the jurors before their individual names be called on the poll, and also because the jury was endeavoring to obtain possession of this written memorandum from the foreman, and was attempting to elicit information from the foreman respecting what their answers should be respecting the verdict of the jury against the four defendants. In other words, there was such entire confusion and lack of knowledge on the part of many of the jurors when their names were called on the poll as to what they would answer in respect to what the verdict was, that they had found against these defendants, that there was an attempt on the part of many of the jurors to question the foreman to ascertain what they should reply when their names were called as to what the verdict was that they had found against these different defendants. I objected at that time to the——

The Court: Have you got that all in here (indicating yellow papers)?

Mr. Kavanagh: Yes, your Honor, but there is just one more thing. I objected at that time to the actions on the part of the foreman of the jury in handing this written memorandum to others of the jury, to attempt to acquaint themselves with what the verdict was, and objections were also made to others on the jury questioning, not only the foreman, but their fellow members as to what answer they should give respecting the verdict against the different defendants when their names were about to be called.

The Court: Is that all?

Mr. Kavanagh: Yes, that is all.

The Court: I do not think there is any occasion for you to reply, Mr. Drewen.

Mr. Drewen: I want to say this, your Honor. It won't take a moment. In view of the fact that the Court has permitted Mr. Kavanagh to state at this time such a version of what occurred, which I regard as being inaccurate and false, I wish to have the record show that what occurred at the time referred to in the narrative just dictated by Mr. Kavanagh as counsel for the defendants is, that the jury returned into court, they were asked by the clerk in the usual formal way as to whether or not they had agreed upon the verdict; that the foreman responded by pronouncing the verdict that was pronounced, and that thereupon Mr. Kavanagh did ask for a poll of the jury and did object, it is true, to the matter proceeding then in the absence of the official court stenographer; that the poll was nevertheless proceeded with, and that the response of each juror in the polling was written down by the clerk of the court, by the Court and by Mr. Kavanagh himself, and that each juror responded for himself as he was called, arising in his seat, responding for himself, and announcing the verdict as he individually had found it, and that each verdict thus pronounced was in conformity with every other finding thus pronounced.

The Court: I just want to simply say this, that at the time that the jury came in, that the court waited for a considerable length of time for the official stenographer, the court having been informed that the official stenographer had been in the Judge's chambers until some time after twelve o'clock, at which time—to which time I am making this statement Mr. Kavanagh, counsel for the defense, nods his head indicating approval, that that is so——

Mr. Kavanagh: Absolutely.

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The Court: That pursuant to my instructions I tried to locate the official stenographer, without success; that at the time the jury came in it was shortly after one o'clock; that we waited a while for the stenographer and being unable to find the stenographer the court ordered that the findings of the jury on the verdict of the jury might be received by the clerk of the court; that Mr. Kavanagh at that time which I have noted objected to the polling of the jury in the absence of the stenographer. That was at a point of time when Juror No. 2 was being polled, and Juror No. 2 turned to the foreman of the jury and secured from him a slip of paper. Upon Mr. Kavanagh's objection the court directed Juror No. 2 to return the piece of paper that he had in his hand and Mr. Talbot, then still standing, announced his individual finding and his individual verdict, which verdict was recorded by the clerk of the court, by the court itself and by Mr. Kavanagh, I believe.

So far as any other discussion or any paper being passed from juror to juror is concerned, that is not so. That is at variance with the facts. So far as other jurors trying to confer with the foreman of the jury, counsel is in error, as each one of these men stood upon his own individual feet and rendered the verdict solely and independently of the other, and particularly independent of the foreman, and at no time did any of the jurors communicate either with each other or with the foreman, or among themselves as to their verdict. Their verdict was received in the regular way, and this court feels that the clerk of the court and the court itself, as long as the court was sitting, had a right to receive the verdict of that jury without the presence of the official stenographer.

I do not know what comment counsel would have to make, for example, if the jury had come in here and acquitted the defendants. Would he then say that the court was powerless to act through either the judge himself or through the clerk of the court; and if there were an acquittal, that the verdict of the jury should not and could not be received? I think not.

I think for the purposes of the record, however, Mr. King, will you have Mr. Neale Ransom come down, and I think I will take a statement from Mr. Ware here in open court as to where he was, so that we may keep the record clear and straight. I am doing that because Mr. Ware tells me that he could not get in the Court House. He went out to get a bite to eat and when he returned the doors were locked.

NORMAN F. WARE, sworn.

By the Court:

Q. Your full name, please? A. Norman F. Ware.

Q. Are you connected with the office of Mr. Neale Ransom, the Official Stenographer of this court?

Mr. Drewen: Does your Honor wish that I examine the witness? If your Honor so directs, I will.

The Court: All right.

A. I am.

By Mr. Drewen:

Q. Were you assigned to duty last night in the case of the State of New Jersey against the four

defendants, Frank Donato and others, now in court? A. I was.

Q. You were assigned for the purpose of reporting such verdict as was agreed upon and rendered by this jury, were you not? A. I was.

Q. When did you come into court after the jury retired—I will withdraw that question. At what time last evening did you come into court awaiting the jury's verdict? A. From time to time, about every fifteen minutes to a half hour.

Q. I see. You remained in the Court House, in other words, and from time to time, as you have just stated, you repaired to the court room to learn whether or not the jury had agreed, is that so? A. Yes, sir.

Q. You continued doing that until how long? A. It was about twelve o'clock.

Q. Then will you state what occurred? A. At twelve o'clock I went out to get a bite to eat. I was out about fifteen or twenty minutes.

The Court: Had you had any supper?

The Witness: I had had a light supper. We finished up a lot of work in connection with the case and I was rather tired and was not very hungry. I got hungry about twelve o'clock, and I went out to get a bite to eat.

Q. You left the building for that purpose? A. I did, yes.

Q. Go ahead. A. Then I came back and when I came back I found the front doors locked. The building was deserted inside; that is, I saw nobody inside the building.

Q. On the lower floor?

The Court: From what point?

The Witness: From the front door.

The Court: Where is the court room?

The Witness: Upstairs, one floor above the main floor.

The Court: On the second floor?

The Witness: On the second floor.

The Court: And on the opposite side of the building?

The Witness: On the opposite side of the building. And I could see nobody,—well, I did not see up on the second floor, I just saw the ground floor.

Q. Yes. A. The lights were reduced, and there was nobody outside the building.

Q. Did you try to get across to the building through the front doors? A. I did.

Q. And they were locked? A. Yes.

Q. Did you try any other means of getting into the building? A. I did not.

Q. Finding you were unable to gain access through the front door of the building what did you then do? A. I concluded in my mind that the jury had been locked up for the night, and I went home.

Mr. Kavanagh: Of course, your Honor, I did not desire to object to the testimony of Mr. Ware, on the ground that I conscientiously felt that he had a right to explain his absence from the court room at the time that the jury brought in their verdict, but the fact remains that objection was made by counsel for the defense.

The Court: All right. You have got the benefit of all that. I think at this time we will take a recess say, for ten minutes. The prisoners may be allowed to remain.

Mr. Kavanagh: Do I take it at this time that your Honor is going to sentence the prisoners?

The Court: I think we may just as well.

Mr. Kavanagh: I respectfully request your Honor that sentence in this case be put over for one week.

The Court: All right, I will consider that application. I will announce my decision within ten minutes.

Mr. Kavanagh: Does your Honor desire to hear the grounds on which I urge it? I think your Honor had better hear them.

The Court: All right, please make them succinct, one, two, three, four.

Mr. Kavanagh: All right, your Honor. First, on the ground that the jury in this case found the defendants guilty——

The Court: You want to urge all the grounds you previously urged?

Mr. Kavanagh: Yes, and in addition to that I want to prepare at this time a motion in arrest of judgment and serve notice on the Prosecutor that I am going to move your Honor to arrest judgment in this case until I get a printed record of yesterday's proceedings.

The Court: Well, I will let you know in ten minutes.

(Recess for ten minutes.)

The Court: Mr. Kavanagh, the Court has given very deep consideration to your application for a continuance in the matter of the imposition of sentence for one week, for the purpose of preparing such motions as you deem advisable, in arrest of judgment. The Court feels that under all of the circumstances, to give you a continuance, we will say, until Monday morning next at ten o'clock, would be amply sufficient. That would give you today, tomorrow, Saturday and

Sunday, and in the matter of sentence therefore, Mr. Clerk, you will note the application of counsel for the defendants for a continuance will be allowed and granted until Monday morning next, July 1st, at ten o'clock, Daylight Saving Time.

Mr. Kavanagh: All right. Thank you, sir.

HUDSON COUNTY COURT OF OYER AND TERMINER.

STATE OF NEW JERSEY, *vs.* FRANK DONATO, GEORGE ORMSBY, VINCENT O'KEEFE and FRANK McNALLY, Defendants.	Before: Hon. Thomas H. Brown, J.

Jersey City, N. J., July 1, 1929.

Appearances:

JOHN DREWEN, Esq., Prosecutor of the Pleas, For the State.

WILLIAM A. KAVANAGH, Esq., EDWARD J. HART, Esq., For the Defendants.

The Court: I presume, Mr. Prosecutor, you are now ready to proceed?

Mr. Drewen: Yes.

The Court: And you move, I presume, that this court convene as a Court of Oyer and Terminer

in the absence of a Justice of the Supreme Court of this Circuit?

Mr. Drewen: Yes.

The Court: It is so ordered, Mr. Clerk.

The Prosecutor will now arraign the prisoners at the Bar.

(The prisoners were thereupon arraigned at the Bar.)

The Court: Now, Mr. Prosecutor, you move the imposition of sentence?

Mr. Drewen: If your Honor pleases, I wish to state to the Court that the defendant at the Bar, Frank Donato, has been convicted in this court of murder in the second degree; that the defendant at this Bar, Vincent O'Keefe, alias Brasch, has been convicted in this court of murder in the second degree; that the defendant at the Bar, George Ormsby, has been convicted in this Court of manslaughter, and the defendant, Frank McNally, at the Bar, has been convicted by this Court of manslaughter, and the State now moves your Honor for sentence of these defendants respectively.

Mr. Kavanagh: May it please the Court:

The Court: Mr. Kavanagh.

Mr. Kavanagh: At this time I desire to move your Honor for a new trial in the case of the State of New Jersey against Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe, alias Brasch, and I will now submit to your Honor and make known to your Honor in a very terse way, very brief manner, the reasons why a new trial should be granted to all of the defendants.

In the first place, the defendants, Donato, McNally, Ormsby and O'Keefe, alias Brasch, were indicted for the crime of murder. In the indictment there were three counts against these four defendants, a count for murder, a count for man-

slaughter, and a count for assault and battery, making in all three counts. I submit to your Honor that the reasons why your Honor at this time should grant these defendants a new trial is because the evidence adduced on the part of the State against all of these four defendants cannot support in anywise the verdict that was brought in by the jury against these four defendants. In other words, the evidence that was produced by the State to prove the counts in the indictment, to prove the indictment itself, to sustain the counts in the indictment fell far short of proving anything whatsoever against any of these four defendants.

I submit to your Honor that the verdict of the jury is not only not supported by the evidence adduced on the part of the State at the trial of these defendants, but the verdict of the jury in respect to all of these four defendants is absolutely inconsistent, is absolutely repugnant and it seems to me cannot stand the scrutiny of the Supreme Court or the Court of Errors and Appeals, and I say that because the evidence adduced on the part of the State, and all of the State's witnesses to sustain the allegations in this indictment against these four men, that evidence was all based on the same facts and same circumstances. In other words, the same evidence and the same circumstances, and the same facts that were alleged by the witnesses for the State were alleged against all of these defendants. In other words, if your Honor pleases, there was not a particle or a scintilla of evidence adduced on the part of any of the witnesses for the State to connect in anywise any one of these four defendants with the murder of this little girl, Catherine McGee. The State brought numerous witnesses at the trial of these

four men, which took three or four days. The State brought witnesses who swore that they were at the place of the alleged crime, namely, on the southeast corner of Fourth and Erie Streets in the City of Jersey City, at the time this little girl fell to the ground. The State brought numerous witnesses, I say, to prove that they were eight or ten feet, a little more or a little less, away from where this little girl was standing when she was struck, when she is alleged to have been struck, and when she is alleged to have fallen to the ground, and out of all these witnesses enumerated, making a dozen or more for the State, not one gave any testimony whatsoever, or swore in anywise that any one of these defendants, Donato, McNally, Ormsby or O'Keefe were present at the time the alleged blow was struck. There was an absolute, I say to your Honor in all respect, an absolute and fatal variance between the proof adduced on all of the State's case and the allegations in the indictment. In other words, at no time during the trial of the case on the part of the State were the allegations in that indictment sustained. And then when the defendants' case went, if your Honor pleases, there was proof beyond any peradventure whatsoever on the part of all these defendants and their witnesses, coupled up with the proof adduced on the part of the witnesses for the State on the cross-examination of counsel for the defendants, that none of these men were at that corner at the time that the assault or the murder of the little girl, Catherine McGee, took place.

Now, I submit, if your Honor pleases, and I am very sincere when I submit this fact, that in view of all those things that I have alleged, in view of the lack of evidence on the part of the

State respecting the proof of the crime against these defendants, I respectfully submit that a stay of execution should be granted to these defendants at this time, and that a new trial should be granted, and for another reason, may it please the court, I respectfully move for a new trial, and that reason is that these men went to trial on three counts of an indictment for murder, a count for murder, a count for manslaughter, and a count for assault and battery, and after the State's case was in, after all the evidence adduced on the part of all of the State's witnesses, and after all of the evidence was in and adduced on the part of the witnesses on the part of the defendants, and the defendants themselves, after counsel in and for the defendants had summed up, and after the Prosecutor of the Pleas of this County had summed up, the third count in the indictment was abandoned by the Prosecutor, and permitted to be abandoned by your Honor. I submit that inasmuch as all the evidence was in, and the State and the defendants had summed up, it was absolutely erroneous for the Court to permit the Prosecutor to abandon the third count in the indictment, the count for assault and battery, because all of the evidence for the State and all the evidence for the defendants being in, it was incumbent and it was up to the jury for the jury to pass upon all that evidence, and from a study of the evidence, from a determination of the evidence, come to the conclusion whether these four young men should not be convicted of a lesser degree of crime, namely, assault and battery, than manslaughter and murder in the first two counts. I say, it was erroneous on the part of the court to permit an abandonment of that count, because when it was done the defendants were deprived of

certain of their legal rights to have the jury pass upon the evidence in all the case to determine not only whether these defendants were guilty of murder or manslaughter, but also to determine from a study of the evidence whether they were guilty of the lesser crime of assault and battery. Those are the main reasons, if your Honor pleases, why I urge your Honor at this time to grant a new trial for these defendants.

The Court: The motion for a new trial will be denied.

Mr. Kavanagh: If I am entitled to an exception, which I do not think I am, your Honor, the matter being discretionary pure and simple on the part of your Honor, nevertheless——

The Court: If you are, the Court will be only too willing to reserve you that right.

(Exception allowed, signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

Mr. Kavanagh: Now, at this time, if your Honor pleases, I move for an arrest of the judgment in the case of the State of New Jersey against Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe, alias Brasch, and I hand to your Honor at this time a written statement of my causes and reasons for moving an arrest of judgment. I also hand to the Prosecutor a copy of the reasons and causes that I now hand to your Honor for an arrest of judgment. The defendants Frank Donato, Frank McNally, George——

The Court: I can read it over, Mr. Kavanagh. (Mr. Kavanagh hands paper to the Court.) It is as follows:

Motion for an Arrest of Judgment.

The defendants, Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe *alias* Brasch, move to Arrest Judgment in the above entitled case, and herewith urge the following grounds and reasons for the arrest of the same:—

1. Because Chapter 246 of the Laws of 1929 under which the jury was empanelled and struck for the trial of the indictment against the said defendants, which indictment contained three counts, namely, murder, manslaughter and assault and battery, operates to deprive the defendants of liberty and property without due process of law within the meaning of the Fourteenth Amendment of the Constitution of the United States.

2. Because the aforesaid Statute is also unconstitutional by reason of the fact that it is an *ex post facto* law inasmuch as it changes the method of regulating peremptory challenges and reduces the number thereof to which the defendants were entitled at the time of the alleged commission of the alleged crime and which subjects the defendants to an illegal disadvantage which was legally non-existent at the time of the alleged crime, and consequently works manifest wrong and injury to the said defendants.

3. Because the amended indictment and verdict thereon operate to deprive the defendants of their rights to enjoy life and liberty within the first section of Article One of the Constitution of the State of New Jersey and the Fourteenth Amendment to the Constitution of the United States, the defendants never having been called upon, by proper process, to appear and answer to the said amended indictment nor to plead thereto, and never having been given an opportunity, by due process, to defend the charges made in said amended indictment.

4. Because the amended indictment and the verdict thereon operate to deprive the defendants of their rights secured to them by the Constitution of the State of New Jersey to a trial by jury.

5. Because the amended indictment and the trial of the amended indictment and the charge of the Court, after the summing up of counsel, and the verdict of the jury, and the action of the Court in allowing the Prosecutor to abandon the third count in the indictment, namely, the count for assault and battery, after the trial had finished and all the evidence was in and the case was about to go to the jury, operate to deprive the defendants of the rights secured to them by the Fourteenth Amendment to the Constitution of the United States, to be secure in their liberty and property unless proceeded against by due process of law, because the effect of the charge of the Court, in the light of the amended indictment and the trial and the abandonment by the Prosecutor of the third count in the indictment was to unwarrantably and illegally remove from the consideration of the jury an offence for the alleged commission of which defendants had also been indicted, and hence to deprive the jury of the opportunity of finding the defendants guilty of a lesser crime than either of those crimes named in the verdict of the jury.

6. Because the defendants were tried by a jury unlawfully empanelled, said jury being empanelled in pursuance of Chapter 246 of the Laws of 1929, which Statute defendants urge is unconstitutional. The said Statute is unconstitutional because: (a) it is an *ex post facto* law, inasmuch as it operated to reduce the number of peremptory challenges to which the defendants were entitled at the time of the alleged commission of the

alleged offenses named in the indictments, thus operating to deprive the defendants of substantial rights which they had already acquired; (b) because the said Statute does not confer upon the defendants the benefit of due process of law; (c) because the Statute is based upon an illusory classification and is discriminatory in its effect. There are but two classes of crimes recognized in the criminal jurisprudence of the State of New Jersey, namely, high misdemeanors and misdemeanors. The crime of "murder" is but a single species of high misdemeanor. The Statute above referred to seeks to set out a special method of selecting juries for the trial of defendants charged with the high misdemeanor known as murder and seeks to place a different and a greater burden upon defendants charged with the commission of that crime than is imposed upon defendants charged with the commission of any other high misdemeanor.

If, however, the Statute in question be regarded as constitutional, nevertheless in the instant case it has been applied without warrant of law inasmuch as the jury created under its provisions and which was the jury which tried the defendants on the murder count in the indictment had no authority and no basis in law for undertaking the trial of the defendants on the count in the indictment for manslaughter nor on the count for assault and battery in the same indictment.

7. Under a strict construction of the law as applicable to this case assuming that the aforesaid Statute is constitutional, nevertheless the Court in proceeding with the trial of these defendants on the second and third counts in the indictment, namely, the counts for manslaughter and assault and battery, deprived the defendants of

the benefit of five peremptory challenges to which they would have been entitled had they been tried by a Struck Jury under the provisions of Section 76 of the Criminal Procedure Act (Revision of 1898), under which section only a Struck Jury could have been legally empanelled to try these defendants on a charge of manslaughter as contained in the indictment, and to further deprive them of the peremptory challenges to which they were entitled in any trial of the count against them for assault and battery, there being no provision in law whatsoever for their being tried by a Struck Jury on the assault and battery charge. Therefore in the trial of these defendants by a jury empanelled pursuant to Chapter 246 of the Laws of 1929, on all three counts in the indictment, on the counts for manslaughter and assault and battery as well as on the count for murder, the defendants have been deprived of due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States and the 1st Section of Article One of the Constitution of the State of New Jersey.

8. Because the verdict of the jury is inconsistent and illegal, the jury having found two of the defendants guilty of second degree murder and two of the defendants guilty of manslaughter on evidence arising out of the same set of facts and circumstances.

9. In view of the state of the pleadings, the indictment having been amended, and the third count of the indictment having been abandoned, and in view of the form of the verdict of the jury, the verdict of the jury cannot be applied to the amended indictment and the count abandoned therein, nor can the verdict of the jury be applied to the original indictment because the original

indictment was not before the jury, it having been amended and the third count for assault and battery having been dropped and abandoned after all the evidence of the entire case had been adduced and after counsel had summed up.

10. Because of the condition of the pleadings at the close of the case and the charge of the Court and the verdict of the jury it is manifest that the defendants did not have a fair trial guaranteed to them by the Constitution of the State of New Jersey nor were they proceeded against by due process of law as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States and the 1st Section of Article One of the Constitution of the State of New Jersey.

11. For all of the reasons urged during the course of the trial for the dismissal of the indictment, the objections to the amended indictment and the objections to the abandonment of the third count, to the various motions made to direct a verdict of Not Guilty in favor of the defendants, on account of all these and for all the previous causes and reasons advanced, it is respectfully submitted that there should be an Arrest of Judgment and a New Trial.

The Court: Your motion in arrest of Judgment will be denied, and your list of reasons will be ordered filed by the court, and the stenographer will incorporate them with the record in this case.

Mr. Kavanagh: I take an exception to your Honor's ruling.

(Exception allowed, signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

The Court: You may have it if you are entitled to it. Are there any other motions now?

Mr. Kavanagh: That is all, your Honor.

The Court: The jury in your case has given your crime the most thoughtful consideration. This was shown by the fact that the jury in your case was out for twelve hours, and their verdict was that you Frank Donato, and you Vincent O'Keefe, were guilty of murder in the second degree, and the verdict as to you George Ormsby, and you Frank McNally, is that you were guilty of manslaughter.

You on the night of November 6th, 1928, armed yourselves with baseball bats. You set out with these bludgeons to do serious bodily harm to a fellow citizen. The law charges you with and presumes your responsibility for the natural consequences of your act. In carrying out your dastardly plot an innocent child was the victim. Yours was the worst kind of murder. Your attack was a ruthless and ferocious attack, not only upon your unfortunate victim, but against law and order and against society. All of you defendants have long criminal records. Your records are here before me. You, George Ormsby, started off in January of 1918, in this city, and following that, the following year, 1919, you were charged with desertion by the United States Navy and returned to the Naval Authorities, and so on down to the present time.

And you, Vincent O'Keefe, you started off with your career of crime back in 1917, and there must be ten or fifteen different convictions of various kinds before me, and the same might be said of you, Frank McNally, and the same also might be said of you, Ormsby. I think I referred to you before, and also Donato.

The pernicious continuance of your criminal activities clearly demonstrate that you gentlemen have chosen deliberately a life of crime in preference to being well respected members of society. Your most audacious challenge to the forces of law and order in this community must be met. The jury has done its duty. It is now incumbent upon the Court to do its duty. Something must be done in this case to act as a deterrent to others, and the sentence of the Court, Frank Donato, as to you, is, you having been convicted of murder in the second degree, that you be confined to the State's Prison at Trenton, at hard labor, for a period of thirty years.

And as to you, Vincent O'Keefe, alias Brasch, the sentence of the law is that you be confined at hard labor in the State's Prison, at Trenton, for a period of thirty years.

And as to you, George Ormsby, you having been convicted of a lesser crime, to wit, that of manslaughter, the sentence of the Court is that you be sentenced to a term of ten years in State Prison, at Trenton, at hard labor.

And as to you, Frank McNally, the sentence of the court is that you likewise, you having been convicted of a lesser crime, to wit, that of manslaughter, be confined at hard labor in the State Prison at Trenton, for a period of ten years.

Mr. Kavanagh: I move that your Honor stay execution of these sentences in the cases of McNally, Ormsby, O'Keefe and Donato.

The Court: On what grounds?

Mr. Kavanagh: On the grounds that I previously urged.

The Court: The application is denied.

Mr. Kavanagh: I ask an exception.

The Court: You may have it, if you are entitled to it.

HUDSON COUNTY COURT OF OYER & TERMINER.

THE STATE OF NEW JERSEY *vs.* FRANK DONATO, GEORGE ORMSBY, VINCENT O'KEEFE and FRANK McNALLY.	Before: Hon. Thomas H. Brown, Judge.

Jersey City, N. J., July 10, 1929.

Appearances:

JOHN DREWEN, Esq., Prosecutor of the Pleas, by R. LEWIS KENNEDY, Esq., Legal Assistant.

WILLIAM A. KAVANAGH, Esq., for the Defendants.

(On Motion of Mr. Kennedy, the Court convened in Oyer and Terminer for the purpose of hearing an application that Mr. Kavanagh has to make.)

The Court: Let it appear that the defendants are in open court.

Mr. Kavanagh: In this case, I move your Honor at this time, to grant a Certificate of reasonable doubt, under Chapter 125 of the Laws of 1927, page 235, and I present to your Honor a Certificate that I have prepared.

Mr. Kennedy: In the matter of this application, the law governing the situation is as Mr. Kavanagh stated, Chapter 125 of the Laws of 1927, which reads as follows:

> "Pending the prosecution of a writ of error the defendant shall not be admitted to bail unless, upon application for the purpose made to the Court in which the conviction was had, he shall receive from that Court a certificate setting forth that there is reasonable doubt as to the validity of the conviction. Upon the allowance of such certificate it shall be the duty of the trial court to admit the defendant to reasonable bail, and not otherwise."

Now, the only case which appears to bear on the situation is State *vs.* Baer, 140 Atlantic Reporter, page 563, and at page 564, after citing the statute just read, the Court proceeds:

> "The sole question to be considered upon an application of this character is whether or not there is a reasonable doubt in the mind of the trial judge as to the validity of the conviction. It is neither the importance, character, nor gravity of the point involved, nor whether the point should, in the opinion of the trial judge, be reviewed by a higher court. It is the state of mind of the trial judge which must determine the question. He must have, not only a doubt, but a reasonable doubt; otherwise the certificate should be refused."

Unless Mr. Kavanagh has shown to you such facts as might raise a reasonable doubt in your mind as to the validity of the conviction, the application could not be granted by your Honor.

Mr. Kavanagh: If your Honor please, in answer to the statement of Mr. Kennedy respecting the matter of reasonable doubt raised in the mind

of your Honor in respect to the conviction against these four defendants (a conviction of second degree murder against two of them, namely against O'Keefe and Donato; a conviction of manslaughter against the other two defendants, McNally and Ormsby) I respectfully submit to your Honor, assuming and setting forth in minute detail all my arguments that I set forth at the conclusion of the State's case at the trial of this cause, and also at the conclusion of the entire case, respecting my motions for a direction of verdict of not guilty in behalf of these defendants; and also I reiterate and repeat minutely the arguments that I presented to your Honor at the time that these defendants were sentenced and when I applied to your Honor for an arrest of judgment and a new trial in this case.

Without going further into detail, but simply recapitulating the main facts that stand out in this case, before all the world, before your Honor and before the Prosecutor as the representative of the State of New Jersey in prosecuting criminal cases, I say again that there was not one scintilla of evidence, not one particle of evidence adduced on the part of the State by a witness, numerous witnesses (nineteen or twenty) that were brought here to testify by the State, not one particle of evidence on the part of any one of them to connect any one of these four defendants with striking little Catherine McGee with the bat, although all of ten witnesses came in here for the State and were sworn, and presented their evidence and swore they were within from five to ten feet of this little girl, at the corner of Fourth and Erie Streets in Jersey City on the night of November 6th, 1928, when she was alleged to have been struck by a bat and precipitated to the ground. Not one of these

witnesses who were present there, and eye-witnesses of the little girl falling, picked out any one of these four defendants as the man or men who struck the fatal blow.

Now, answering Mr. Kennedy, and saying to your Honor with all respect, if there is not reasonable doubt, all of the doubt in the world, in the mind of your Honor respecting the innocence of these men, what more can I say, when the State, with all its numerous witnesses, who were there at the scene and saw the thing enacted, not one of them picked out any of these four defendants who have been convicted of this alleged crime as the one who struck the little girl.

That is the main point in this case and surely on a consideration of these facts negatives absolutely the allegation contained in the indictment against these four defendants, that they first were guilty of malice aforethought in the slaying of this little girl, and the count of manslaughter for the slaying, and the count for assault and battery that they did certain other injuries perpetrated upon the little girl. Not one witness for the State picked them out, or swore they were present.

Certainly there must be, not a reasonable doubt from the evidence, but all the doubt in the world that any one of these four men is guilty of these crimes.

I submit this main point, if your Honor please.

And all of the evidence, the numerous exceptions taken by counsel for the defendant, the numerous alleged errors in law that were alleged and appear on the record; the count for assault and battery, at the instigation of the Prosecutor, was permitted by your Honor to be abandoned after the close of the entire case against these defendants; and the Prosecutor had summed up and

Counsel for the defendants had summed up when the count for assault and battery was permitted to be abandoned.

Then there are other numerous alleged errors and exceptions that I can point out in this lengthy record that we have here, show that surely a reasonable doubt would be putting it mildly—a reasonable doubt of the guilt of these defendants would be putting it mildly.

In view of all these facts, there is not only a reasonable doubt, but there is all the doubt in the world of the guilt of these defendants, and I respectfully submit to your Honor that as a man of very keen intelligence, long experience in the trial of criminal cases, long experience as a lawyer in all kinds of cases in the Courts of this County, and many years as Assistant Prosecutor trying criminal cases from murder down to the lowest degree of crime, the very lowest kind of indictment, and with your Honor's experience in all of these cases, I am sure after an inspection of the evidence adduced on the part of the State in the case against these four defendants, and after an inspection of the evidence in denial and the alibi and the other testimony that was brought out on the part of all of these four defendants, you will find they were innocent, that by the strongest kind of reasoning this would convince your Honor in all sincerity that these men are not guilty of the crime beyond a reasonable doubt, and that in the mind of your Honor, in view of all these facts, both on the part of the defense and on the part of the prosecution, a very strong doubt, not only a reasonable doubt, but a very strong doubt, using the word doubt without any adjective reasonable, of the innocence of these men in your mind, must necessarily follow, from what I have said, exist in

your Honor's mind. That was the purpose of Chapter 125 of the Laws of 1927 respecting the issuance of a certificate of reasonable doubt when the defendant had sought out a writ or error for a review of his conviction in the lower court. That was the purpose of the Act and I specifically set forth to your Honor that before this case was tried, another murder case in this County of our own, the Court of Errors, in the case of Zerinsi, where the man was tried on an indictment for murder, was convicted on one count in that indictment, a certificate of reasonable doubt was signed and issued and Zerinsi was admitted to bail pending his appeal to the Court of Errors and Appeals.

I submit, in view of the facts, and in view of the law of 1927 respecting Certificates of Reasonable Doubt, Chapter 125 of the Laws of 1927 overrules Section 140 of the Criminal Procedure Act, 2 Compiled Statutes, page 1867, which says that bail is not allowed in capital cases. The purpose of the Act was to overrule that very section of the Compiled Statutes respecting bail on a conviction in capital cases.

The Prosecutor has mentioned to you State *vs.* Baer, in 140 Atlantic Reporter, page 563, on a motion for a certificate of reasonable doubt. I admit that unless the Trial Judge has a reasonable doubt of the validity of the conviction, such certificate cannot be granted, but, as I have said to your Honor, there must exist in your mind a strong conviction, a strong doubt of the guilt of all of these four defendants. On page 564 in the case of State *vs.* Baer, in 140 Atlantic, the Court said that the Trial Judge must determine the question, and he must have not only a doubt, but a reasonable doubt as to the validity of the conviction otherwise a certificate should be refused.

I admit that, but my argument in this case is there was no evidence, there was no legal evidence to warrant a conviction by the jury of these four men, two of them for second degree murder and two for manslaughter, all arising out of the same indictment, all arising out of the same set of facts, all arising out of the same alleged evidence that was adduced on the part of the State—repugnant verdicts, absolutely inconsistent verdicts; when we are alleged to be there and were not proven to be there, alleged to be there and were not proven to have struck the fatal blow effecting a verdict of murder in the second degree; who were alleged to be there and who were alleged to have struck the fatal blow and were not proved by any witness of the State to have struck the fatal blow, effecting a manslaughter verdict—I submit to your Honor, and I submit it with great persistence, that the verdict in this case cannot stand in the Court of Errors and Appeals respecting errors, alleged errors and exceptions in this record, and in view of the fact that the verdict was entirely against the weight of the evidence, the verdicts were actually inconsistent, absolutely repugnant one against the other, and could not stand the scrutiny of the upper Courts. I submit to your Honor that there is all the doubt in the world, not only a reasonable doubt, of the guilt of these defendants for the reasons that I have given and have set forth in minute detail to your Honor.

Now, if your Honor please, I again refer you to the case I mentioned before of State *vs.* Villano in Vol. 140 of Atlantic Reporter, page 11, where it says:

> A prisoner is not deprived of any constitutional right by an act which went into

effect after the crime was committed, providing—providing—that such bail should only be allowed upon a certificate of reasonable doubt granted by the trial judge.

I also respectfully submit that under the protection of the case of State *vs.* Zurinsky bail was allowed, and he was allowed out on $5,000 bail pending his appeal, I say in view of what happened there, these men are absolutely entitled to a certificate of reasonable doubt and are entitled to bail in this case, pending appeal.

The Court: Let me ask you, what was the date of the alleged commission of this crime?

Mr. Kavanagh: November 6, 1928.

The Court: Well, this Act went into effect in March, 1927, March 19, 1927, so that this Act of 1927 was in full force and effect at the time and your reference *in re* Villano, where the application was made to Vice-Chancellor Backes, would not apply to this particular case, that is, as regards the bail feature of the case.

(Argument ended.)

The Court: This is an application, made informally rather than by a petition, for the granting of a certificate of reasonable doubt and for the admission of defendants to bail.

The Act of 1927 does not seem to prescribe any particular mode of procedure, whether by petition in regular solemn form, or by way of *ex-parte* application in open Court. Therefore, I do not feel that this Court needs to be concerned with that phase of the situation, because the Court's course of conduct in the matter will be entirely and must necessarily be governed by the Statute in this case (which has been referred to as Chapter 125 of the Laws of 1927), and par-

ticularly paragraph 5, which paragraph reads as follows:

> "Pending the prosecution of a writ of error the defendant shall not be admitted to bail unless, upon application for the purpose made to the court in which the conviction was had, he shall receive from that court a certificate setting forth that there is reasonable doubt as to the validity of the conviction. Upon the allowance of such certificate it shall be the duty of the trial court to admit the defendant to reasonable bail, and not otherwise."

This statement is one patterned after the New York statute which has been in existence for many years. This statement is statutory and is mandatory upon the Court, and is addressed entirely to the judicial discretion of the Court.

That in turn necessarily creates the question before this Court as to whether or not this Court has any reasonable doubt as to the legality and sufficiency of the conviction and the verdict of the Jury that has been rendered in this matter.

So far as this Court is concerned, the Court would be rather loath in the first instance to disturb a verdict of guilty that has been rendered by a jury of twelve men, where defendants have had the right of trial by a jury of their peers.

This jury gave serious consideration to this case for two or three days. During that period of time, various phases of this case were presented, not only by the State but by the defendants.

The defense was a total denial; coupled with that was a defense of an alibi.

I might say in passing, that their defense of an alibi fell down miserably, that evidently the Jury

must have been convinced of the fact that their alibi was miserably weak.

There was abundant proof upon the part of the police officers and others that they were at the scene at the time and place where the crime was alleged to have been committed. The statements of the defendants themselves, made to the police, which stood uncontradicted, was damning testimony against all of them.

By their own statement, that is not all of them, but as to one of them, they admitted going out purposely and buying baseball bats; so that absolutely showed, so far as that one defendant was concerned, his frame of mind, that they had set out with premeditation to commit a crime of a probable heinous nature, and they must be held responsible for the natural and probable consequences of their act, irrespective of the question of whether they went out with the design of visiting any bodily harm on this poor little girl, Catherine McGee.

I do not feel that I should arrogate to myself, although this Court has inherent power to set aside willy-nilly the verdict of a jury who have given this matter calm and deliberate consideration; I feel that the Courts and particularly judges should always be loath to set aside the verdict of a jury, unless they are convinced there was absolutely no evidence upon which the jury could have possibly predicated its opinion, or unless the judge feels that the verdict is the result of prejudice or passion, and there certainly is no evidence of that fact before the Court.

There was no feeling of any favor, or intensity pervading the court room, even so far as so-called court room demeanor was concerned, at the time of the trial. This Court was very solicitous in

seeing to it that the trial was proceeded with in an orderly quiet way, so that absolute judicial calm both pervaded the court room, and the conduct not only of counsel for the defendants but also of the prosecutor; not by way of any interest, but that is the way both Mr. Kavanagh and Mr. Hart who was associated with him, and also Mr. Drewen for the State were.

In addition to that, I do not feel, after reflecting and reviewing the case, considering all the evidence that is in, that there is any reasonable doubt in my mind as to the guilt of these defendants, and I therefore feel obliged to deny your application.

Mr. Kavanagh: I don't know if I am entitled to it, but will your Honor allow me an exception?

The Court: I don't think you are, but the Court will certainly allow you an exception.

(Exception allowed, signed and sealed accordingly.

THOMAS H. BROWN,
Judge.)

Certificate.

State of New Jersey, } ss.:
County of Hudson, }

I, Thomas H. Brown, Judge of the Hudson County Court of Oyer and Terminer, and the Judge who presided during the trial of the above cause, to wit, the case of the State of New Jersey against Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe, alias Brasch, certify that the foregoing contents are the entire record of the proceedings had upon the trial of the said cause, and that the same is returned by the plaintiffs-in-error therein with the writ of error bringing up the bill of exceptions.

Signed and sealed in this cause and dated September 17th, 1929.

Thomas H. Brown,
Judge.

(Seal)

Certificate.

State of New Jersey, } ss.:
County of Hudson, }

We, Norman F. Ware and James A. McKeever, official stenographers of the Hudson County Court of Oyer and Terminer, do hereby certify that the foregoing transcript contains the entire record of the proceedings and testimony taken by us at the trial of the case of the State of New Jersey *vs.* Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe, alias Brasch, on an indictment for Murder, which trial was held before the Honorable Thomas H. Brown, Judge of the Hudson County Court of Common Pleas, holding the Hudson County Court of Oyer and Terminer, in and for the County of Hudson, and a jury, on May 3, June 4, June 24, June 25, June 26, June 27, 1929 and July 1 and July 10th, 1929.

Norman F. Ware,
James A. McK[illegible]

Assignments of Error.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE STATE OF NEW JERSEY, Defendant-in-Error, *vs.* FRANK DONATO, FRANK MCNALLY, GEORGE ORMSBY and VINCENT O'KEEEFE alias BRASCH, Plaintiffs-in-Error.	On Indictment for Murder. On Error to Hudson Oyer and Terminer. Assignments of Error.

Afterwards, to wit, on the return day of said Writ of Error, before our Judges of our Court of Errors and Appeals in the last resort at Trenton, come the said Frank Donato, Frank McNally, George Ormsby, and Vincent O'Keefe alias Brasch, plaintiffs-in-error, by William A. Kavanagh, their attorney, and pray the reversal of the judgment of the Court below, and say, that in the record and proceedings aforesaid and also in the giving of judgment as aforesaid, there is manifest error, and herein assign error in the record therein as follows:—

1. Because the trial court denied defendant's motion to quash the indictment found against them notwithstanding the fact that the said indictment and the counts contained therein were inconsistent and ambiguous and did not set out with sufficient clearness, certainty and perspicuity the offense or charge against all of the said defendants; and did not specify with any clearness or certainty whatsoever whether the said defendants, or any of

them, or some of them, were charged either as principals or accessories in the commission of the crime charged in the three counts of the indictment.

2. Because the trial court over the objection of defendants allowed the State to amend the first count in the indictment charging murder.

3. Because the trial court overruled the challenge of the defendants to the array of jurors, defendants alleging that Chapter 246 of the Laws of 1929, under which chapter an order was made for the striking of the jury for the trial of the indictment against the defendants, violated the constitutional provision respecting *ex post facto* law; changed the method of regulating peremptory challenges; is special and discriminatory legislation; substitutes a new method for striking and empanelling a jury; does not provide for repeal of any provision inconsistent with the Criminal Procedure Act of 1898; deprived the defendants of a right which existed in the law when the alleged crime for which they were indicted was committed; is unconstitutional because it is a statute passed by the legislature after the commission of the alleged offense for which the defendants were indicted.

4. Because the trial court overruled the objection of the defendant's counsel to the following question put to the witness Janicke by the Prosecutor: "Q. During the evening of November 6th did you witness any fight or disturbance around the school building or on the sidewalk in front of the building?"

5. Because the trial court overruled the objection of defendants' counsel to the following ques-

tion put to the witness Janicke by the Prosecutor: "Q. What do you mean by fight, what happened?"

6. Because the trial court overruled the objection of defendants' counsel to the following question put to the witness Janicke by the Prosecutor: "Q. Did you or did you not disperse the fighters?"

7. Because the trial court overruled the objection of defendants' counsel to the following question put to the witness Janicke: "Q. At the time of this fight, this general disturbance, as you called it, was there any vehicle of any kind standing at the curbstone in front of the school?"

8. Because the trial court overruled the objection of defendants' counsel to the following question put to the witness Janicke by the Prosecutor: "Q. Now, did you see any men after you broke up this fight, as you say, did you see any men that had been in that fight get into this sedan?"

9. Because the trial court overruled the objection of the defendants' counsel to the following question put to the witness Janicke by the Prosecutor: "Q. Well, before it got to Fourth Street what happened to it, did it drive along Erie Street?"; and in refusing to strike out the answer to the said question.

10. Because the trial court overruled the objection of defendants' counsel to the following question put to the witness Janicke by the Prosecutor: "Q. At any time that night did you witness anything unusual occur on the corner of Fourth Street and Erie Street?"

11. Because the trial court overruled the objection of the defendants' counsel to the following question put to the witness Janicke by the Prose-

cutor: "Q. Was there anything peculiar about the face or the dress or the arrangement of anyone of them?"

12. Because the trial court refused to strike out all the testimony adduced by the witness Janicke on direct examination by the Prosecutor, counsel for defendants urging that all of said testimony was immaterial, irrelevant and incompetent to the issue, not evidential against defendants and not in anywise binding them or any of them.

13. Because the trial court overruled the objection of defendants' counsel to the following question put to the witness McFall by the Prosecutor: "Q. When you came outside what was happening in front of the school?"

14. Because the trial court refused to strike out the answer to the following question put to the witness McFall on cross-examination by defendants' counsel: "Q. Why did you say they were all in the car? A. I said there were a bunch in the car, four or five people"; because the said answer was not responsive to the question.

15. Because the trial court refused to strike out the answer of the witness McFall to the question put to him on cross-examination by defendants' counsel: "Q. Why didn't you speak to him that night if you knew him? A. Because I was not going to speak to him when he was out there causing a disturbance in the street."; for the reason that said answer was not responsive to the question and was an unwarranted assumption of fact, there being no evidence adduced by said witness that defendant Donato was causing a disturbance in the street at any time.

16. Because the trial court refused to strike out the answer of the witness Whelan to the ques-

tion put to him by the Prosecutor: "Q. While you were there on the corner of Fourth and Erie Streets, the southeast corner, tell the court and jury what happened? A. I was standing on the corner and some excitement had gone before that, and I was standing there to see what was going to happen. I had been downstairs. I was standing there talking to a young man going to school, who asked me what was the matter. I was explaining to him what was the matter, when a car pulled around the corner and stopped. When the car stopped in front of me, I stopped talking. I looked at the car. Just as I looked the door was opened and I heard somebody say, "Get that fellow in the cap." I was wearing a cap at the time. I hesitated a minute, looked up and down to see what was going on, whether I should go or not. I knew there had been some trouble. I was not going to stand there. I looked back and I seen a fellow going like that (illustrating)—not on top of me, but almost, and coming with a base-ball bat. I turned around, threw my hands and ran back about eight or nine steps, and I heard a crash. Maybe I did not take that many steps, maybe I did.——"; because any conversation held and explanations made by the said witness with and to any other person in the absence of said defendants was not binding or evidential against them.

17. Because the trial court refused to strike out the answer of the witness Whelan to the following question put to him by the Prosecutor: "Q. Now, you step down here, Whelan. Let this chair illustrate the automobile that you say stopped at the corner. All right. You sit in that chair. I am you. I am James Whelan standing there on the street talking. Now, you illustrate

to the jury just what was done by the person whom you say came out of the automobile with the baseball bat with regard to you? A. As the door opened I see somebody getting out and crouching. When I seen that at the same time I looked at this fellow crouching, getting out of the car I heard somebody yelling: "Get that cap there."

Mr. Kavanagh: I object and ask that it be stricken out.

The Court: "You want stricken out 'the man said, "Get that fellow with the cap.' "? A. "I do not know who said it."

18. Because the trial court refused to strike out the answer of the witness Whelan to the question put to him by the Prosecutor: "Q. After you saw this man get out of the car crouching, as you say, where did he go with reference to where you stood? A. You see, when I heard somebody yell 'get that fellow'—— Q. 'Get that fellow, that fellow with the cap'——"

Mr. Kavanagh: I object for the same reason.

The Court: It will be allowed. Exception.

19. Because the trial court overruled the objection of defendants' counsel to the following question put to the witness Reilly by the Prosecutor: "Q. What kind of a car was it? A. A Chandler Sedan."

20. Because the trial court overruled the objection of defendants' counsel to the following question put to witness Reilly by the Prosecutor: "Q. Did you see it after three o'clock?

"Mr. Kavanagh: Now, if your Honor please, I must object to this line of questions on the part of the prosecutor for the reasons that they are absolutely immaterial, incompetent and irrele-

vant for the purpose of this issue—the fact that an automobile was somewhere in Jersey City on some street—how is that competent to this trial? How is it material? How is that relevant?

"The Court: I will allow it.

"Mr. Kavanagh: I object and ask an exception."

21. Because the trial court refused to strike out the answer of the witness Mylott to the question put to him by the Prosecutor: "Q. What was it? A. I seen a car stop upon the center of the street on Fourth Street. Q. Louder. A. And two fellows—I think now, when the door opened and somebody said, 'Now, get that fellow with the cap'."

22. Because the trial court overruled the objection of defendants' counsel to the following question put to the witness Mylott by the Prosecutor: "Q. Tell us what you heard said by someone in the automobile at the time the door opened and the man got out with the bat? A. Get the fellow with the cap."

23. Because the trial court overruled the objection of defendants' counsel to the question put to the witness Mylott by the Prosecutor: "Q. When you came to that corner of Fourth and Erie Streets, shown on the photograph S-2, what happened; what did you see? A. As I came up to Fourth and Erie Street there, I was on the corner. I was about fifteen feet away from the store, from the National Grocery Store, and I heard some fellow holler, 'Come on, Vince', and the car went around the corner."

24. Because the trial court overruled the objection of defendants' counsel to the question put to the witness Black by the Prosecutor: "Q.

What did you hear then? A. Well, that was the time the car was standing still. Q. What did you hear? A. 'Come on Vince' they hollered.''

25. Because the trial court over the objection of defendants' counsel admitted in evidence an alleged written statement of the defendant Donato, which alleged statement was wholly unsigned by the said defendant and the admission of which in evidence was erroneous, improper and manifestly highly prejudicial and injurious to the legal rights of the said defendant.

26. Because the trial court over the objection of defendants' counsel admitted in evidence an alleged written statement of the defendant O'Keefe, which alleged statement was wholly unsigned by the said defendant and the admission of which in evidence was erroneous, improper and manifestly highly prejudicial and injurious to the legal rights of the said defendant.

27. Because the trial court over the objection of counsel for defendants at the close of the State's case refused to direct a verdict in favor of the defendants Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe, alias Brasch, notwithstanding the fact that there was no legal evidence adduced by the State and its witnesses to sustain the allegations contained in the indictment, and also no legal evidence adduced which in anywise connected any of the four defendants with the perpetration of the alleged crime charged.

28. Because the trial court over the objection of counsel for defendants at the close of the State's case refused to direct a verdict in favor of the defendant Frank Donato, notwithstanding the fact that there was no legal evidence adduced

by the State and its witnesses to sustain the allegations contained in the indictment, and also no legal evidence adduced which in any wise connected this defendant with the perpetration of the alleged crime charged.

29. Because the trial court over the objection of counsel for the defendants at the close of the State's case refused to direct a verdict in favor of the defendant Frank McNally, notwithstanding the fact that there was no legal evidence adduced by the State and its witnesses to sustain the allegations contained in the indictment, and also no legal evidence adduced which in any wise connected this defendant with the perpetration of the alleged crime charged.

30. Because the trial court over the objection of counsel for the defendants at the close of the State's case refused to direct a verdict in favor of the defendant George Ormsby, notwithstanding the fact that there was no legal evidence adduced by the State and its witnesses to sustain the allegations contained in the indictment, and also no legal evidence adduced which in any wise connected this defendant with the perpetration of the alleged crime charged.

31. Because the trial court over the objection of counsel for the defendants at the close of the State's case refused to direct a verdict in favor of the defendant Vincent O'Keefe alias Brasch, notwithstanding the fact that there was no legal evidence adduced by the State and its witnesses to sustain the allegations contained in the indictment, and also no legal evidence adduced which in any wise connected this defendant with the perpetration of the alleged crime charged.

32. Because the trial court overruled the objection of defendants' counsel to the following question put the defendant Donato on cross-examination: "Q. What did you work at, Donato?"

Mr. Kavanagh: I object to that, if your Honor please, on the ground that it is improper cross-examination and immaterial, irrelevant and incompetent.

The Court: The question is allowed.

Mr. Kavanagh: Exception.

Mr. Drewen: I say respectfully to your Honor ——

The Court: I am allowing the question. I understand the tenor of the question perfectly. There is no question in my mind about its admissibility.

Mr. Drewen: I should like to remind my adversary right now that any defendant is charged with committing an offense is offered as a witness, he is open for cross-examination on every aspect of the case.

Mr. Kavanagh: I deny that, if your Honor pleases, and I object again. Your Honor allows it and I take an exception.

The Court: I will allow it from the general angle that it is a question attacking his credibility.

Mr. Kavanagh: I ask an exception to that, if your Honor pleases, to your Honor's remark about attacking this witness' credibility."

33. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant Donato by the Prosecutor on cross-examination: "Q. What were you working at on the 6th day of November, 1928?"

34. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant Donato by the Prosecutor on cross-examination: "Q. Where were you that day?"

35. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant Donato by the Prosecutor on cross-examination: "Q. Where were you during the day; account for your whereabouts on the day of November 6, 1928?"

36. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant Donato by the Prosecutor on cross-examination: "Q. How were you interested in the election then?"

37. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant Donato by the Prosecutor on cross-examination: "Q. Why did you stop at No. 2 School?"

38. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant Donato by the Prosecutor on cross-examination: "Q. Who were they?"

39. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant Donato by the Prosecutor on cross-examination: "Q. You made a statement to the police, did you not?"

40. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant Donato by the

Prosecutor on cross-examination: "Q. You were questioned in the Second Precinct Station House, Jersey City, were you not? A. Yes. Q. By the police with regard to this charge against you?"

41. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant Donato by the Prosecutor on cross-examination: "Q. What do you mean when you say you were not convicted of crime? A. I was put on probation. Q. You were convicted, weren't you; you were found guilty? A. I pleaded guilty. Q. What do you mean when you say you were never convicted of crime, when you pleaded guilty to obtaining money under false pretenses?"

Mr. Kavanagh: There is a difference where a man comes in and pleads guilty to a crime and where a man pleads not guilty and is tried and found guilty.

The Court: Are you making a statement to me of your understanding of the law, or are you making an objection?

Mr. Kavanagh: I am making an objection to the purport of the question.

The Court: The objection is overruled.

Mr. Kavanagh: Exception".

42. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant Donato by the Prosecutor on cross-examination: "Q. Where were you on the 7th day of November?"

43. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant Donato by the Prosecutor on cross-examination: "Q. Don't you know, Donato, that you went to Easton, Penn-

sylvania, in this automobile after the slaying of the girl, and did not come back until the night?"

44. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant McNally by the Prosecution on cross-examination: "Q. On the 6th day of November, 1928, where did you live?"

45. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant McNally by the Prosecutor on cross-examination: "Q. Were you on the evening of November 6th, 1928, in Number Two School also, Jersey City?"

46. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant McNally by the Prosecutor on cross-examination: "Q. I show you a paper writing purporting to be a statement made by you to the police and ask you if that is your signature, Frank McNally? Will you look at it?"

47. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant McNally by the Prosecutor on cross-examination: "Q. You say that you signed this paper that I show, S-9 for identification? A. I signed a paper. Q. Where did you sign the paper? A. I signed it in the Second Precinct. Q. What kind of a paper was it you signed.

"Mr. Kavanagh: I object to that. The paper speaks for itself now.

Q. What kind of a paper was it you signed?

Mr. Kavanagh: I object to it your Honor.

The Court: The question is allowed.

Mr. Kavanagh: Exception".

48. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant McNally by the Prosecutor on cross-examination: "Q. I call to your attention this question contained in Exhibit S-9 for identification, which you say is your signature, 'you are charged with murder in that at 8.40 P. M. at Fourth and Erie Streets, Jersey City on November 6th, 1928, you were in a fight in which a baseball bat was used, causing the death of one Catherine McGee, age eight; what have you to say'; was that question asked you?"

49. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant McNally by the Prosecutor on cross-examination: "Q. I will ask it again. I read to you a question contained in the paper which you say bears your signature, the paper being S-9 for identification. This is the question purporting to be directed to you by Lieutenant Ballarene. 'You are charged with murder in that at 8.40 P. M. at Fourth and Grove Street on November 6th, 1928, you were in a fight in which a baseball bat was used, causing the death of one Catherine McGee, age eight; what have you to say', was that question asked you?"

50. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant McNally by the Prosecutor on cross-examination: "Q. I call your attention to this answer appearing after the question just read: 'Yes, there was some bats in the back rear seat and on the floor'. Did you state that to the police?"

51. Because the trial court overruled the objection of defendants' counsel to the following

question put to the defendant Ormsby by the Prosecutor on cross-examination: "Q. I show you a paper S-7 in evidence and ask you if the name 'George Ormsby', appended to the first sheet is your signature?"

52. Because the trial court sustained the objection of the Prosecutor to the following question put to the witness Meehan by defendants' counsel: "Q. What did you treat him for, Doctor?"

53. Because the trial court sustained the objection of the Prosecutor to the following question put to the witness Meehan by defendants' counsel: "Q. Did you prescribe for him?"

54. Because the trial court overruled the objection of defendants' counsel to the following question put to the witness Josephine Donato by the Prosecutor on cross-examination: "Q. And don't you know that on July 20th, 1928, you caused a warrant for his arrest to be issued out of the Courts of this County and applied for it through the Probation Office for desertion?"

55. Because the trial court overruled the objection of defendants' counsel to the following question put to the witness Josephine Donato by the Prosecutor on cross-examination: "Q. Don't you know that he was arrested on your warrant, charged with desertion, and that that arrest was made October 11, 1928."

56. Because the trial court overruled the objection of defendants' counsel to the following question put to the witness Josephine Donato by the Prosecutor on cross-examination: "Q. Do you remember that on the 25th of October he was arraigned on the charge of desertion before Judge

O'Regan in the Hudson County Court of Sessions?''

57. Because the trial court over the objection of defendants' counsel admitted in evidence an alleged statement of the defendant McNally.

58. Because the trial court over the objection of defendants' counsel during the course of the trial used the words ''confession'' and ''admission'' in referring to certain unsigned alleged statements of the defendants Donato and O'Keefe and signed alleged statements of the defendants Ormsby and McNally, when in fact the said unsigned alleged statements and the said signed alleged statements were not confessions or admissions but simply answers to certain questions propounded to the defendants by the police.

59. Because the trial court overruled the objection of defendants' counsel to the following question put to the witness Josephine Donato by the Prosecutor on cross-examination: ''Q. Mrs. Donato, do you know where the Probation Office is at Five Corners in Jersey City?''

60. Because the trial court overruled the objection of defendants' counsel to the following question put to the witness Josephine Donato by the Prosecutor on cross-examination: ''Q. You went to the Probation Office, did you not, on October 9th, 1928, at the time that your husband was on probation?''

61. Because the trial court overruled the objection of defendants' counsel to the following question put to the witness Josephine Donato by the Prosecutor on cross-examination: ''Q. You went there for the purpose of complaining to the Probation Officer about your husband, did you not?''

62. Because the trial court denied the motion of the defendants' counsel for directions of verdicts of acquittal for each of the defendants, Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe *alias* Brasch at the close of the entire case.

63. Because the trial court over the objection of defendants' counsel permitted the Prosecutor to abandon the count for assault and battery after the Prosecutor and counsel for defendants had summed up the case and immediately before the trial court charged the jury.

64. Because the trial court in its charge to the jury erroneously and improperly defined murder.

65. Because the trial court in its charge to the jury erroneously and improperly defined manslaughter.

66. Because the trial court erroneously charged the jury in part as follows: "Now, it is at the moment that this automobile turned the corner of Fourth and Erie Streets and at that point that the crime in this case is alleged by the State to have been committed and the testimony at that juncture as given by some of the State's witnesses is that the automobile here slowed down or stopped entirely after it had turned easterly into Fourth Street from Erie and had gone a distance of a few feet; that thereupon one or more of the occupants of the automobile armed with bats, left the car and walked directly to the State witness Whalen who at that time was standing on the sidewalk in front of the grocery store on the southeast corner of Fourth and Erie Streets."

67. Because the trial court erroneously charged the jury in part as follows: "I charge you that

the four occupants of that car, whoever you find them to be, were present at the scene of the crime."

68. Because the trial court erroneously charged the jury in part as follows: "If you find from the evidence that the defendant Ormsby halted or slowed the motion of that car so as to permit the assailant to leave it, that he aided and abetted the crime and is therefore a principal. And I charge you also that if you find from the evidence that the defendant McNally was the occupant of that car who uttered the words about getting the fellow with the cap, or in any other way aided or abetted or urged the assailants on in their attack upon Whelan, that he likewise is a principal."

69. Because the trial court erroneously charged the jury in part as follows: "Now as to flight; in a statement alleged to have been made by the defendant O'Keefe at the time of his arrest, there is contained an alleged admission by O'Keefe that after the killing of Catherine McGee he, with the party in the automobile went to Easton, Pennsylvania. That admission, if you find it to have been made by the defendant O'Keefe, can be considered by you only as against the defendant O'Keefe. And in this connection I charge you, if you find the fact to be that O'Keefe did actually go to Pennsylvania as the alleged admission purports to state, that you may consider such facts as evidence of flight from the scene of the crime and as bearing upon his guilt."

70. Because the trial court erroneously charged the jury in part as follows: "Now, gentlemen, the issue in this case I must fairly say to you is clear. These defendants are charged by indictment with the crime that I have defined to you."

71. Because the trial court in its charge to the jury improperly and erroneously defined the term "alibi."

72. Because the trial court erroneously charged the jury in part as follows: "I perhaps should say to you that whatever the evidence of alibi is in this case is brought out not on direct examination by defendants' own counsel but on cross-examination by the prosecutor. The defendants Ormsby and McNally have stated in their testimony that they were not present. Further than this, as to these two defendants there is no evidence of alibi."

73. Because the trial court erroneously charged the jury in part as follows: "In the event that your verdict shall be one of murder of the first degree, it will be necessary for you to bear in mind a statute of the State which I shall now read to you. This statute gives you as a jury in this case, if you find the defendants or any of them guilty of murder in the first degree, power to make a recommendation to the Court relative to the punishment which shall be inflicted."

74. Because the trial court erroneously charged the jury in part as follows: "In closing, the Court wants to impress upon the jury the importance of this case: I need not call your attention to the fact that this is an important case. It is important to the State as it represents organized society, because it strikes at the very right of human life."

75. Because the trial court erroneously failed and refused to charge the first request to charge of the defendants as requested: "The defendants, and each of them, in this case are presumed to be

innocent and the burden of proof is upon the State to prove them guilty of the charge contained in the indictment beyond a reasonable doubt, and if the evidence fails to convince you beyond a reasonable doubt of the guilt of these defendants, it is your duty to acquit."

76. Because the trial court erroneously failed and refused to charge the second request of the defendants as requested: "It is your duty to consider the evidence as to each of the defendants and to base your verdict as to each of such defendants upon the evidence affecting such defendants respectively, and if the evidence fails to convince you beyond a reasonable doubt of the guilt of such defendants respectively, it is your duty to acquit each of such defendants as to whom you have a reasonable doubt of guilt."

77. Because the trial court erroneously failed and refused to charge the third request of the defendants as requested: "In order for the jury to reach a verdict either of guilty or of not guilty, each and every juror must agree to such verdict, as the verdict must be unanimous and not by a mere majority vote of the jurors. It is the duty of each juror to vote to acquit if such juror is not convinced beyond a reasonable doubt of the defendant's guilt."

78. Because the trial court erroneously failed and refused to charge the fourth request of the defendants as requested: "In determining the guilt or innocence of the defendants and each of them, you may take into consideration not only the evidence in the case but also the lack of such evidence as you deem to be essential in determining beyond a reasonable doubt the defendant's guilt or innocence".

79. Because the trial court erroneously failed and refused to charge the fifth request of the defendants as requested: "The defense in this case of the four defendants, Vincent O'Keefe, Frank Donato, Frank McNally and Gorge Ormsby is that of complete innocence of the commission of the crime charged in the indictment and in conjunction therewith and in support thereof the defendants Vincent O'Keefe and Frank Donato, Frank McNally and George Ormsby have testified that they were not at the place where it was committed when it was committed and this feature of the evidence is termed in law an alibi, and if a reasonable doubt of guilt is raised even by inconclusive evidence of an alibi, the defendants, Vincent O'Keefe and Frank Donato, Frank McNally and George Ormsby and each of them, are entitled to the benefit of that doubt and to an acquittal."

80. Because the trial court erroneously failed and refused to charge the sixth request of the defendants as requested: "Certain motions for directions of verdict of acquittal were made to the Court by these defendants which the Court denied, but you must not consider the rulings of the Court as any determination of the facts in dispute or even as indications of the Court's opinion as to the facts, the Court having merely ruled that the evidence presents questions of fact for the jury rather than questions of law for the Court."

81. Because the trial court erroneously failed and refused to charge the seventh request of the defendants as requested: "In considering the question of the guilt of each of these defendants, I charge you that you are not to take into consideration the fact that such defendants have been

previously convicted of crime except so far as this fact may affect their credibility as witnesses in this case, and under no circumstance may you take into consideration as creating any probability that the defendants, or any of them, were guilty of the crime charged in this indictment, nor should it influence you in any way in passing upon their conduct or actions at the time mentioned in the indictment."

82. Because the trial court erroneously failed and refused to charge the eighth request of the defendants as requested: "Although the four defendants are indicted and tried jointly you must consider each defendant's case separately, applying the evidence to his case which, under this charge, is admissible against or binding upon him, and if you find that the State has not sustained the burden of proving such one or more of the defendant's guilt beyond a reasonable doubt, then such defendant or defendants is or are entitled to acquittal."

83. Because the trial court erroneously failed and refused to charge the ninth request of the defendants as requested: "In this case, presence of these defendants at the scene of the commission of the crime must be proven beyond a reasonable doubt, and if you have a reasonable doubt as to the presence of any of the defendants at such scene of the crime, then such defendant as you have a reasonable doubt to must be acquitted. Even if the jury should find that any particular defendant has not proven his absence from the scene of the crime, or his alibi, yet if the testimony as to such alibi creates such a degree of uncertainty as to his whereabouts that the jury is not satisfied beyond a reasonable doubt of his

guilt of the crime for which he is indicted, he is entitled to an acquittal."

84. Because the trial court erroneously failed and refused to charge the tenth request of the defendants as requested: "The jury is instructed that the indictment in this case is of itself a mere accusation or charge against the defendants, and creates no presumption whatever of their guilt and is not of itself any evidence of the guilt of the defendants who are presumed to be innocent in spite of the indictment."

85. Because the trial court erroneously failed and refused to charge the eleventh request of the defendants as requested: "The court instructs the jury that the law does not require that the defendants sustain the burden of proving themselves innocent, but the law imposes upon the prosecution the burden of proving that the defendants are guilty in manner and form as charged in the indictment beyond a reasonable doubt."

86. Because the trial court erroneously failed and refused to charge the twelfth request of the defendants as requested: "In the investigation of all matters of fact and in the weighing of evidence the jury has no right to assume the guilt of the defendants, and then try to reconcile the testimony with such theory, but it is the sworn duty of the jury to presume the innocence of the defendants and to give them the benefit of such presumption all through the trial and at every stage of the investigation of the evidence in the jury room until it is overcome, if it shall be overcome, by proof beyond a reasonable doubt, and the evidence in order to establish the guilt of the defendants must not only be consistent with the theory of guilt but must be inconsistent with and

exclude every reasonable theory of innocence, and as long as the jury are able to reconcile the evidence with any reasonable theory of the innocence of the defendants, the law makes it their duty so to do; and if, upon a full consideration of all the facts in the case, the jury entertain a reasonable doubt as to whether these defendants are guilty of the crime charged against them in the indictment, then you should find them not guilty."

87. Because the trial court erroneously failed and refused to charge the thirteenth request of the defendants as requested: "The court instructs the jury that it is the duty of the jury to consider the question of guilt or innocence of each of these defendants, bearing in mind that each defendant has the right to have the evidence separately applied to him, and that while the indictment charges them all jointly, the presumption as to each defendant is that he is innocent, and he has a right to have the evidence applied to him exactly as if he came to trial alone."

88. Because the trial court erroneously failed and refused to charge the fourteenth request of the defendants as requested: "The jury are further instructed, that if, upon a clear and impartial consideration of all the evidence in the case, they find that there are two reasonable theories equally supported by the testimony in the case, and that one of such theories is consistent with the innocence of the defendants, then it is the policy of the law, and the law makes it the duty of the jury to adopt that theory which is consistent with the innocence of the defendants, and to find the defendants not guilty."

89. Because the trial court erroneously failed and refused to charge the fifteenth request of the

defendants as requested: "You may take into consideration in determining the credibility to be given to the testimony of any witness, probabilities and reasonableness of the proof of all his statements in evidence, and if you find that the testimony of any witness is improbable in any essential part and is not believed by the jury the jury has the right to reject the remainder of such witnesses' testimony if it believes him unworthy of belief."

90. Because the trial court erroneously failed and refused to charge the sixteenth request of the defendants as requested: "The court further instructs the jury that if the jury in a prosecution for homicide, which this is, are not satisfied beyond a reasonable doubt, upon and after a consideration of all the evidence adduced in the case that the death of the little girl Catherine McGee was not an accident in the legal sense of that term and was not brought about by reason of some misadventure on the part of the little girl, then the jury should acquit the defendants."

91. Because the trial court erroneously failed and refused to charge the seventeenth request of the defendants as requested: "The court further instructs the jury that it is the duty of the State to prove beyond a reasonable doubt that intent to commit or perpetrate some unlawful act, of which the probable consequence might be bloodshed existed in the minds of the defendants at the time the little girl Catherine McGee is alleged to have been struck, and if the State does not sustain this burden, it is the duty of the jury to acquit; and moreover it is also the duty of the State to prove beyond a reasonable doubt that such alleged striking was not an accident in the legal sense of the

term, and also, that it was not caused or brought about by some misadventure on the part of the deceased."

92. Because the trial court erroneously failed and refused to charge the eighteenth request of the defendants as requested: "The court instructs the jury that mere presence at the scene of the perpetration of the alleged crime does not render a person *particeps criminis*. To constitute him a party to the criminal act there must be not only presence upon the scene but an actual participation; that is, 'an aiding and abetting in the crime committed'."

93. Because the trial court erroneously failed and refused to charge the nineteenth request of the defendants as requested: "If the jury shall find that the prosecution has not sustained the burden of proving beyond a reasonable doubt that the defendant Frank Donato is guilty, he is entitled to an acquittal."

94. Because the trial court erroneously failed and refused to charge the twentieth request of the defendants as requested: "If the jury shall find that the prosecution has not sustained the burden of proving beyond a reasonable doubt that the defendant Vincent O'Keefe is guilty, he is entitled to an acquittal".

95. Because the trial court erroneously failed and refused to charge the twenty-first request of the defendants as requested: "If the jury shall find that the prosecution has not sustained the burden of proving beyond a reasonable doubt that the defendant George Ormsby is guilty, he is entitled to an acquittal."

96. Because the trial court erroneously failed and refused to charge the twenty-second request

of the defendants as requested: "If the jury shall find that the prosecution has not sustained the burden of proving beyond a reasonable doubt that the defendant Frank McNally is guilty, he is entitled to an acquittal."

97. Because the trial court improperly and erroneously defined "malice".

98. Because the trial court declined to grant the motion of the defendants for an arrest of judgment and a new trial upon or some of the following grounds:—

1. Because Chapter 246 of the Laws of 1929 under which the jury was empaneled and struck for the trial of the indictment against the said defendants, which indictment contained three counts, viz., murder, manslaughter and assault and battery operates to deprive the defendants of liberty and property without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

2. Because the aforesaid statute is also unconstitutional by reason of the fact that it is an *ex post facto* law, inasmuch as it changes the method of regulating peremptory challenges and reduces the number thereof to which the defendants were entitled at the time of the alleged commission of the alleged crime, and which subjects the defendants to an illegal disadvantage which was legally non-existent at the time of the alleged crime, and consequently works manifest wrong and injury to the said defendants.

3. Because the amended indictment and the verdict thereon operate to deprive the defendants of their rights to enjoy life and liberty within the first section of Article One of the Constitution of the State of New Jersey and the Fourteenth

Amendment to the Constitution of the United States, the defendants never having been called upon, by proper process to appear and answer to the said amended indictment nor to plead thereto, and never having been given an opportunity by due process to defend the charge made in said amended indictment.

4. Because the amended indictment and the verdict thereon operate to deprive the defendants of their rights secured to them by the Constitution of the State of New Jersey to a trial by jury.

5. Because the amended indictment and the trial of the amended indictment and the charge of the court, after the summing up of counsel, and the verdict of the jury, and the action of the trial court in allowing the Prosecutor to abandon the third count in the indictment, namely, the count for assault and battery after the trial had finished and all of the evidence was in and the case was about to go to the jury, operate to deprive the defendants of the rights secured to them by the Fourteenth Amendment to the Constitution of the United States to be secure in their liberty and property unless proceeded against by due process of law, because the effect of the charge of the court in the light of the amended indictment and the trial and the abandonment by the Prosecutor of the third count in the indictment was to unwarrantably and illegally remove from the consideration of the jury an offense for the alleged commission of which the defendants had also been indicted, and hence to deprive the jury of the opportunity of finding the defendants guilty of a lesser crime than either of those crimes named in the verdict of the jury.

6. Because the defendants were tried by a jury unlawfully empaneled, said jury being empan-

eled in pursuance of chapter 246 of the Laws of 1929, which Statute the defendants urge is unconstitutional. The said Statute is unconstitutional: (a) It is an *ex post facto* law, inasmuch as it operates to reduce the number of peremptory challenges to which the defendants were entitled at the time of the alleged commission of the alleged offenses named in the indictment, thus operating to deprive the defendants of substantial legal rights which they already acquired; (b) because the said statute does not confer upon the defendants the benefit of due process of law; (c) because the Statute is based upon an illusory classification and is discriminatory in its effect. There are but two classes of crime recognized in the criminal jurisprudence of the State of New Jersey, namely, high misdemeanors and misdemeanors. The crime of murder is but a single species of high misdemeanor. The Statute above referred to seeks to set out a special method of selecting juries for the trial of defendants charged with the high misdemeanor known as murder and seeks to place a different and a greater burden upon defendants charged with the commission of that crime than is imposed upon defendants charged with the commission of any other high misdemeanor, if, however, the Statute be regarded as constitutional, nevertheless in the instant case it has been applied without warrant of law inasmuch as the jury created under its provisions and which was the jury which tried the defendants on the murder count in the indictment had no authority and no basis in law for undertaking the trial of the defendants on the count in the indictment for manslaughter nor on the count for assault and battery in the same indictment.

7. Under a strict construction of the law as applicable to this case assuming that the afore-

said statute is constitutional, nevertheless the court in proceeding with the trial of these defendants on the second and third counts in the indictment, namely the counts for manslaughter and assault and battery, deprived the defendants of the benefit of five peremptory challenges to which they would have been entitled had they been tried by a struck jury under the provisions of Section 76 of the Criminal Procedure Act (Revision of 1898) under which section only a struck jury could have been legally empaneled to try these defendants on the charge of manslaughter as contained in the indictment and to further deprive them of the ten peremptory challenges to which they were entitled to in any trial of the count against them for assault and battery, there being no provision in law whatsoever for their being tried by a struck jury on the assault and battery charge. Therefore in the trial of these defendants by a jury empaneled pursuant to Chapter 246 of the Laws of 1929, on all three counts in the indictment, on the counts for manslaughter and assault and battery, as well as on the count for murder, the defendants have been deprived of due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States and the first section of Article One of the Constitution of the State of New Jersey.

8. Because the verdict of the jury is inconsistent and illegal, the jury having found two of the defendants guilty of second degree murder and two of the defendants guilty of manslaughter on evidence arising out of the same set of facts and circumstances.

9. In view of the state of the pleadings, the indictment having been amended and the third

count of the indictment having been abandoned, and in view of the form of the verdict of the jury, the verdict of the jury cannot be applied to the original indictment because the original indictment was not before the jury, it having been amended and the third count for assault and battery having been dropped and abandoned after all the evidence of the entire case had been adduced and after counsel had summed up.

10. Because the condition of the pleadings at the close of the case and the charge of the court and the verdict of the jury it is manifest that the defendants did not have a fair trial guaranteed to them by the Constitution of the State of New Jersey nor were they proceeded against by due process of law as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States and the first section of Article One of the Constitution of the State of New Jersey.

11. For all of the reasons urged during the course of the trial for the dismissal of the indictment, the objections to the amended indictment and the objections to the abandonment of the third count, to the various motions to direct a verdict of not guilty in favor of the defendants, on account of all these and for all the previous causes and reasons advanced, it is respectfully submitted that there should be an arrest of judgment and a new trial.

Plaintiffs-in-error pray that the judgment of their conviction may be reversed for the aforesaid reasons.

WILLIAM A. KAVANAGH,
Attorney for and of Counsel with Plaintiffs-in-Error, Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe alias Brasch.

Service of the within Assignments of Error is hereby acknowledged this 17th day of August, 1929.

JOHN DREWEN,
Prosecutor of the Pleas.

Additional Assignments of Error.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE STATE OF NEW JERSEY, Defendant-in-Error, *vs.* FRANK DONATO, FRANK MCNALLY, GEORGE ORMSBY and VINCENT O'KEEFE alias BRASCH, Plaintiffs-in-Error.	On Indictment for Murder. On Error to Hudson Oyer and Terminer. Additional Assignments of Error.

Afterwards, to wit, on the return day of said Writ of Error, before our Judges of our Court of Errors and Appeals, in the last resort at Trenton, come the said Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe alias Brasch, plaintiffs-in-error, by William A. Kavanagh, their Attorney, and pray the reversal of the judgment of the Court below, and say, that in the record and proceedings aforesaid and also in the giving of judgment aforesaid, there is manifest error, and herein assign additional error in the record as follows:

99. Because the trial court erroneously charged the jury in part as follows: "Any person who in committing or attempting to commit an unlawful act against the peace of the State of which the probable consequence may be bloodshed, shall kill another, shall be guilty of murder."

100. Because the trial court erroneously charged the jury in part as follows: "As to murder of the second degree, the law is that any

person who, in committing any unlawful act against the peace of the State, of which the probable consequence may be bloodshed, shall kill another, shall be guilty of murder."

101. Because the trial court erroneously charged the jury in part as follows: "I charge you now, gentlemen, that the violent swinging of a baseball bat or similar heavy instrument at the head or body of another person with intent to do injury to that person is an act against the peace of the State, the probable consequence of which is bloodshed."

102. Because the trial court erroneously charged the jury in part as follows: "And I charge you also that, if as a result of such an act death ensues, the crime is murder, so that the killing here is presumed to be malicious and is therefore murder unless and until the person or persons by whom such act was committed produce the facts and circumstances from which justification, excuse or extenuation may arise. If all that you can find in this case is that the defendants or any of them are guilty of murder only because the killing was the unlawful act of such defendant or defendants as you may find to have perpetrated it, and because you find no evidence in the case to justify, excuse or extenuate the killing, you can only find the degree of such killing to be murder in the second degree."

103. Because the trial court erroneously charged the jury in part as follows: "If you find from the evidence that the defendant Ormsby halted or slowed the motion of that car so as to permit the assailant to leave it, then he aided and abetted the crime and therefore is a principal. And I charge you also that if you find from the

evidence that the defendant McNally was the occupant of the car who uttered the words about getting the fellow with the cap, or in any other way aided or abetted or urged the assailant on in their attack upon Whalen, then he likewise is a principal."

104. Because the trial court erroneously charged the jury in part as follows: "For the purpose of this case, it is sufficient to say to you, that manslaughter exist where one or more persons kill another, upon a sudden transport of passion, or heat of blood, upon a reasonable provocation and without malice."

105. Because the trial court erroneously charged the jury in part as follows: "The Court will now define an alibi. The word alibi means in plain English 'elsewhere' that is to say, that the defendants claim that they were not at the scene of this crime, but they were elsewhere and consequently that they did not and could not have committed the crime charged against them. I perhaps should say to you that whatever evidence of alibi is in this case is brought out not on direct examination by defendants' own counsel, but in the cross-examination by the Prosecutor."

106. Because the trial court erroneously charged the jury in part as follows: "In this connection, however, gentlemen, I deem it incumbent upon me to inform you that the Court of Pardons of this State now has the power to change or reduce or abolish or set aside whatever results you may have arrived at in this matter whether you fix the penalty at life imprisonment or not. The Court of Pardons can reduce or change it but it cannot make the punishment any greater than you make it."

Additional Assignments of Error.

107. Because the trial court erroneously charged the jury in part as follows: "I also at this time charge you that you may convict or acquit any or all of these defendants. In your verdict in this case, whatever that verdict is to be you may deal individually or collectively with these four defendants. What I mean by that is this: that all four defendants may be acquitted, all four may be convicted; or you may convict one or more of them or acquit one or more of them. This is true whether your verdict be one of murder in the first degree, or of murder of the second degree or of manslaughter."

108. Because the trial court erroneously charged the jury in part as follows: "I have been requested by counsel for the defendant to make certain charges to you, and I will charge you in compliance with those requests.

PLAINTIFFS-IN-ERROR PRAY THAT THE JUDGMENT OF THEIR CONVICTION MAY BE REVERSED FOR THE AFORESAID ADDITIONAL REASONS.

WILLIAM A. KAVANAGH,
Attorney for and of counsel with
Plaintiffs-in-Error, Frank Donato,
Frank McNally, George Ormsby
and Vincent O'Keefe alias Brasch.

Service of the within Additional Assignments of Error is hereby acknowledged this 18th day of September, 1929.

JOHN DREWEN,
Prosecutor of the Pleas.

Specifications of Causes for Reversal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE STATE OF NEW JERSEY, Defendant-in-Error, *vs.* FRANK DONATO, FRANK MCNALLY, GEORGE ORMSBY and VINCENT O'KEEFE, alias BRASCH, Plaintiffs-in-Error.	On Indictment for Murder. On Error to Hudson Oyer and Terminer. Specifications of Causes for Reversal.

And the said plaintiffs-in-error, Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe, alias Brasch, by William A. Kavanagh, their attorney, hereby specify the causes in the record relied upon for relief or reversal in the aforesaid cause as follows:

1. Because the trial court denied defendants' motion to quash the indictment found against them notwithstanding the fact that the said indictment and counts contained therein were inconsistent and ambiguous and did not set out with sufficient clearness, certainty and perspicuity the offense or charge against all of the said defendants; and did not specify with any clearness or certainty whatsoever whether the said defendants, or any of them, or some of them, were charged either as principals or accessories in the commission of the crime charged in the three counts of the indictment.

2. Because the trial court over the objection of defendants allowed the State to amend the first count in the indictment charging murder.

3. Because the trial court overruled the challenge of the defendants to the array of jurors, defendants alleging that Chapter 246 of the Laws of 1929, under which chapter an order was made for the striking of the jury for the trial of the indictment against the defendants, violated the constitutional provision respecting *ex post facto* law; changed the method of regulating peremptory challenges; is special and discriminatory legislation; substitutes a new method for striking and empanelling a jury; does not provide for repeal of any provision inconsistent with the Criminal Procedure Act of 1898; deprived the defendants of a right which existed in the law when the alleged crime for which they were indicted was committed; is unconstitutional because it is a statute passed by the legislature after the commission of the alleged offense for which the defendants were indicted.

4. Because the trial court overruled the objection of defendants' counsel to the following question put to the witness Janicke by the Prosecutor: "Q. During the evening of November 6th, did you witness any fight or disturbance around the school building or on the sidewalk in front of the building?"

5. Because the trial court overruled the objection of defendants' counsel to the following question put to the witness Janicke by the Prosecutor: "Q. What do you mean by fight, what happened?"

6. Because the trial court overruled the objection of defendants' counsel to the following question put to the witness Janicke by the Prosecutor: "Q. Did you or did you not disperse the fighters?"

7. Because the trial court overruled the objection of defendants' counsel to the following ques-

tion put to the witness Janicke by the Prosecutor: "Q. At the time of this fight, this general disturbance, as you called it, was there any vehicle of any kind standing at the curbstone in front of the school?"

8. Because the trial court overruled the objection of defendants' counsel to the following question put to the witness Janicke by the Prosecutor: "Q. Now, did you see any men after you broke up this fight, as you said, did you see any men that had been in that fight get into this sedan?"

9. Because the trial court overruled the objection of defendants' counsel to the following question put to the witness Janicke by the Prosecutor: "Q. Well, before it got to Fourth Street what happened to it, did it drive along Erie Street?"; and in refusing to strike out the answer to the said question.

10. Because the trial court overruled the objection of defendants' counsel to the following question put to the witness Janicke by the Prosecutor: "Q. At any time that night did you witness anything unusual occur on the corner of Fourth Street and Erie Street?"

11. Because the trial court overruled the objection of defendants' counsel to the following question put to the witness Janicke by the Prosecutor: "Q. Was there anything peculiar about the face or the dress or the arrangement of any one of them?"

12. Because the trial court refused to strike out all the testimony adduced by the witness Janicke on direct examination by the Prosecutor, counsel for defendants urging that all of said testimony

was immaterial, irrelevant and incompetent to the issue, not evidential against defendants and not in anywise binding them or any of them.

13. Because the trial court overruled the objection of defendants' counsel to the following question put to the witness McFall by the Prosecutor: "Q. When you came outside what was happening in front of the school?"

14. Because the trial court refused to strike out the answer to the following question put to the witness McFall on cross-examination by defendants' counsel: "Q. Why did you say they were all in the car? A. I said there were a bunch in the car, four or five people."; because the said answer was not responsive to the question.

15. Because the trial court refused to strike out the answer of the witness McFall to the question put to him on cross-examination by defendants' counsel: "Q. Why didn't you speak to him that night if you knew him? A. Because I was not going to speak to him when he was out there causing a disturbance in the street."; for the reason that said answer was not responsive to the question and was an unwarranted assumption of fact, there being no evidence adduced by said witness that defendant Donato was causing a disturbance in the street at any time.

16. Because the trial court refused to strike out the answer of the witness Whalen to the question put to him by the Prosecutor: "Q. While you were there on the corner of Fourth and Erie Street, the southeast corner, tell the court and jury what happened? A. I was standing on the corner and some excitement had gone before that, and I was standing there to see what was going

to happen. I had been down stairs. I was standing there talkng to a young man going to school who asked me what was the matter. I was explaining to him what was the matter, when a car pulled around the corner and stopped. When the car stopped in front of me, I stopped talking. I looked at the car. Just as I looked the door was opened and I heard somebody say, "Get that fellow in the cap." I was wearing a cap at the time. I hesitated a minute, looked up and down to see what was going on, whether I should go or not. I knew there had been some trouble. I was not going to stand there. I looked back and I seen a fellow going like that (illustrating)—not on top of me, but almost, and coming with a baseball bat. I turned around, threw my hands and ran back about eight or nine steps, and I heard a crash. Maybe I did not take that many steps, maybe I did. * * *"; because any conversation held and explanations made by the said witness with and to any other person in the absence of the said defendants was not binding or evidential against them.

17. Because the trial court refused to strike out the answer of the witness Whalen to the following question put to him by the Prosecutor: "Q. Now, you step down here, Whalen. Let this chair illustrate the automobile that you say stopped at the corner. All right. You sit in that chair. I am you. I am James Whalen standing there on the street talking. Now, you illustrate to this jury just what was done by the person whom you say came out of the automobile with the baseball bat with regard to you? A. As the door opened I see somebody getting out and crouching. When I seen that at the same time I looked at this fellow crouch-

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ing, getting out of the car I heard somebody yelling: 'Get that cap there.'

Mr. Kavanagh: I object and ask that it be stricken out.

The Court: You want stricken out 'the man said, "get that fellow with the cap" '? Was that one of the men that got out of the automobile?

The Witness: I do not know who said it."

18. Because the trial court refused to strike out the answer of the witness Whalen to the question put to him by the Prosecutor: "Q. After you saw this man get out of the car crouching, as you say, where did he go with reference to where you stood? A. You see, when I heard somebody yell 'get that fellow'— Q. 'Get that fellow, that fellow with the cap'——

Mr. Kavanagh: I object for the same reason.

The Court: It will be allowed."

19. Because the trial court overruled the objection of defendants' counsel to the following question put to the witness Reilly by the Prosecutor: "Q. What kind of a car was it? A. A Chandler Sedan."

20. Because the trial court overruled the objection of defendants' counsel to the following question put to the witness Reilly by the Prosecutor: "Q. Did you see it after three o'clock?

Mr. Kavanagh: Now, if your Honor please, I must object to this line of questions on the part of the Prosecutor for the reasons that they are absolutely immaterial, incompetent and irrelevant for the purpose of this issue—the fact that an automobile was somewhere in Jersey City on some street—how is that competent to this trial? How is that material? How is that relevant?

The Court: I will allow it.

Mr. Kavanagh: I object and ask an exception."

21. Because the trial court refused to strike out the answer of the witness Mylott to the question put to him by the Prosecutor: "Q. What was it? A. I seen a car stop upon the center of the street on Fourth Street. Q. Louder. A. And two fellows—I think now, when the door opened and somebody said, 'Now, get that fellow with the cap'."

22. Because the trial court overruled the objection of defendants' counsel to the following question put to the witness Mylott by the Prosecutor: "Q. Tell us what you heard said by some one in the automobile at the time the door opened and the man got out with the bat? A. Get the fellow with the cap."

23. Because the trial court overruled the objection of defendants' counsel to the question put to the witness Mylott by the Prosecutor: "Q. When you came to that corner of Fourth and Erie Street, shown on the photograph S-2, what happened; what did you see? A. As I came up to Fourth and Erie Street there, I was on the corner. I was about fifteen feet away from the store, from the National Grocery Store, and I heard some fellow holler, 'Come on, Vince,' and the car went around the corner."

24. Because the trial court overruled the objection of defendants' counsel to the question put to the witness Black by the Prosecutor: "Q. What did you hear then? A. Well, that was the time the car was standing still. Q. What did you hear? A. 'Come on Vince' they hollered."

25. Because the trial court over the objection of defendants' counsel admitted in evidence an

alleged written statement of the defendant Donato, which alleged statement was wholly unsigned by the said defendant and the admission of which in evidence was erroneous, improper and manifestly highly prejudicial and injurious to the legal rights of the said defendant.

26. Because the trial court over the objection of defendants' counsel admitted in evidence an alleged written statement of the defendant O'Keefe, which alleged statement was wholly unsigned by the said defendant and the admission of which in evidence was erroneous, improper and manifestly highly prejudicial to the legal rights of the said defendant.

27. Because the trial court over the objection of counsel for defendants at the close of the State's case refused to direct a verdict in favor of the defendants Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe alias Brasch, notwithstanding the fact there was no legal evidence adduced by the State and its witnesses to sustain the allegations contained in the indictment, and also no legal evidence adduced which in anywise connected any of the four defendants with the perpetration of the alleged crime charged.

28. Because the trial court over the objection of counsel for defendants at the close of the State's case refused to direct a verdict in favor of the defendant Frank Donato, notwithstanding the fact that there was no legal evidence adduced by the State and its witnesses to sustain the allegations contained in the indictment, and also no legal evidence adduced which in anywise connected this defendant with the perpetration of the alleged crime charged.

29. Because the trial court over the objection of counsel for defendants at the close of the State's case refused to direct a verdict in favor of the defendant Frank McNally, notwithstanding the fact there was no legal evidence adduced by the State and its witnesses to sustain the allegations contained in the indictment, and also no legal evidence adduced with which this defendant could be connected with the alleged crime charged.

30. Because the trial court over the objection of counsel for defendants at the close of the State's case refused to direct a verdict in favor of the defendant George Ormsby, notwithstanding the fact that there was no legal evidence adduced by the State and its witnesses to sustain the allegations contained in the indictment, and also no legal evidence adduced which in anywise connected this defendant with the perpetration of the alleged crime charged.

31. Because the trial court over the objection of counsel for defendants at the close of the State's case refused to direct a verdict in favor of the defendant Vincent O'Keefe alias Brasch, notwithstanding the fact that there was no legal evidence adduced by the State and its witnesses to sustain the allegations contained in the indictment, and also no legal evidence adduced which in anywise connected this defendant with the perpetration of the alleged crime charged.

32. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant Donato on cross-examination: "Q. What do you work at Donato?"

"Mr. Kavanagh: I object to that, if your Honor pleases, on the ground that it is improper cross-

examination and immaterial, irrelevant and incompetent.

The Court: The question is allowed.

Mr. Kavanagh: Exception.

Mr. Drewen: I say respectfully to your Honor——

The Court: I am allowing the question. I understand the tenor of the question perfectly. There is no question in my mind about its admissibility.

Mr. Drewen: I should like to remind my adversary right now that any defendant is charged with committing an offense is offered as a witness, he is open for cross-examination on every aspect of the case.

Mr. Kavanagh: I deny that, if your Honor pleases, and I object again. Your Honor allows it and I take an exception.

The Court: I will allow it from the general angle that it is a question attacking his credibility.

Mr. Kavanagh: I ask an exception to that, if your Honor pleases, to your Honor's remark about attacking this witness' credibility."

33. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant Donato by the Prosecutor on cross-examination: "Q. What were you working at on the 6th day of November, 1928?"

34. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant Donato by the Prosecutor on cross-examination: "Q. Where were you on that day?"

35. Because the trial court overruled the objection of defendants' counsel to the following

question put to the defendant Donato by the Prosecutor on cross-examination: "Q. Where were you during the day; account for your whereabouts on the day of November 6, 1928?"

36. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant Donato by the Prosecutor on cross-examination: "Q. How were you interested in the election then?"

37. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant Donato by the Prosecutor on cross-examination: "Q. Why did you stop at No. 2 School?"

38. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant Donato by the Prosecutor on cross-examination: "Q. Who were they?"

39. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant Donato by the Prosecutor on cross-examination: "Q. You made a statement to the police, did you not?"

40. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant Donato by the Prosecutor on cross-examination: "Q. You were questioned in the Second Precinct Station House, Jersey City, were you not? A. Yes. Q. By the police with regard to this charge against you?"

41. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant Donato by the

Prosecutor on cross-examination: "Q. What do you mean when you say you were not convicted of crime? A. I was put on probation. Q. You were convicted, weren't you; you were found guilty? A. I pleaded guilty. Q. What do you mean when you say you were never convicted of crime, when you pleaded guilty to obtaining money under false pretenses?

Mr. Kavanagh: There is a difference where a man comes in and pleads guilty to a crime and where a man pleads not guilty and is tried and found guilty.

The Court: Are you making a statement to me of your understanding of the law or are you making an objection?

Mr. Kavanagh: I am making an objection to the purport of the question.

The Court: The objection is overruled.

Mr. Kavanagh: Exception."

42. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant Donato by the Prosecutor on cross-examination: "Q Where were you on the 7th day of November?"

43. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant Donato by the Prosecutor on cross-examination: "Q. Don't you know, Donato, that you went to Easton Pennsylvania, in this automobile after the slaying of the girl, and did not come back until the night?"

44. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant McNally by the Prosecutor on cross-examination: "Q. On the 6th day of November, 1928, where did you live?"

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45. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant McNally by the Prosecutor on cross-examination: "Q. Were you on the evening of November 6th, 1928, in Number Two School also, Jersey City?"

46. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant McNally by the Prosecutor on cross-examination: "Q. I show you a paper writing purporting to be a statement by you to the police and ask you if that is your signature, Frank McNally? Will you look at it?"

47. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant McNally by the Prosecutor on cross-examination: "Q. You say that you signed this paper that I show, S-9 for identification? A. I signed a paper. Q. Where did you sign the paper? A. I signed it in the Second Precinct. Q. What kind of a paper was it you signed? Mr. Kavanagh: I object to that. The paper speaks for itself now. Q. What kind of a papers was it you signed? Mr. Kavanagh: I object to it, your Honor. The Court: The question is allowed. Mr. Kavanagh: Exception."

48. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant McNally by the Prosecutor on cross-examination: "Q. I call to your attention this question contained in Exhibit S-9 for identification, which you say is your signature, you are charged with murder in that at 8.40 P. M. at Fourth and Erie Streets, Jersey City, on November 6th, 1928, you were in a fight in which a baseball bat was used, causing the

death of one Catherine McGee, age eight; what have you to say; was that question asked you?"

49. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant McNally by the Prosecutor on cross-examination: "Q. I will ask it again. I read to you a question contained in the paper which you say bears your signature, the paper being S-9 for identification. This is the question purporting to be directed to you by Lieutenant Ballarene. You are charged with murder in that at 8.40 P. M. at Fourth and Grove Street on November 6th, 1928, you were in a fight in which a baseball bat was used, causing the death of one Catherine McGee, age eight; what have you to say, was that question asked you?"

50. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant McNally by the Prosecutor on cross-examination: "Q. I call your attention to this answer appearing after the question just read: Yes, there was some bats in the back rear seat and on the floor. Did you state that to the police?"

51. Because the trial court overruled the objection of defendants' counsel to the following question put to the defendant Ormsby by the Prosecutor on cross-examination: "Q. I show you a papers S-7 in evidence and ask you if the name 'George Ormsby' appended to the first sheet is your signature?"

52. Because the trial court sustained the objection of the Prosecutor to the following question put to the witness Meehan by defendants' counsel: "Q. What did you treat him for, Doctor?"

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53. Because the trial court sustained the objection of the Prosecutor to the following question put to the witness Meehan by the defendants' counsel: "Q. Did you prescribe for him?"

54. Because the trial court overruled the objection of defendants' counsel to the following question put to the witness Josephine Donato by the Prosecutor on cross-examination: "Q. And don't you know that on July 20th, 1928, you caused a warrant for his arrest to be issued out of the courts of this county and applied for it

55. Because the trial court overruled the objection of defendants' counsel to the following question put to the witness Josephine Donato by the Prosecutor on cross-examination: "Q. Don't you know that he was arrested on your warrant, charged with desertion, and that that arrest was made October 11, 1928."

56. Because the trial court overruled the objection of defendants' counsel to the following question put to the witness Josephine Donato by the Prosecutor on cross-examination: "Q. Do you remember that on the 25th of October he was arraigned on the charge of desertion before Judge O'Regan in the Hudson County Court of Sessions?"

57. Because the trial court over the objection of defendants' counsel admitted in evidence an alleged statement of the defendant McNally.

58. Because the trial court over the objection of defendants' counsel during the course of the trial used the words "confession" and "admission" in referring to certain unsigned alleged statements of the defendants Donato and O'Keefe and signed alleged statements of the defendants

Ormsby and McNally, when in point of fact the said unsigned alleged statements and the said signed alleged statements were not confessions or admissions but simply anwers to certain questions propounded to the defendants by the police.

59. Because the trial court overruled the objection of defendants' counsel to the following question put to the witness Josephine Donato by the Prosecutor on cross-examination: "Q. Mrs. Donato, do you know where the Probation Office is at Five Corners, Jersey City?"

60. Because the trial court overruled the objection of defendants' counsel to the following question put to the witness Josephine Donato by the Prosecutor on cross-examination: "Q. You went to the Probation Office, did you not, on October 9th, 1928, at the time that your husband was on probation?"

61. Because the trial court overruled the objection of defendants' counsel to the following question put to the witness Josephine Donato by the Prosecutor on cross-examination: "Q. You went there for the purpose of complaining to the Probation Officer about your husband, did you not?"

62. Because the trial court denied the motion of the defendants' counsel for directions of verdicts of acquittal for each of the defendants, Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe alias Brasch at the end of the entire case.

63. Because the trial court over the objection of defendants' counsel permitted the Prosecutor to abandon the count of assault and battery, after the Prosecutor and counsel for defendants

had summed up the case and immediately before the trial court charged the jury.

64. Because the trial court in its charges to the jury erroneously and improperly defined murder.

65. Because the trial court in its charge to the jury erroneously and improperly defined manslaughter.

66. Because the trial court erroneously charged the jury in part as follows: "Now, it is at the moment that this automobile turned the corner of Fourth and Erie Street and at that point that the crime in this case is alleged by the State to have been committed and the testimony at that juncture as given by some of the State's witnesses is that the automobile here slowed down or stopped entirely after it had turned easterly into Fourth Street from Erie and had gone a distance of a few feet; that thereupon one or more of the occupants of the automobile armed with bats, left the car and walked directly to the State witness Whalen who at that time was standing on the sidewalk in front of the grocery store on the southeast corner of Fourth and Erie."

67. Because the trial court erroneously charged the jury in part as follows: "I charge you that the four occupants of that car, whoever you find them to be, were present at the scene of the crime."

68. Because the trial court erroneously charged the jury in part as follows: "If you find from the evidence that the defendant Ormsby halted or slowed the motion of that car so as to permit the assailant to leave it, that he aided and abetted the crime and is therefore a principal. And I charge you also that if you find from the evidence that

the defendant McNally was the occupant of the car who uttered the words about getting the fellow with the cap, or in any other way aided or abetted or urged the assailant on in their attack upon Whalen, that he likewise is a principal."

69. Because the trial court erroneously charged the jury in part as follows: "Now as to flight: in a statement alleged to have been made by the defendant O'Keefe at the time of his arrest, there is contained an alleged admission by O'Keefe that after the killing of Catherine McGee he, with the party in the automobile went to Easton, Pennsylvania. That admission, if you find it to have been made by the defendant O'Keefe, can be considered by you only as against the defendant O'Keefe. And in this connection I charge you, if you find the fact to be that O'Keefe did actually go to Pennsylvania as the alleged admission purports to state, that you may consider such facts as evidence of flight from the scene of the crime and as bearing upon his guilt."

70. Because the trial court erroneously charged the jury in part as follows: "Now Gentlemen, the issue in this case I must fairly say to you is clear. These defendants are charged by indictment with the crime that I have defined to you."

71. Because the trial court in its charge to the jury improperly and erroneously defined the term "alibi."

72. Becase the trial court erroneously charged the jury in part as follows: "I perhaps should say to you that whatever the evidence of alibi is in this case is brought out not on direct examination by defendants' own counsel, but on cross-examination by the prosecutor. The defendants

Ormsby and McNally have stated in their testimony that they were not present. Further than this, as to these two defendants, there is no evidence of alibi."

73. Because the trial court erroneously charged the jury in part as follows: "In the event that your verdict shall be one of murder of the first degree, it will be necessary for you to bear in mind a statute of the State which I shall now read to you. This statute gives you as a jury in this case, if you find the defendants or any of them guilty of murder in the first degree, power to make a recommendation to the Court relative to the punishment which shall be inflicted."

74. Because the trial court erroneously charged the jury in part as follows: "In closing, the Court wants to impress upon the jury the importance of this case. I need not call your attention to the fact that this is an important case. It is important to the State as it represents organized society, because it strikes at the very right of human life."

75. Because the trial court erroneously failed and refused to charge the first request to charge of the defendants as requested: "The defendants, and each of them, in this case are presumed to be innocent and the burden of proof is upon the State to prove them guilty of the charge contained in the indictment beyond a reasonable doubt, and if the evidence fails to convince you beyond a reasonable doubt of the guilt of these defendants, it is your duty to acquit."

76. Because the trial court erroneously failed and refused to charge the second request of the defendants as requested: "It is your duty to consider the evidence as to each of the defendants

and to base your verdict as to each of such defendants upon the evidence affecting such defendants respectively, and if the evidence fails to convince you beyond a reasonable doubt of the guilt of such defendants respectively, it is your duty to acquit each of such defendants as to whom you have a reasonable doubt of guilt."

77. Because the trial court erroneously failed and refused to charge the third request of the defendants as requested: "In order for the jury to reach a verdict either of guilty or of not guilty, each and every juror must agree to such verdict, as the verdict must be unanimous and not by a mere majority vote of the jurors. It is the duty of each juror to vote to acquit if such juror is not convinced beyond a reasonable doubt of the defendant's guilt."

78. Because the trial court erroneously failed and refused to charge the fourth request of the defendants as requested: "In determining the guilt or innocence of the defendants, and each of them, you may take into consideration not only the evidence in the case but also the lack of such evidence as you deem to be essential in determining beyond a reasonable doubt the defendant's guilt or innocence."

79. Because the trial court erroneously failed and refused to charge the fifth request of the defendants as requested: "The defense in this case of the four defendants, Vincent O'Keefe, Frank Donato, Frank McNally and George Ormsby, is that of complete innocence of the commission of the crime charged in the indictment and in conjunction therewith and in support thereof the defendants Vincent O'Keefe and Frank Donato, Frank McNally and George Ormsby have testified

that they were not at the place where it was committed when it was committed, and this feature of the evidence is termed in law an alibi, and if a reasonable doubt of guilt is raised even by inconclusive evidence of an alibi, the defendants, Vincent O'Keefe, and Frank Donato, Frank McNally and George Ormsby and each of them, are entitled to the benefit of that doubt and to an acquittal.

80. Because the trial court erroneously failed and refused to charge the sixth request of the defendants as requested: "Certain motions for directions of verdicts of acquittal were made to the Court by these defendants which the Court denied, but you must not consider the rulings of the Court as any determination of the facts in dispute or even as indications of the Court's opinion as to the facts, the Court having merely ruled that the evidence presents questions of fact for the jury rather than questions of law for the Court."

81. Because the trial court erroneously failed and refused to charge the seventh request of the defendants as requested: "In considering the question of the guilt of each of these defendants, I charge you that you are not to take into consideration the fact that such defendants have been previously convicted of crime except so far as this fact may affect their credibility as witnesses in this case, and under no circumstance may you take into consideration as creating any probability that the defendants, or any of them, were guilty of the crime charged in this indictment, nor should it influence you in any way in passing upon their conduct or actions at the time mentioned in the indictment."

82. Because the trial court erroneously failed and refused to charge the eighth request of the

defendants as requested: "Although the four defendants are indicted and tried jointly you must consider each defendant's case separately, applying the evidence to his case which, under this charge, is admissible against or binding upon him, and if you find that the State has not sustained the burden of proving such one or more of the defendants' guilt beyond a reasonable doubt, then such defendant or defendants is or are entitled to acquittal."

83. Because the trial court erroneously failed and refused to charge the ninth request of the defendants as requested: "In this case, presence of these defendants at the scene of the commission of the crime must be proved beyond a reasonable doubt, and if you have a reasonable doubt as to the presence of any of the defendants at such scene of the crime, then such defendant as you have a reasonable doubt to must be acquitted. Even if the jury should find that any particular defendant has not proven his absence from the scene of the crime, or his alibi, yet if the testimony as to such alibi creates such a degree of uncertainty as to his whereabouts that the jury is not satisfied beyond a reasonable doubt of his guilt of the crime for which he is indicted, he is entitled to an acquittal."

84. Because the trial court erroneously failed and refused to charge the tenth request of the defendants as requested: "The jury is instructed that the indictment in this case is of itself a mere accusation or charge against the defendants, and creates no presumption whatever of their guilt and is not of itself any evidence of the guilt of the defendants who are presumed to be innocent in spite of the indictment."

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85. Because the trial court erroneously failed and refused to charge the eleventh request of the defendants as requested: "The Court instructs the jury that the law does not require that the defendants sustain the burden of proving themselves innocent, but the law imposes upon the prosecution the burden of proving that the defendants are guilty in manner and form as charged in the indictment beyond a reasonable doubt."

86. Because the trial court erroneously failed and refused to charge the twelfth request of the defendants as requested: "In the investigation of all matters of fact and in the weighing of evidence the jury has no right to assume the guilt of the defendants, and then try to reconcile the testimony with such theory, but it is the sworn duty of the jury to presume the innocence of the defendants and to give them the benefit of such presumption all through the trial and at every stage of the investigation of the evidence in the jury room until it is overcome, if it shall be overcome, by proof beyond a reasonable doubt, and the evidence in order to establish the guilt of the defendants must not only be consistent with the theory of guilt but must be inconsistent with and exclude every reasonable theory of innocence, and as long as the jury are able to reconcile the evidence with any reasonable theory of the innocence of the defendants, the law makes it their duty so to do; and if, upon a full consideration of all the facts in the case, the jury entertain a reasonable doubt as to whether these defendants are guilty of the crime charged against them in the indictment, then you should find them 'not guilty'."

87. Because the trial court erroneously failed and refused to charge the thirteenth request of

the defendants as requested: "The court instructs the jury that it is the duty of the jury to consider the question of guilt or innocence of each of these defendants, bearing in mind that each defendant has the right to have the evidence separately applied to him, and that while the indictment charges them all jointly, the presumption as to each defendant is that he is innocent, and he has a right to have the evidence applied to him exactly as if he came to trial alone."

88. Because the trial court erroneously failed and refused to charge the fourteenth request of the defendants as requested: "The jury are further instructed, that if, upon a fair and impartial consideration of all the evidence in the case, they find that there are two reasonable theories equally supported by the testimony in the case, and that one of such theories is consistent with the innocence of the defendants, then it is the policy of the law, and the law makes it the duty of the jury to adopt that theory which is consistent with the innocence of the defendants, and to find the defendants not guilty."

89. Because the trial court erroneously failed and refused to charge the fifteenth request of the defendants as requested: "You may take into consideration in determining the credibility to be given to the testimony of any witness, probabilities and reasonableness of the proof of all his statements in evidence, and if you find that the testimony of any witness is improbable in any essential part and is not believed by the jury, the jury has the right to reject the remainder of such witnesses' testimony if it believes him unworthy of belief."

90. Because the trial court erroneously failed and refused to charge the sixteenth request of the

defendant as requested: "The court further instructs the jury that if the jury in a prosecution for homicide, which this case is, are not satisfied beyond a reasonable doubt, upon and after a consideration of all the evidence adduced in the case that the death of the little girl Catherine McGee was not an accident in the legal sense of that term, and was not caused and brought about by reason of some misadventure on the part of the little girl, then the jury should acquit the defendants."

91. Because the trial court erroneously failed and refused to charge the seventeenth request of the defendants as requested: "The court further instructs the jury that it is the duty of the State to prove beyond a reasonable doubt that intent to commit or perpetrate some unlawful act, of which the probable consequence might be bloodshed existed in the minds of the defendants at the time that the little girl Catherine McGee alleged to have been struck, and if the State does not sustain this burden, it is the duty of the jury to acquit; and moreover it is also the duty of the State to prove beyond a reasonable doubt that such alleged striking was not an accident in the legal sense of the term, and also that it was not caused or brought about by some misadventure on the part of the deceased."

92. Because the trial court erroneously failed and refused to charge the eighteenth request of the defendants as requested: "The court instructs the jury that mere presence at the scene of the perpetration of the alleged crime does not render a person *particeps criminis*. To constitute him a party to the criminal act there must be not only presented upon the scene but an actual par-

ticipation; that is, 'an aiding and abetting in the crime committed'."

93. Because the trial court erroneously failed and refused to charge the nineteenth request of the defendants as requested: "If the jury shall find that the prosecution has not sustained the burden of proving beyond a reasonable doubt that the defendant Frank Donato is guilty, he is entitled to an acquittal."

94. Because the trial court erroneously failed and refused to charge the twentieth request of the defendants as requested: "If the jury shall find that the prosecution has not sustained the burden of proving beyond a reasonable doubt that the defendant Vincent O'Keefe is guilty, he is entitled to an acquittal."

95. Because the trial court erroneously failed and refused to charge the twenty-first request of the defendants as requested: "If the jury shall find that the prosecution has not sustained the burden of proving beyond a reasonable doubt that the defendant George Ormsby is guilty, he is entitled to an acquittal."

96. Because the trial court erroneously failed and refused to charge the twenty-second request of the defendants as requested: "If the jury shall find that the prosecution has not sustained the burden of proving beyond a reasonable doubt that the defendant Frank McNally is guilty, he is entitled to an acquittal."

97. Because the trial court improperly and erroneously defined malice.

98. Because the trial court declined to grant the motion of the defendants for an arrest of

judgment and a new trial upon one or some of the following grounds:

1. Because Chapter 246 of the Laws of 1929 under which the jury was impanelled and struck for the trial of the indictment against the said defendants, which indictment contained three counts, viz., murder, manslaughter and assault and battery, operates to deprive the defendants of liberty and property without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

2. Because the aforesaid statute is also unconstitutional by reason of the fact that it is an *ex post facto* law, inasmuch as it changes the method of regulating peremptory challenges and reduces the number thereof to which the defendants were entitled at the time of the alleged commission of the alleged crime, and which subjects the defendants to an illegal disadvantage which was legally non-existent at the time of the alleged crime, and consequently works manifest wrong and injury to the said defendants.

3. Because the amended indictment and the verdict thereon operate to deprive the defendants of their rights to enjoy life and liberty within the first section of Article One of the Constitution of the State of New Jersey and the Fourteenth Amendment to the Constitution of the United States, the defendants never having been called upon, by proper process to appear and answer to the said amended indictment nor to plead thereto, and never having been given an opportunity by due process to defend the charge made in said amended indictment.

4. Because the amended indictment and the verdict thereon operate to deprive the defendants

of their rights secured to then by the Constitution of the State of New Jersey to a trial by jury.

5. Because the amended indictment and the trial of the amended indictment and the charge of the Court, after the summing up of counsel, and the verdict of the jury, and the action of the trial court in allowing the prosecutor to abandon the third count in the indictment, namely, the count for assault and battery, after the trial had finished and all of the evidence was in and the case was about to go to the jury, operate to deprive the defendants of the rights secured to them by the Fourteenth Amendment to the Constitution of the United States to be secure in their liberty and property unless proceeded against by due process of law, because the effect of the charge of the Court in the light of the amended indictment and the trial and the abandonment by the Prosecutor of the third count in the indictment was to unwarrantably and illegally remove from the consideration of the jury an offense for the alleged commission of which the defendants had also been indicted, and hence to deprive the jury of the opportunity of finding the defendants guilty of a lesser crime than either of those crimes named in the verdict of the jury.

6. Because the defendants were tried by a jury unlawfully empanelled, said jury being empanelled in pursuance of Chapter 246 of the Laws of 1929, which statute the defendants urge is unconstitutional. The said statute is unconstitutional because: (a) It is an *ex post facto* law, inasmuch as it operates to reduce the number of peremptory challenges to which the defendants were entitled at the time of the alleged commission of the alleged offenses named in the indictment, thus

operating to deprive the defendants of substantial legal rights which they already acquired; (b) because the said statute does not confer upon the defendants the benefit of due process of law; (c) because the statute is based upon an illusory classification and is discriminatory in its effect. There are but two classes of crimes recognized in the criminal jurisprudence of the State of New Jersey, namely, high misdemeanors and misdemeanors. The crime of murder is but a single species of high misdemeanor. The statute above referred to seeks to set out a special method of selecting juries for the trial of defendants charged with the high misdemeanor known as murder and seeks to place a different and a greater burden upon defendants charged with the commission of that crime than is imposed upon defendants charged with the commission of any other high misdemeanor. If, however, the statute be regarded as constitutional, nevertheless in the instant case it has been applied without warrant of law, inasmuch as the jury created under its provisions and which was the jury which tried the defendants on the murder count in the indictment had no authority and no basis in law for undertaking the trial of the defendants on the count in the indictment for manslaughter nor on the count for assault and battery in the same indictment.

7. Under a strict construction of the law as applicable to this case, assuming that the aforesaid statute is constitutional, nevertheless the Court in proceeding with the trial of these defendants on the second and third counts in the indictment, namely, the counts for manslaughter and assault and battery, deprived the defendants of the benefit of five peremptory challenges to which they

would have been entitled had they been tried by a struck jury under the provisions of Section 76 of the Criminal Procedure Act (Revision of 1898), under which section only a struck jury could have been legally empanelled to try these defendants on the charge of manslaughter as contained in the indictment, and to further deprive them of the ten peremptory challenges to which they were entitled to in any trial of the count against them for assault and battery, there being no provision in law whatsoever for their being tried by a struck jury on the assault and battery charge. Therefore, in the trial of these defendants by a jury empanelled pursuant to Chapter 246 of the Laws of 1929, on all three counts in the indictment, on the counts for manslaughter and assault and battery as well as on the count for murder, the defendants have been deprived of due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States and the first section of Article One of the Constitution of the State of New Jersey.

8. Because the verdict of the jury is inconsistent and illegal, the jury having found two of the defendants guilty of second degree murder and two of the defendants guilty of manslaughter on evidence arising out of the same set of facts and circumstances.

9. In view of the state of the pleadings, the indictment having been amended, and the third count of the indictment having been abandoned, and in view of the form of the verdict of the jury, the verdict of the jury cannot be applied to the amended indictment and the count abandoned therein, nor can the verdict of the jury be applied to the original indictment because the original in-

dictment was not before the jury, it having been amended and the third count for assault and battery having been dropped and abandoned after all the evidence of the entire case had been adduced and after counsel had summed up.

10. Because of the condition of the pleadings at the close of the case and the charge of the Court and the verdict of the jury it is manifest that the defendants did not have a fair trial guaranteed to them by the Constitution of the State of New Jersey nor were they proceeded against by due process of law as guaranteed to them by the Fourteenth Amendment of the United States and the first section of Article One of the Constitution of the State of New Jersey.

11. For all of the reasons urged during the course of the trial for the dismissal of the indictment, the objections to the amended indictment and the objections to the abandonment of the third count, to the various motions to direct a verdict of not guilty in favor of the defendants, on account of all these and for all the previous causes and reasons advanced, it is respectfully submitted that there should be an arrest of judgment and a new trial.

99. Because manifest injustice was done to the defendants by the whole charge of the Court.

100. That it was impossible for the jury to learn from the charge of the Trial Court what facts, if proved to their satisfaction without a reasonable doubt, would warrant the jury in convicting the defendants.

101. The defendants assign as error and specify as causes for reversal under the provisions of

Chapter 349 of the Laws of 1921, that the verdict was against the weight of the evidence.

102. The defendants further assign as error that there was no creditable testimony to support the verdict.

10 103. Because in other respects the verdict and judgment were erroneous.

104. That the charge of the Trial Court to the jury as to the law of the case was confusing, inconsistent, contradictory and misleading.

105. Because the charge of the Trial Court was calculated to produce to the minds of the jurors misapprehension and mistake as to the law of the case.

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106. Because the evidence could not satisfy a considerate mind beyond a reasonable doubt that the defendants Vincent O'Keefe and Frank Donato are guilty of murder in the second degree and that the defendants George Ormsby and Frank McNally are guilty of manslaughter.

107. Because the verdict of the jury is repugnant, conflicting, inconsistent, contradictory and illegal for when the evidence attempted to be in-
30 troduced by the State against all of the four defendants to sustain the allegations in the said indictments against them, is examined, scrutinized, studied and considered, it must be clearly patent and manifestly plain that the verdict of second degree murder against the defendants Vincent O'Keefe and Frank Donato and the verdict of manslaughter against the defendants George Ormsby and Frank McNally is absolutely without any legal justification and without any basis
40 in law or in fact.

Specifications of Causes for Reversal.

108. The verdict of the jury was contrary to the evidence in view of the contradictions, improbabilities and insufficiencies in the testimony.

109. The verdict was the result of mistake, passion, prejudice and partiality.

Plaintiffs-in-error pray that the judgment of their conviction may be reversed for the aforesaid reasons.

WILLIAM A. KAVANAGH,
Attorney for and of Counsel with Plaintiffs-in-Error, Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe, alias Brasch.

Service of the within Specifications of Causes for Reversal is hereby acknowledged this 17th day of August, 1929.

JOHN DREWEN,
Prosecutor of the Pleas.

Additional Specifications of Causes for Reversal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE STATE OF NEW JERSEY, Defendant-in-Error, *vs.* FRANK DONATO, FRANK MCNALLY, GEORGE ORMSBY and VINCENT O'KEEFE alias BRASCH, Plaintiffs-in-Error.	On Indictment for Murder. On Error to Hudson Oyer and Terminer. Additional Specifications of Causes for Reversal.

And the said plaintiffs-in-error, Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe alias Brasch, by William A. Kavanagh, their attorney, in addition to the causes hereinbefore specified and set out in the record relied upon for relief or reversal, herein specify the following additional causes for reversal in the record to be relied upon for relief or reversal in the aforesaid cause, as follows:

110. There is manifest error in this, because the trial court erroneously charged the jury in part as follows: "Any person who in committing or attempting to commit an unlawful act against the peace of the State of which the probable consequence may be bloodshed, shall kill another, shall be guilty of murder."

111. There is manifest error in this, because the trial court erroneously charged the jury in part as follows: "As to murder of the second de-

gree, the law is that any person who, in committing any unlawful act against the peace of the state, of which the probable consequence may be bloodshed, shall kill another, shall be guilty of murder."

112. There is manifest error in this, because the trial court erroneously charged the jury in part as follows: "I charge you now, gentlemen, that the violent swinging of a baseball bat or similar heavy instrument at the head or body of another person with intent to do injury to that person is an act against the peace of the state, the probable consequence of which is bloodshed."

113. There is manifest error in this, because the trial court erroneously charged the jury in part as follows: "And I charge you also that, if as a result of such an act death ensues, the crime is murder, so that the killing here is presumed to be malicious and is therefore murder unless and until the person or persons by whom such act was committed produce the facts and circumstances from which justification, excuse or extenuation may arise. If all that you can find in this case is that the defendants or any of them are guilty of murder only because the killing was the unlawful act of such defendant or defendants as you may find to have perpetrated it, and because you find no evidence in the case, to justify, excuse or to extenuate the killing, you can only find the degree of such killing to be murder of the second degree."

114. There is manifest error in this, because the trial court erroneously charged the jury in part as follows: "If you find from the evidence that the defendant Ormsby halted or slowed the motion of that car so as to permit the assailant

to leave it, then he aided and abetted the crime and is therefore a principal. And I charge you also that if you find from the evidence that the defendant McNally was the occupant of the car who uttered the words about getting the fellow with the cap, or in any other way aided or abetted or urged the assailants on in their attack upon Whalen, then he likewise is a principal."

115. There is manifest error in this, because the trial court erroneously charged the jury in part as follows: "For the purpose of this case, it is sufficient to say to you, that manslaughter exists where one or more persons kill another, upon a sudden transport of passion, or heat of blood upon a reasonable provocation and without malice."

116. There is manifest error in this, because the trial court erroneously charged the jury in part as follows: "The court will now define an alibi. The word alibi means in plain English 'elsewhere', that is to say, that the defendants claim that they were not at the scene of this crime, but they were elsewhere and consequently that they did not and could not have committed the crime charged against them. I perhaps should say to you that whatever evidence of alibi is in this case is brought out not on direct examination by defendants' own counsel, but in the cross examination by the prosecutor."

117. There is manifest error in this, because the trial court erroneously charged the jury in part as follows: "In this connection, however, Gentlemen, I deem it incumbent upon me to inform you that the Court of Pardons of this state now has the power to charge or reduce or abolish or set aside whatever result you may have ar-

rived at in this matter, whether you fix the penalty at life imprisonment or not. The Court of Pardons can reduce or change it but it cannot make the punishment any greater than you make it."

118. There is manifest error in this, because the trial court erroneously charged the jury in part as follows: "I also at this time charge you that you may convict or acquit any or all of these defendants. In your verdict in this case, whatever that verdict is to be, you may deal individually or collectively with these four defendants. What I mean by that is this: that all four defendants may be acquitted, all four may be convicted; or you may convict one or more of them or acquit one or more of them. This is true whether your verdict be one of murder in the first degree, or of murder in the second degree or of manslaughter."

119. There is manifest error in this, because the trial court erroneously charged the jury in part as follows: "I have been requested by counsel for the defendant to make certain charges to you, and I will charge you in compliance with those requests."

Plaintiffs-in-error pray the judgment of their conviction may be reversed for the additional aforesaid reasons.

WILLIAM A. KAVANAGH,
Attorney for and of Counsel with Plaintiffs-in-Error, Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe, alias Brasch.

Service of the within Additional Specifications of Causes for Reversal is hereby acknowledged this 18th day of September, 1929.

JOHN DREWEN,
Prosecutor of the Pleas.

Joinder in Error.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE STATE OF NEW JERSEY, Defendant-in-Error, *vs.* FRANK DONATO, FRANK MCNALLY, GEORGE ORMSBY, and VINCENT O'KEEFE, alias BRASCH, Plaintiffs-in-Error.	In Error. Joinder in Error.

And thereupon, afterwards, to wit, on the twenty-ninth day of July, A. D. Nineteen hundred and twenty-nine, the said State of New Jersey, by John Drewen, Prosecutor of the Pleas of the County of Hudson, comes into Court and says that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid, and he prays that the Court here may proceed to examine as well the record and proceedings as the matters aforesaid assigned for error, and that the judgment aforesaid, in the manner aforesaid given, may in all things be affirmed, etc.

JOHN DREWEN,
Prosecutor of the Pleas,
Counsel for State of New Jersey,
Defendant-in-Error.

I hereby consent to the filing of the within Joinder in Error as within time.

WILLIAM A. KAVANAGH,
Counsel for Plaintiffs-in-Error.

Joinder in Error to Supplemental Assignments of Error.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE STATE OF NEW JERSEY, Defendant-in-Error, *vs.* FRANK DONATO, FRANK MCNALLY, GEORGE ORMSBY, and VINCENT O'KEEFE, alias BRASCH, Plaintiffs-in-Error.	In Error. Joinder in Error to Supplemental Assignments of Error.

And thereupon, afterwards, to wit, on the twenty-ninth day of July, A. D. Nineteen hundred and twenty-nine, the said State of New Jersey, by John Drewen, Prosecutor of the Pleas of the County of Hudson, comes into Court and says that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid, and he prays that the Court here may proceed to examine as well the record and proceedings as the matters aforesaid assigned for error in the supplemental assignments of error, and that the judgment aforesaid, in the manner aforesaid given, may in all things be affirmed, etc.

JOHN DREWEN,
Prosecutor of the Pleas,
Counsel for State of New Jersey,
Defendant-in-Error.

I hereby consent to the filing of the within Joinder in Error to Supplemental Assignments of Error as within time.

WILLIAM A. KAVANAGH,
Counsel for Plaintiffs-in-Error.

New Jersey Court of Errors and Appeals

(October Term, A. D. 1929.)

The State of New Jersey, Defendant-in-Error. *vs.* Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe, alias Brasch, Plaintiffs-in-Error,	On Indictment for Murder. On Writ of Error to the Hudson Oyer and Terminer.

BRIEF FOR THE STATE.

The defendants were indicted in the Hudson Oyer and Terminer for the murder of Catherine McGee, a child of eight years, at Jersey City, on November 6th, 1928.

Donato and O'Keefe were convicted of murder in the second degree. McNally and Ormsby were convicted of manslaughter.

For all the confusion and frenzy of the defendants' brief, the facts in this case are simple and the proofs are clear.

Before going further it is perhaps not amiss to say that there are parts of the defendants' brief that we frankly do not understand. For example, on page 32, counsel is dealing with the admission into evidence of written statements made to the police by the defendants at the time of their arrest. These statements were admitted into evidence upon full proof of their legal validity and character as free and voluntary declarations. By

way of objection to the statements, the brief contains this passage:

> "To allow the statements itself in evidence to prove the truth of the facts written upon it is harmful error, *since it is not only hearsay, but also deprives the defendant of the right to cross-examine the witness as to the extent of his recollection.*"

What this language is intended to convey or how it becomes applicable to the argument in question, we are at a loss to know.

And there are passages in the brief that contain statements in direct contradiction of the obvious content of the record. An instance of this occurs at the bottom of page 21 of the brief. Counsel is there arguing as to notice of the State's application for the struck jury, by which the defendants were tried. The passage reads:

> "A careful scrutiny of the record in this case fails to disclose when and where a Court of Common Pleas resolved itself in the absence of the Supreme Court Justice for the County into the Court of Oyer and Terminer, for the purpose of entertaining any motion for the selection by the Court of the Struck Jury list or panel to be used in the trial of these defendants."
>
> "It is a fair subject for contention as a matter of judicial procedure that counsel for defendants were entitled to notice of this motion and that the Court could not of its own motion select a jury for the trial in this cause, but that it could be done only upon motion in the regular way. There is no record of any such motion."

This statement is made notwithstanding the fact that reference to the record readily shows that the application for the struck jury, upon

notice duly given, was made to and heard in the Hudson Oyer and Terminer (page 19, line 1). The appearances and proceedings had upon this application are printed in full, and at page 40, line 30, the following appears of record:

> "Mr. Besson (Assistant Prosecutor): Before I enter into a discussion of that I would like to call your Honor's attention to this fact, that this notice of motion of course is entitled in the Oyer and Terminer, and this order if made will have to be made in the Oyer and Terminer. I would like to have a rule entered on the record that your Honor in the absence of a Supreme Court justice will convene a Court of Oyer and Terminer and sit as a Court of Oyer and Terminer for the purpose of hearing this matter, and that that be entered on the minutes so that there can be no objection to the jurisdiction of your Honor in hearing the argument on this rule.
>
> "Mr. Kavanagh: Of course, Mr. Besson's application comes rather late, *but I will not object to it.*"

And later, upon the return of the rule for the struck jury and when the jury was to be struck, counsel for defendants stated that he had no objection *either to the form or to the substance of the State's notice of the application for the jury* (page 59, line 1, etc.).

We take up the matters dealt with under the respective points of the brief. But since the brief contains no statement of the facts presented by the proofs in the case, we briefly and concisely set them forth here:

Facts.

The scene of the crime is entirely shown in the photograph S-2 in evidence. The three-story building to the right of the picture and adjoining that on the corner is Public School No. 2 in Jersey City. The corner building (with the National Grocery Store on the ground floor) is situated on the southeast corner of Erie and Fourth Streets. Erie Street runs obliquely across the picture and shows a single line of car-tracks in the center. Fourth Street is shown crossing it. The crime was committed on Election Day, 1928. In Public School No. 2 were the polling places for two election districts. At about 8:30 in the evening, a gang fight occurred on the sidewalk directly in front of the School. Three or four policemen were called there to disperse the fighters and the crowd that had assembled. There was standing at the time (at the curb nearest the School), in front of the School an automobile—a Chandler Sedan—the front of the car looking toward Fourth Street. There was no other automobile there. When the fighters were dispersed, four disheveled men—one or two of them holding handkerchiefs to their mouths—were seen hurriedly to get into this standing automobile; and when they had done so, the car was immediately driven away in the direction of Fourth Street. The events that followed and resulted in the mortal wounding of Catherine McGee took place *in a space of seconds.* The automobile, *no one having left it after the four men had gotten in,* was seen to turn east on Fourth Street, that is, around the corner upon which stands the National Grocery store, as shown in photograph S-2. When the car had gone some twenty-five feet or so, into Fourth

Street from Erie Street, the car was stopped or brought to a very low speed—a "creep", as one of the witnesses said, and at the same time, the doors of the car were opened and two or more of its occupants—at least one of them having a handkerchief tied to his mouth—hurried out of it and ran directly to a group of persons who were standing on the sidewalk near the National Grocery store window. As they did so a voice from the car was heard to call out: "Get the fellow with the cap!" In the group on the sidewalk at the time was one Whalen, wearing a cap. He knew none of the defendants and had had no trouble with them. The men leaving the car were each armed with what is described as a baseball bat. One of the men ran toward Whalen and upon reaching him raised his bat in the air and struck a violent blow at Whalen. Whalen quickly stepped away to avoid the blow and it glanced from his arm. Catherine McGee happened along at this instant. The baseball bat that glanced from Whalen struck her on the head. It made a "terrible sound"; a "crash". The child fell on her face unconscious. She was taken to the Hospital where she died the next morning of a fractured skull. Autopsy showed that the skull was virtually crushed. There was a multiple fracture, causing pieces or shreds of the skull to be broken from the skull cap. When the blow had been struck, the car immediately picked up its speed. The assailant, and those who had left the car with him, fled back into it and the car was driven away. For a short distance several people ran after it. After the assault upon the child and while the assailant and his companions were running back toward the car, someone in the car was heard to call out: "Come on Vince".

The men who got into the car after the fight in front of the School were demonstrably the same men who were in the car when it was stopped on Fourth Street. No one had left it *and these men are the four defendants.* Immediately before the car left from in front of the School, a number of policemen who testified, *saw Donato get into the car and saw McNally already in the car.* McNally and Donato were in the rear seat. Who the two men were in the front seat, the witnesses could not at that time tell. But upon their arrest all defendants made written statements to the police. The defendant Ormsby stated, among other things, *that he drove the car and that at the time of the assault the three occupants who were riding with him got out of the car.* He tells of the presence of baseball bats in the car. And he tells of a conversation with reference to the assault upon the child that he had with the defendant O'Keefe, when the latter had returned to the car and they were driving away. The defendant O'Keefe in his statement *admits his presence in the car and states that he sat beside Ormsby, the driver.* He, too, tells of the bats in the car and tells why they were there; and he also undertakes an explanation of his manner of getting out of the car.

All defendants admit being in and about the polls at No. 2 School on Election Day. The direct testimony of each defendant was confined to a categorical denial of the charge; nothing more. No one of them on direct examinations so much as undertook to account for his whereabouts at the time of the assault. Whatever of alibi there was (except possibly in the case of Donato) was brought out on cross-examination.

And it is also in the State's proof that immediately before entering his car and driving away with his companions from in front of the School,

the defendant Ormsby stated to the witness, Cena: "I know your gang and we are going to get you". A few seconds later they attacked "the fellow with the cap", and Catherine McGee was killed.

The foregoing statement of fact is built solidly upon the evidence in the State's case. It runs through the story of all the witnesses. The only contradiction was the simple, "I did not do it" as uttered by the defendants in their direct examination as witnesses in their own behalf. Because this statement of fact is a compact summary of the evidence, we have not undertaken to cite any particular passages of the testimony.

POINT I.

There was no error in the refusal of the Trial Court to quash the indictment.

The argument under Point I of the defendants' brief is based upon the refusal of the Court to grant defendants' motion to quash.

Counsel complains because the indictment "does not allege the facts which enter into the offense". This quarrel is not with the indictment but with the statute, which prescribes precisely the form of the indictment that was followed. The count for murder and the count for manslaughter were drawn in the form established as sufficient by Section 36 of the Criminal Procedure Act (Comp. Stat., vol. 2, page 1832).

There are a number of things set out in the headnote of Point I which are not argued and are probably abandoned. But in the headnote mention is made of the Trial Court's permission to

the State to amend the First Count charging murder.

This amendment is shown in the record at page 68, line 25. The indictment as originally presented contained in the first count the words: "did of *his* malice aforethought kill and murder." The amendment consisted in the change of the word "*his*" to the word "*their*", so that the passage was made to read: "did of *their* malice aforethought kill and murder."

This amendment was in a matter of clerical error only and was formal in its nature. Without the amendment, it was "obvious that a charge of murder was originaly intended against all four defendants, and appeared on the face of the indictment." *State* vs. *Johnson,* 91 N. J. L. 611.

> "The power of amending may be applied to that class of cases where, on the face of the indictment, a specific criminal charge can be perceived, which fails to be effective only by means of an error, which, looking at the charge and averments of the indictment, the Court can clearly infer, was a clerical error." State *vs.* Kern, 51 N. J. L. 259.

The amendment in the present case was properly made under the authority of Section 44 of the Criminal Procedure Act (Comp. Stat., vol. 2, p. 1834.

POINT II.

The struck jury by which the defendants were tried was a legal jury.

The argument under Point II in defendants' brief is long and involved. The question, however, is simple and the authority clear.

The defendants were tried by a struck jury that was drawn under the provisions of Chapter 246 of the Laws of 1929. The statute reads as follows:

> "When a rule for a struck jury shall be entered upon any indictment for murder, the court granting such rule may, upon motion of the prosecutor, or of the defendant, or on its own motion, select from the persons qualified to serve as jurors in and for the county in which any indictment was found, whether the names of such persons appear on the list of jurors prepared and selected by the commissioners of jurors of the persons qualified to serve as jurors in and for such county or not, sixty names, with their places of abode, from which the prosecutor and the defendants shall each strike twelve names in the usual way, and the remaining thirty-six names shall be placed by the sheriff in the box in the presence of the court, and from the names so placed in the box, a jury shall be drawn in the usual way."

It is contended by the defendants, for one thing, that this statute could not lawfully be applied in the present case because it is, with regard to this case, *ex post facto*.

A word as to the history of the statute of 1929. Section 76 of the Criminal Procedure Act of 1898 was amended in 1916, 1918, and finally in 1919. Chapter 246 of the Laws of 1929—the statute in question—re-enacts literally the provisions of Section 76 of the Criminal Procedure Act as it existed from its enactment in 1898, until it was first amended in 1916. Prior to the 1929 Act, and since 1919, the law as to struck juries in criminal cases was laid down in Chapter 260 of the Laws of 1919. And the essential change effected by the statute of 1929 is in the method of selecting the

list of names from which the jury shall be struck. Under the method prescribed by the 1919 Act, the jury commissioners shall draw by lot sixty names from a list of three hundred previously made and certified by them. From these sixty each side strikes twelve, thus leaving a panel of thirty-six names from which the jury is drawn at the trial. Under the method provided by the Act of 1929, the sixty names are handed down by the Trial Court, when a rule for a struck jury has been made pursuant to Section 75 of the Criminal Procedure Act. The former method (1919) required that these sixty names be drawn from the list of three hundred previously certified by the jury commissioners, whereas the statute of 1929 provides that the Court granting the rule for a struck jury may

> "select from the persons qualified to serve as jurors in and for the County in which any indictment was found, *whether the names of such persons appear on the list of jurors prepared and selected by the commissioners of jurors * * * or not,* sixty names," etc.

From these sixty names the trial jury is finally obtained *exactly as was the case under the Act of 1919.* So that in considering the question of the *ex post facto* character of the 1929 statute, it is to be noted that the statute imposes no change to the prejudice of these defendants. *The number of peremptory challenges remains the same—five for each side, as provided by Section 81 of the Criminal Procedure Act.*

The 1929 statute provides that after the list has been reduced to the number of thirty-six names, these names shall be placed in the box, and "the jury shall be drawn in the usual way." Some reference is made in defendants' brief to the un-

certainty involved in the use of the words "in the usual way." These very words are used in the same connection in all three statutes: Section 76 of the Criminal Procedure Act; Chapter 260 of the Laws of 1919; and Chapter 246 of the Laws of 1929.

The statute of 1929 is not improperly applied to this case; it is not *ex post facto.* It does not alter the situation of the defendants in any way of which they have a legal right to complain. And even in a case where a statute did reduce very materially the number of peremptory challenges, it was held by the highest court of this State to be constitutional. *Brown* vs. *The State,* 62 N. J. L. 666.

The statute of 1929 could not by any possibility be regarded as *ex post facto* under the definition firmly established in the law of an *ex post facto* statute.

> "An *ex post facto* law is one which imposes a punishment for an act which was not punishable when it was committed; imposes additional punishment, or, changes the rules of evidence by which lesser or different testimony is sufficient to convict" (12 C. J. 1097, Sec. 803) citing many cases from various states including *Moore* vs. *The State,* 43 N. J. L. 203.

The effect of the 1929 statute is to repeal by necessary implication the provisions of the Act of 1919, "when a rule for a struck jury shall be entered on any indictment for murder". The two statutes are simply contradictory of each other. It is not possible to require that a list of sixty names of available persons for struck jury service be provided in the manner prescribed by the statute of 1919, and, at the same time, to require that this list of sixty names be provided as pre-

scribed by the statute of 1929. The latter method is a complete substitution for the former. The very least that can be said for the Act of 1929, is that it provides a concurrent method of procedure. *Arzonico* vs. *Board of Education,* 75 N. J. L. 21.

But it is the law of this State that

> "when the legislature has framed a new and general rule governing a subject matter, all earlier and different rules, touching the same matter, are to be discarded in favor of such later rule."
>
> *Harrington* vs. *Jersey City,* 78 N. J. L. 610;
> *Vroom* vs. *Board of Education,* 79 N. J. L. 46.

Defendants also argue under this head that the present case does not come within the terms of the statute of 1929, and, therefore, was not such a case as the statute could be applied to. The statute, by its own terms, shall apply "when a rule for a struck jury shall be entered upon *any indictment for murder*". It is contended for defendants that because the indictment for murder in the present case contained a count for manslaughter and also a count for assault and battery, therefore the statute has no application.

Now a defendant may be under an indictment for murder; or under an indictment for manslaughter; or under an indictment for assault and battery. And the legislature might provide, as it does in the present case, for a particular method of drawing a struck jury "when a rule for a struck jury shall be entered upon any indictment for murder" without making similar provisions in the case of indictments for manslaughter or

indictments for assault and battery. It does not follow that the "indictment for murder" shall not contain any count for manslaughter or for assault and battery.

If the defendants' contention in this regard is sound, it means that the legislature in enacting Chapter 246 of the Laws of 1929 must have intended that the case of murder to which that statute was to be applicable, must be a case where, *should the proof show the crime committed to be manslaughter, the jury could nevertheless render no verdict of manslaughter, but must either find the defendant guilty of murder or must acquit.* An unthinkable proposition.

An "indictment for murder" is universally known and understood in the law to be a charge of crime that embraces together with that of murder, the cognate and ingredient allegations of manslaughter and assault and battery, *not as separate and distinct crimes but as representing possible aspects of the crime committed, as might be ultimately determined by the jury from the facts proved.*

The term "indictment for murder" is a technical concept. It is readily distinguishable, for example, from the term "charge of murder". The latter is a specific and exclusive thing. It is, in a word, a lay term. Whereas the term "indictment for murder" used in the act of 1929 connotes not a charge strictly of murder *and nothing else, but a technical document of presentation by the grand jury, drawn in precise language and averring the several possible aspects of the one crime presented.*

The tenth paragraph of the written challenge to the array (page 72, line 24) reads as follows:

> "In this case the defendants have not been indicted for murder only, but they have been

> indicted for murder, manslaughter and assault and battery, *all of which offenses are alleged to have arisen out of the assault and slaying of Catherine McGee,'' etc.*

This language reveals with peculiar clearness the force of the argument that we make and the fallacy that underlies defendants' contention. Counsel speaks of *''all of which offenses''*, etc., as if there were more than one offense committed or charged. And he says that these offenses ''are alleged to have arisen out of the assault and slaying of Catherine McGee''. No more than one offense, so far as the present indictment is concerned, *could possibly have arisen out of the killing of Catherine McGee, and, by the same token, no more than one offense is charged to have arisen out of that killing.*

Two of the defendants were convicted of second degree murder and two were convicted of manslaughter. But a plurality of degrees of the one crime must not be mistaken for a plurality of crimes.

The indictment is, in the language of the statute, ''an indictment for murder'', containing the usual counts for manslaughter and assault and battery. And our point is further illustrated by the language of the defense brief appearing in the middle of page 23. We read:

> ''Nowhere in the Criminal Procedure Act do we find any provision for the trial, at the same time, for murder, manslaughter, and assault and battery before a struck jury selected by the Court.''

This was not a trial *''at the same time for murder, manslaughter and assault and battery''*. We do not know how there could be such a trial under our system of jurisprudence. It was a trial

"upon an indictment for murder" with the indictment drawn in the universally recognized form, *so as to sustain a lesser verdict should the facts developed in the case require that a lesser verdict be found.*

Again, if Counsel's argument under this head is sound, it follows that the term "indictment for murder" in the statute of 1929 excludes from its meaning any "indictment for murder" that contains the usual counts for manslaughter and assault and battery. Such a proposition is of course untenable, for an indictment for murder *by virtue of its very nature, is one under which sanity and sense require that a verdict of manslaughter or assault and battery can, in proper cases, be returned.*

The legislature, in providing a special method of drawing struck juries for the trial of "any indictment for murder" must be presumed, in common sense not to have intended that in cases where such method is applied there could not, by reason of the nature of the indictment contemplated, be any verdict for a lesser crime than murder.

So far as the legal workability of the 1929 statute is concerned, it should be said that the same mechanism, brought into being by the same language operated for many years under Section 76 of the Criminal Procedure Act of 1898. And the constitutionality of Section 76 has been established beyond question. *State* vs. *Brown,* 62 N. J. L. 666; *State* vs. *Taylor,* 68 N. J. L. 276; *State* vs. *Barker,* 68 N. J. L. 19.

The *Barker* case, *supra,* is especially in point, since it holds that

> "the legislature has the right to remove the requirements that struck jurors be especially qualified as to knowledge, quality, talent, independence," etc.

We mention this because argument is also made in the defendants' brief that the statute of 1929 wrongfully supersedes qualifications for struck jurors like those quoted above and as provided in the Act of 1919.

At the beginning of this brief we made reference to the statement appearing in defendants' argument that the record here does not show that a proper application for a struck jury was made in the Oyer and Terminer. We think that no further comment is necessary.

POINT V.

There is no merit in the objection to the Court's admission into evidence of the voluntary statement made by the defendants to the police at the time of their arrest.

As already stated, these four defendants made statements which were reduced to writing by the police. The statements were clearly proved to have been voluntary statements and to have been made without any force, threats or promises whatsoever. The defendants Donato and O'Keefe refused to sign their statements. Statements of this kind do not require a signature in order to make them either valid or what they purport to be or to make them admissible in evidence. We call the Court's attention to the pronouncement of the Trial Judge at the time the statements were admitted in evidence. This appears at page 243 of the Case (lines 25 *et seq.*). A number of authorities are cited by the Trial Court.

The only case cited by the defendants under this point is that of *State* vs. *Rombolo,* 89 N. J. L. 565. This case has no application whatsoever

here. There the Court of Errors and Appeals dealt with the admission into evidence of a photograph of the defendant, upon the back of which was printed what purported to be a record of the fact that the person pictured in the photograph was in confinement under a charge of burglary. In that case the defendant of course was in no way responsible for what appeared on the back of the photograph. It was no statement coming from him and therefore without question was not admissible in evidence against him or binding upon him in any way. The situation was totally different from the one here presented.

Statements of an incriminatory or comprising character made by defendant of and concerning the charge against him, so long as they are in every way voluntary and not the product of duress or hope, are admissible in evidence. There is no requirement that such statements be in writing. And of course when they happen to have been reduced to writing there is no requirement that they be signed. A signature could add nothing to the admissibility of the paper.

State vs. *Young,* 97 N. J. L. 501;
State vs. *Fairbrothers,* 2 N. J. Adv. R. 657; 124 Atl. 452.

> "Where the admissibility of a confession is challenged the primary question for the trial court is whether the defendant acted voluntarily."

State vs. *Morehous,* 97 N. J. L. 285.

An attempt is made to develop an argument out of the fact that the written declarations by the defendants did not of themselves amount to a complete avowal of guilt of the crime charged. In other words, that these statements were not,

in that sense, what might be called "confessions". In order that declarations by the accused be admitted into evidence it is not necessary that such declarations amount to a confession.

> "Statements and declarations by accused before or after commission of the crime, *although not amounting to a confession,* but from which in connection with other evidence of surrounding circumstances an inference of guilt may be drawn are admissible against him *as admissions.*"
>
> 16 C. J., p. 626, sec. 1243.

Counsel argues that wrong was done by the Court in using the term "confessions" and the term "admissions" with reference to the written statements made by the defendants to the police. No possible harm could have come from the use of such terms. The Trial Judge was more than scrupulous in preventing any prejudice whatever of this kind. The Court stated to the jury (Case, page 247, line 20 *et seq.*):

> "The court is determined to allow this alleged statement or confession or whatever its purport be to be admitted in evidence because the only requisite required by law is that it appear affirmatively to have been made voluntarily. And for your enlightenment, counsellor, if I have referred to the document as a statement or confession I want to say that I do not know anything about the document. It has not been submitted to me. I won't have a chance to look at it until after it is officially and judicially received in evidence, and if I have referred to it as a confession or statement I want the jury to understand that I thought I had, as I have very cautiously throughout this trial, used the prefix 'alleged,' and I particularly at this time want to refer to it as an alleged statement or

> an alleged confession or whatever the paper writing purports to be. If as you say the statement that has been made is provable, if it is proved as you say, that it contains no admission against interest, why then surely no harm can be done."

After the statement that has just been quoted was made by the trial judge there was no exception taken or objection stated by counsel to any reference that the Court made to the written statements in question.

In considering the admissibility of these statements from the point of view of their value as evidence, it must be borne in mind that the defendents at the trial denied absolutely their presence in the automobile that was used in bringing the assailants to and taking them from the place of the murder; whereas the statements made by the defendants admitted in each instance—save only in the case of McNally—that they were in the automobile right up to the time of the assault upon Catherine McGee. To the other incriminating statements contained in the writings it is not necessary here to refer.

POINT VI.

The Trial Court did not err in denying defendants' motion for a direction of a verdict at the close of the State's case.

In all fairness, it would seem that the argument made under Point VI of defendants' brief requires little or no discussion. When the State closed its case every fact and element contained in the statement set out at the beginning of this brief was fully and clearly in evidence. If what

the State had proved did not amount to a case that called upon the defendants to answer, it follows necessarily that what is known in the law as circumstantial evidence—strong circumstantial evidence in the present instance, to say nothing of the incriminations contained in the written declarations of the defendants—is of no value whatever as proof. That of course is not the law. The attention of this Court, however, should be called to the fact that the only motion made by counsel for direction of a verdict was a motion that a verdict be directed in favor of *all the defendants alike.* The motion for direction did not contemplate that anyone of the defendants was in a position under the State's proof more favorable than that of any other defendant.

Where a number of persons are tried for a criminal homicide all may be convicted though it is impossible to identify the individual by whom the fatal wound was inflicted (*State* vs. *Bavier,* 89 N. J. L. 214).

The State's proof in toto at the close of its own case, provided a firm basis for the inference that all of the defendants throughout the entire homicidal venture—beginning with the fight in front of the school and ending with the mortal blow—were together by pre-concert. The State had proved that the defendants knew of the presence of bats in the car; that when dispersed by the police the four of them entered the automobile; that one of the defendants, Ormsby, had immediately prior to getting into his car made threats to the witness Cena about getting Cena's gang. Furthermore, one of the witnesses had testified that the defendant Donato was one of those who had been "causing a disturbance in front of the school" (Case, page 148, line 33). From all the circumstances shown in the State's

proof it was in every way fair for the jury to draw the inference that the four defendants had associated themselves together by pre-concert in the disturbance that occurred in front of the school and in the violent escapade that followed within a few seconds after. The defendants were companions in going to the crime; they were companions in fleeing from it.

> "If the presence of defendants is by pre-concert they may be guilty as aiders and abetters although neither by word nor by act do they encourage or discourage the commission of the crime. The presence of one at the commission of a felony by another is evidence to be considered in determining whether or not he was guilty of aiding and abetting. And it has also been held that presence, *companionship and conduct before and after the offense are circumstances from which one's participation in the criminal intent may be inferred.*"
>
> 16 C. J., page 133, sec. 122.

POINT VII.

There was no error in the Trial Court's refusal to sustain any objection that was made to questions put to the witness Josephine Donato.

The argument under Point VII goes far afield. Especially when it has resort to the statute relating to the competency of a wife as a witness against her husband.

The wife of the defendant Donato was called as a witness on behalf of the defense. She gave evidence tending to show an alibi for her husband. She testified not only that her husband was home throughout the evening of Election Day but

also, on cross-examination, that he had been living with her "steadily" for the "last five years" (Case, page 345, line 10, *et seq.*). The fact was that the defendant had deserted his wife and had not been living at home at all and that this was true over a period shortly preceding Election Day of 1928. Certainly the State had a right to show by this witness that in October, 1928, she went to the probation office in Hudson County for the purpose of complaining that her husband had not been at home for five months (Case, page 365, lines 10-30). And certainly the State had a right to use the truth concerning the matter in question as a means of showing to the jury the extent of the accuracy and veracity of the witness. It may well be that the State was bound by her responses to these questions, but that problem does not enter into the present discussion.

In view of the testimony given by this witness on her examination in chief, it became not only the right but the duty of the State to show that a few months prior to the date of this crime she had applied for the arrest of her husband on the ground of desertion. This is the question to which objection is mainly taken under Point VII, and there can be no merit in it.

POINT VIII.

There was no error in admitting into evidence the written declaration of the defendant McNally.

Point VIII of defendants' brief is devoted to the admission into evidence of McNally's written statement. What has already been said with regard to the declarations made to the police by the defendants is also pertinent under this head.

McNally's statement was not offered in the State's main case. When this defendant became a witness in his own behalf he testified that he was not present at the school when the automobile left for the scene of the crime and of course that he was not in the automobile. The statement that he made to the police at the time of his arrest was an absolute admission that he was in the automobile at the time when the State's witnesses say they saw him there, while the automobile was yet standing in front of the school. True, in his statement he declared he left the automobile before it started on its way to Fourth Street, but this was no reason for the State's withholding so much of the statement as contradicted McNally's own testimony. Of course, McNally had the right to have his entire statement introduced, and the entire statement was introduced.

POINT IX.

The State had a right to abandon the count for assault and battery.

When the summations had been concluded, and just before the Court's charge, the State announced that it abandoned the count for assault and battery. Under the proofs in the case assault and battery had no place in the jury's deliberations. The criminal assault upon Catherine McGee directly resulted in her death. The crime was homicide. A verdict of assault and battery would have been a palpable miscarriage. That being so the charge of assault and battery upon which such a verdict might have been based was no longer properly in the case.

> "Where the whole evidence tended to show that the assailant of deceased shot and killed him without provocation and the whole effort of the defendant was to show that he did not participate in the shooting it was proper for the court to instruct the jury that they might disregard counts charging manslaughter and assault and battery."
>
> *State* vs. *Moynihan,* 93 N. J. L. 253.

In *State* vs. *Carlino,* 98 N. J. L. 148; aff. 122 Atl. 830, the Court held that the instruction that the jury must find a verdict either of murder in the first degree or one of acquittal was proper.

In *State* vs. *Sage,* 122 Atl. 827, this Court held that the count for manslaughter was properly abandoned.

POINT X.

The Trial Court properly defined murder.

The first answer to be made here is that so much of the argument under Point X as relates to the Court's treatment of the crime of murder in the first degree is impertinent because there was no verdict of murder in the first degree.

When counsel deals on page 46 of his brief with what he terms the "practical admission by the Trial Court of its own error" in charging upon murder in the second degree we cannot follow him and do not understand what is meant. The argument seems to culminate in this:

> "Since this was the logical conclusion of his legal interpretation of the different degrees in murder the charge of murder in the first degree should have been abandoned specifically."

The reasoning that justifies any such assertion certainly is not apparent to us and we cannot understand it. But what difference does it make now whether first degree murder was abandoned or not?

The brief deals with that passage of the charge to the jury appearing on page 378 of the printed case, in which the Court instructs that:

> "The violent swinging of a baseball bat or similar heavy instrument at the head or body of another person with intent to do injury to that person is an act against the peace of the State, the probable consequence of which is bloodshed. And I charge you also that if as a result of such an act death results the crime is murder, so that the killing here is presumed to be malicious and is therefore murder unless and until the person or persons by whom such act was committed produces the facts and circumstances from which justification, excuse or extenuation may arise."

The first proposition contained in this excerpt is that with regard to the character in the criminal law of the act of "violently swinging a baseball bat * * * at the head or body of another person with intent to do injury to that person * * *." Certainly this Court will not overlook the fact that what the Trial Judge was dealing with in his instructions to the jury was the swinging of the baseball bat *in the case that the jury had before them. The uncontradicted evidence in that case was that the baseball bat was used with such violence and intent as to be made the means in the hands of the assailant of crushing the skull of Catherine McGee in the manner described by the witness Dr. Hasking.* If the probable consequence of such an act of assault as was committed on the deceased in this case

is not bloodshed, it becomes difficult to say that a court and a jury are to deal with violence of this kind with sanity and common sense. The Court in its instructions on this point was not indulging in general principles or abstract propositions of criminal law. *It was dealing with the proved conduct of the person or persons whose violence resulted in the death of the deceased; and the violent and deadly character of this conduct was in no way contradicted or qualified by any other evidence in the case.* In the face of what the witnesses had described as "a terrible sound" and a "crash" when the skull of Catherine McGee was smashed by the swinging of the assailants' baseball bat there was certainly nothing else for the Court to tell the jury except that the probable consequence of such use of a baseball bat was bloodshed.

The next proposition in the excerpt from the Court's charge now being dealt with is that:

> "If as a result of such an act death results the crime is murder, so that the killing here is presumed to be malicious and therefore murder unless and until the person or persons by whom such act was committed produces the facts and circumstances from which justification, excuse or extenuation may arise."

This latter proposition is legally sound. If the probable consequence of the act described in the testimony was bloodshed, it necessarily follows that if death result from such an act, the crime is, by virtue of the statute, murder. And if the crime of murder is thus established the presumption of malice is necessarily involved because where there is murder there must be malice.

"The statement and instruction that the intent to take life may be presumed from the use of a deadly weapon is a sound statement of the law, whether such presumption arises being dependent upon the facts of a given case."

State vs. *Maioni,* 78 N. J. L. 339.

"Where one kills another with a deadly weapon, an instrument that *as used* may produce either death or at least serious bodily harm, the presumption until the contrary appears is that at least serious bodily injury was intended."

State vs. *Silverio,* 79 N. J. L. 482.

"Where one kills another it is not to be presumed without evidence that the slayer committed the act unconsciously or accidentally or while insane."

State vs. *Silverio, supra.*

"A homicide resulting from the breach of the peace committed by the use of a deadly weapon in heat and passion without due meditation but also without justifiable provocation is murder in the second degree."

State vs. *Biango,* 75 N. J. L. 284; Aff. 79 N. J. L. 523.

The above statement of authority from the *Biango* case is an apt and fitting description of the crime described by the evidence in the present case.

"A person on trial for murder is presumed to be innocent until he is found by the jury to be guilty of a criminal homicide. And when the jury have reached the conclusion the presumption arises that the crime of which he is guilty is murder in the second degree; the presumption of innocence not ex-

> tending until the degree of guilt has been determined."

State vs. *Leo,* 80 N. J. L. 21.

We urge that the Court's Charge in this as in every other particular was legally correct, but for the completeness of argument we cite the case of *State* vs. *Maioni,* 78 N. J. L. 339, in which it is said:

> "Once the facts in this case as to use of a deadly weapon are known to the jury, the presumptions to be drawn from those facts are not to be considered by the jury and therefore any misstatement by the court as to such presumptions is not error."

As to presumption of second degree murder see also *State* vs. *Rombolo,* 91 N. J. L. 560.

It is argued on page 47 of defendants' brief that:

> "It is not sufficient to constitute the crime of murder that one should attack another with 'a baseball bat or similar heavy instrument' with intent 'to do injury to that person'."

The point here appears to be that the Court did not use the term "serious" as modifying the reference to the bodily injury intended. Again we say that the Court was dealing with uncontroverted facts in *this case* and was not laying down general principles of law. The assailant of Catherine McGee must be held to have intended the natural consequences of his act, and the consequence of his act in the instant case, naturally enough, turned out to be "serious" indeed.

Counsel cites the case of *State* vs. *Mosley,* 131 Atl. 292; but the opinion quoted from that case was written in dissent and was not the prevailing opinion of the Court.

POINT XI.

The Trial Court properly defined manslaughter.

At one place in the Court's Charge murder in the second degree is expounded to the jury. At another place in the Charge manslaughter is expounded to the jury. The device of counsel under Point XI is to take an excerpt from the Court's language as to murder in the second degree, and bring from elsewhere in the Charge the Court's language as to manslaughter, and ~~this~~ thus in some way to set up the appearance of contradiction or of anomoly in the instructions.

A perfect answer to the contention made under this point would seem to lie in the fact that the jury did not misunderstand what the Court said either about murder in the second degree or about manslaughter; that the distinction between the two grades of homicide remained clear in the jury's mind. This being evidenced by the fact that they returned a verdict against two of the defendants for murder in the second degree and against two of them for manslaughter.

POINT XII.

The instructions to the jury as quoted in the headnote under Point XII concerning a possible finding as to the conduct of the defendant Ormsby and the conduct of the defendant McNally were not erroneous.

First let us deal with the Court's reference to the defendant Ormsby. The Court said:

> "If you find from the evidence that the defendant Ormsby halted or slowed the motion

> of the car so as to permit the assailant to leave it, then he aided and abetted the crime and is therefore a principal."

There was clear proof in the case to justify this observation of the Court. Ormsby admitted to the police that he drove the car. The use to which the car was put in bringing the four defendants to the scene of the murder and in getting them quickly away from it was fully and amply described in the testimony of all the witnesses for the State. If the jury found what the Court indicated certainly Ormsby was an aider and abetter.

But some argument is made of the fact that the Court referred to the jury's finding that Ormsby permitted "the assailant to leave it" without any qualifying instruction as to Ormsby's knowledge of the purpose that underlay the assailant's leaving the car. But the Court referred to Ormsby's permitting "the *assailant* to leave it". The import of the term "assailant" described the purpose of the one who left the car and also fixed the character of Ormsby's conduct in permitting an *assailant* to leave it. Who was it that the jury might find that Ormsby permitted to leave the car? An assailant; and clearly *the* assailant who struck the blow that killed Catherine McGee. In all fairness it seems to us that the discussion of this particular subject in the defendants' brief degenerates to quibbling.

Now as to the Court's reference to the defendant McNally. These references by the Court must be dealt with separately because they referred to separate defendants, neither defendant being involved in the reference to the other. Certainly if McNally was the one who "uttered the words about getting the fellow with the cap, or if he in any other way aided or abetted or urged the as-

sailants on in their attack'' he was guilty of participating in the homicide. The testimony was that a voice from the car in which McNally was proved to be sitting said, ''Get the fellow with the cap''. The Court had a right and a duty to tell the jury what importance they must attach to their determination as to which defendant it was that uttered these words. If it was the defendant McNally, McNally was, as the Court said, to be held accountable for theim, but the Court did not confine its proposition as to McNally to the mere matter of uttering the words in question. It added ''or in any other way aided or abetted or urged the assailants on in their attack'', etc.

Returning to Ormsby for a moment, it must be remembered that Ormsby's purpose in driving and using the car as he did in connection with the assault could not be better indicated than by his threat to the witness Cena immediately before he took his place behind the wheel of his car and drove it the short distanct to the scene of the killing.

Furthermore, as to Ormsby, the jury could not possibly find that Ormsby stopped or slowed his car to permit an assailant to leave it, *without also finding that he it was who waited for the assailant to return to the car after the fatal blow had been struck and then drove off in flight.*

POINT XIII.

Point XIII of the defendants' brief is a repetition of defendants' objections to the admission into evidence of O'Keefe's declaration to the police and requires no further discussion here.

POINT XIV.

The Court properly charged on the subject of alibi.

Nothing more need be said under this point than that the Court's Charge to the jury on the subject of alibi was precisely the Charge that counsel for defendants requested the Court to make. The request appears in the printed case on page 396, line 20, *et seq.* The language of this request appears in the Court's Charge at page 390, line 35, *et seq.*

POINT XV.

The comment made by the Trial Court on the evidence of alibi that the case presented to the jury was not erroneous.

The passage from the Court's Charge that is set forth in the head note of Point Fifteen is excerpted from what the Court had to say on the subject of alibi evidence; and it is excerpted in such a way as to give an entirely false presentation of the Court's statement. This is what the Court said in full on the subject in question:

> "I perhaps should say to you that whatever evidence of alibi is in this case is brought out not on direct examination by Defendants' own counsel, but in the cross-examination by the Prosecutor. The defendants Ormsby and McNally have stated in their testimony that they were not present. Further than this, as to these two defendants, there is no evidence of alibi. As to the defendant Donato, there is some testimony—you will recall what it is—given by his wife, to the effect that on the

> night of the killing of Catherine McGee, he was at home, arriving there shortly after eight o'clock. You heard her direct examination and you heard the testimony which she gave on cross-examination. The weight, the credibility and the effect to be given to her testimony is a thing to be determined by you and by you alone. As to the defendant O'Keefe, there was some effort made by counsel for the defendant to show medical treatment by physicians of O'Keefe, but I charge you that there is no evidence in the case from the physician or the physicians who were called, that in any way tends to show, so far as the doctors are concerned, that they treated him or knew of his whereabouts on the 6th day of November, 1928, or at the time of the alleged commission of the crime."

The foregoing was a full, fair and adequate comment on the alibi evidence. The Court omitted nothing and all factual references to the testimony contained in this passage of the Charge are correct.

In the excerpt set up for attack in the head note of Point Fifteen, the Court's express reference to the testimony of Josephine Donato is excluded. Nevertheless, in the discussion that is made under this point the Court is criticized for making no reference to the fact that "plenary evidence was given by Josephine Donato, wife of the defendant Frank Donato, that he was at his home when the alleged crime is alleged to have taken place".

If it was counsel's purpose to criticize the instructions given by the Trial Judge, upon the basis of testimony which Josephine Donato is claimed by counsel to have given, counsel should at least have included what the Court actually said about her testimony in the passage to which exception is taken.

POINT XVI.

The Trial Court was not in error in refusing to allow certain of the requests to charge presented by counsel for the defendant.

Point Sixteen is devoted to a discussion of those requests to Charge which the Court disallowed. The requests referred to under this point are those having to do with the separate responsibility of the four defendants.

Every proper principle of law which these requests embrace was amply covered in the Court's own language.

The defendants cannot possibly maintain that the Trial Court permitted the jury for an instant to get any impression except that the State's case was to be considered as affecting each defendant individually. The Court said:

> "I would suggest to you gentlemen that you first consider the charge of murder and should you fail to find that the defendants *or any of them* are guilty of either the first or second degree of murder under the rules which I have already laid down to you, that you then proceed to consider the count of manslaughter."

And again:

> "I charge you that the four occupants of that car, *whoever you find them to be,* were present at the scene of the crime. Of course the burden is upon the State under the rules which I lay down to you, to show that these defendants were the occupants of that car at that time, and I charge you that *such of these defendants* as you find to have been in the car at the time in question were present at the scene of the killing."

And again:

"I charge you that in considering these statements, whatever they contain can be used by you only as evidence against *that defendant by whom the statement was made* and any one of these statements cannot be considered by you as evidence against the *other defendants by whom such statement was not made,* and who were not present at the time of the making of the alleged statement, and particularly in view of the fact that the evidence in this case shows that the statements that were made or were alleged to have been made by the various defendants here separately and at a time when the other three were not physically or bodily present."

And again:

"Should you find as your verdict in this case under all the rules I have laid down to you that these defendants *or any of them* are guilty of the crime of murder, it will be your duty, and you are required under the law as a part of that verdict, to state the degree of murder of which you find the defendants *or any of them* guilty."

And again:

"I also at this time charge you that you may convict or acquit *any or all of these defendants.*

In your verdict in this case, whatever that verdict is to be, you may deal individually or collectively with these four defendants. What I mean by that is this: *That all four defendants may be acquitted, all four may be convicted; or you may convict one or more of them or acquit one or more of them. This is true whether your verdict be one of murder of the first degree or of murder of the second degree or of manslaughter."*

The Court was not obliged to adopt the language of the defendants' requests. The sense, import and legal principle of the requests were clearly conveyed to the jury in the Court's instructions.

POINT XVII.

The requests to charge, which are the subject of the Seventeenth Point are erroneous in law and the Court was not in error in disallowing them.

The requests here referred to are flagrantly erroneous. They involve novel burdens for the State in the proof of a criminal homicide. They require the State to prove affirmatively that the death of Catherine McGee "was not an accident * * * and was not caused and brought about by reason of some misadventure on the part of the little girl." All those presumptions that are clearly established in the law as arising from the intentional inflicting of serious bodily injury resulting in death, are by these requests entirely subverted.

POINT XVIII.

Presumption of innocence was fully covered in the Court's Charge.

The request to charge considered under Point Eighteen of defendants' brief was properly excluded because the Court had fully instructed the jury as to presumption of innocence.

POINT XIX.

The reference in the Charge to the power of the Court of Pardons over any verdict of guilty that the jury might find was proper.

This question was disposed of in the case of *State* vs. *Mosley*, 102 N. J. L., page 94.

POINT XX.

There was no error in the denial of the motion for an arrest of judgment.

All of the matters urged on the motion for an arrest of judgment have been hitherto considered in this brief.

POINT XXI.

(This requires no discussion.)

POINT XXII.

The Court's instruction as to reasonable doubt and burden of proof was not erroneous.

The charge to the jury on this subject appears in the printed case, page 305, line 1 to page 386, line 10.

Whatever criticism may be urged under this head by counsel for defendants, a complete answer would seem to lie in the fact that if any special or particular form of instructions as to

burden of proof or reasonable doubt were to be employed by the Trial Judge, counsel for defendant should at least have proposed such form in a request to charge. This was not done, except as to the first request to charge (Case, page 394, line 15, etc.), which reads as follows:

> "The defendants, and each of them, in this case are presumed to be innocent and the burden of proof is upon the State to prove them guilty of the charge contained in the indictment beyond a reasonable doubt, and if the evidence fails to convince you beyond a reasonable doubt of the guilt of these defendants, it is your duty to acquit."

The language of this request embraces far less detail and is less expansive than the form in which the instruction was given by the Trial Judge, and lack of detail and expansiveness seem to be what counsel complains of in this connection.

POINT XXIII.

(This point requires no discussion.)

POINT XXIV.

(This point requires no discussion.)

POINT XXV.

(This point requires no discussion.)

POINT XXVI.

The verdict of the jury is valid.

The fact that the jury found two of the defendants guilty of murder in the second degree and two guilty of manslaughter is in no way inconsistent, contradictory or illegal.

The degree of the homicide committed, as well as the question of guilt or innocence, as counsel has argued under another point, bears a relation to the part played in the entire criminal transaction *by each defendant respectively.* It is clear, therefore, that once guilt is established, the degree of guilt is a matter of the *quality of the underlying animus from which the guilty conduct in the case of each defendant proceeded.* In the light of this proposition the jury could not be denied the right—indeed, it was its duty—if the quality of this animus was found to vary in the case of some of the defendants as compared with that of the others, to express that finding in the verdict.

The State might, with some cogency, argue that there was nothing in the evidence to justify a finding of minor guilt as expressed in the manslaughter verdict; that a finding by the jury that the homicide was a criminal one, of necessity fixed the grade of the homicide as murder in the second degree; that there were no circumstances in the case to justify the finding by the jury of the elements necessary to constitute the crime of manslaughter. This, as we say, is an argument that the State might properly make. Surely, it is no subject for complaint by the defendants.

The verdict is legally valid.

POINT XXVII.

The verdict was not against the weight of the evidence.

The argument under this point in the defendants' brief is entirely made up of special pleading. In making argument counsel employs certain features of the evidence, minimizes others and ignores the remainder.

Weight of evidence requires no discussion here in addition to that which has already been devoted to it in this brief.

It is respectfully submitted that the judgment of the Hudson Oyer and Terminer should be affirmed.

JOHN DREWEN,
Prosecutor of the Pleas of Hudson County,
Attorney for the State of New Jersey,
Defendant-in-Error.

New Jersey Court of Errors and Appeals

State of New Jersey, Defendant-in-error, *vs.* Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe, alias Brasch, Plaintiffs-in-error.	On Indictment for Murder. On Writ of Error to Hudson County Court of Oyer and Terminer.

BRIEF FOR PLAINTIFFS-IN-ERROR.

Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe alias Brasch were indicted for murder by the Hudson County Grand Jury. The indictment against said four defendants read as follows:

> "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 Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe, alias Brasch, on the 6th day of November in the year of our Lord One Thousand Nine Hundred and Twenty-eight, with force and arms at the City of Jersey City aforesaid, in the County aforesaid, and within the jurisdiction of this Court, one Catherine McGee in the peace of God and of this State, then and there being, did wilfully, feloniously and of his malice aforethought, kill and murder, 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.

"And the Grand Inquest aforesaid upon their oath aforesaid, do further present that the said Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe alias Brasch on the 6th day of November, in the year of our Lord One Thousand Nine Hundred and Twenty-eight, at the City of Jersey City aforesaid, in the County of Hudson aforesaid, and within the jurisdiction of this Court, did feloniously kill and slay one Catherine McGee 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.

"And the Grand Inquest aforesaid upon their oath aforesaid, do further Present, that the said Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe alias Brasch on the 6th day of November, in the year of our Lord One Thousand Nine Hundred and Twenty-eight, at the City of Jersey City aforesaid, in the County of Hudson aforesaid, and within the jurisdiction of this Court, in and upon Catherine McGee in the peace of God and of this State, then and there being, an assault did make, and her the said Catherine McGee then and there did beat, wound and ill-treat and other wrongs to the said Catherine McGee then and there did, to the great damage of the said Catherine McGee, 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."

Two of the said defendants, viz., Frank Donato and Vincent O'Keefe alias Brasch, were found guilty of murder in the second degree and were sentenced to imprisonment at hard labor for thirty years in the State Prison, the other two defendants, Frank McNally and George Ormsby, were found guilty of manslaughter and were sen-

tenced to ten years at hard labor in the State Prison.

Upon the convictions of the defendants by the jury a writ of error was issued out of the New Jersey Court of Errors and Appeals, and the case is before this Court on Assignments of Error and Specifications of Causes for Reversal, the entire record having been certified and returned pursuant to Section 136 of our Criminal Procedure Act.

There are one hundred and eight assignments of error (S. C., pp. 434-468) and one hundred and nineteen specifications of causes for reversal (S. C., pp. 469-505), which assignments of error and causes for reversal are practically the same, consisting chiefly of rulings on motions before the trial, alleged errors in the manner of empanelling and drawing the jury, rulings of the Trial Court excluding numerous questions on cross-examination of State's witnesses and overruling defence's objections to questions put by the Prosecutor to witnesses; to certain errors of the Trial Court in the admission and rejection of evidence; to certain errors of the Trial Court in the admission of unsigned alleged statements of defendants; to alleged error on the part of the Trial Court in refusing to direct an acquittal of the defendants both at the close of the State's case and at the close of the entire case; to the failure of the Trial Court to charge the requests of the defendants; to alleged injurious error appearing in the charge of the Court; to alleged injurious error on the part of the Trial Court in refusing to grant a motion in arrest of judgment and a new trial. In addition thereto, it is strongly urged that the verdicts are contrary to the weight of the evidence as to each of the defendants.

The assignments of errors and the specifications of causes for reversal will be argued sepa-

rately, being grouped together whenever the same principles of law or questions of error apply similarly to the several.

At the trial, which began on Monday, June 24th, 1929, counsel for the defense interposed a challenge to the Array of Jurors drawn for the trial of the indictment and moved to quash the said Array.

The Indictment upon which these defendants were tried contained three counts, for murder, manslaughter and assault and battery, and was for the alleged murder of one Catherine McGee, a little girl about eight years of age, on November 6, 1928 at or near Fourth and Erie Street in the City of Jersey City. These four defendants were arrested about three or four days after the death of the little girl and were indicted for the murder. The four plaintiffs-in-error, the defendants below, denied absolutely any participation whatsoever in the killing of the child and offered evidence and alibis to support their denial. It is contended here that the conviction of the plaintiffs-in-error, defendants below, was the result of prejudice and passion coupled with a total absence of identification of all of the said defendants as the persons in, near or at the automobile that was alleged to have been used in the perpetration of the alleged crime.

POINT ONE.

Assignments 1 and 2. Specifications 1 and 2.

The Trial Court denied defendants' motion to quash the indictment found against them notwithstanding the fact that the said indictment and the count contained therein were inconsistent and ambiguous and did not set out with sufficient clearness, certainty and perspicuity the charge against the said defendants; and also the said indictment did not specify with any clearness or certainty whatsoever whether the said defendants, or any of them, were charged as principals or accessories in the commission of the alleged crime set forth in the three counts of the indictment; and also because the Trial Court over the objection of defendants allowed the State to amend the first count in the indictment charging murder.

This point was raised by motion to quash (S. C., pages 65-68).

It is contended that in the present case the indictment contains no allegation of fact whatsoever. It contains mere conclusions. It fails to apprise the defendants in any respect of the nature of the crime as to whether they are charged as principals or as accessories. It does not allege all of the facts which entered into the offense, nor does it set down by express averment that the alleged crime arose or grew out of the commission of any illegal act in which the said defendants are alleged to have participated.

State v. *Titus*, 49 N. J. L. 36, seems to hold to this view, but it can hardly be said that in a situation like the one at bar that the defendants are apprised of the nature of the accusations against them, in a similar indictment for murder without

stating the facts upon which the state intends to rely to prove the murder.

In the case of the *State* v. *Schmid,* 57 N. J. L. 625, at page 626, the learned Justice said:

> "This method of pleading likewise ignores those provisions of the Constitution of this State by force of which every person held for a criminal offense is guaranteed not only that he shall be accused of such an offense by Grand Jury, but also that he shall be informed of the nature and cause of the accusation."
>
> Const., Art. 1, paragraphs 7 and 8.
>
> "Unless the charge contains a description of the crime of which the Grand Jury accuses the defendant, and *a statement of some circumstances by which it may be identified and its particular nature disclosed,* it is readily conceivable that a true bill may be found for *one offense,* and the defendant be compelled at the trial to meet any offense that happens to fall within the general terms of the indictment."

And again (on page 627) the learned jurist continues:

> "It is, undoubtedly, a well settled general rule that in an indictment for an offense created by statute, it is sufficient to describe the offense in the words in which the statute describes it. This rule, however, is based upon and applies only to those cases in which the statute describes the offense with which it has to do. Unless this is so, the mere recital of the non-descriptive words from the statute will not constitute in reasonable completeness a statement of the offense, so as to relieve the pleader from *averring the acts* that go to make it up."
>
> See to same effect,
> *State* v. *Solomon,* 96 N. J. L. 124.

"The function of a bill of particulars is not to supply defects in indictments or to supply essential averments omitted or necessary to charge an indictable offense. No such legal effect can be given to it, without contravening Article 1, paragraphs 7 and 8 of this State."

"A bill of particulars is no part of the indictment or judgment record."

State v. *Lehigh Valley Railroad,* 92 N. J. L. 261; 94 N. J. L. 171.

In *State* v. *Solomon,* 117 Atl. 260 (Ct. E. & Ap.), in the opinion of the Court pronounced by Mr. Justice Kalisch it is said:

"The fragile theory that a presumption may be raised in aid of an indictment which omits a constituent element of the statutory crime is shattered by the force of the familiar inflexible legal rule that no presumption of guilt arises from the mere finding of an indictment against an accused, and that there is a presumption of innocence which abides with an accused until his guilt is established by proof beyond a reasonable doubt."

"Before concluding it may be well to advert here to an unbendable and substantial rule of pleading, essential to the validity of an indictment whether founded on the Common Law or Statute, which rule, though simple and familiar seems by reason of its universality often to escape attention. This rule is cogently stated by Bishop in Volume 1, on Cr. Proc. 81, 2d. Ed. as follows: 'This principle that *the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted pervades the entire system of the adjudged law of criminal proceedings.* It is not made apparent to our understandings by a single case only.'

"Wherever we move in this department of our jurisprudence, we come in contact with

it. We can no more escape from it than from the atmosphere which surrounds us.

"The same learned author in his valuable treatise on Statutory Crimes, §166, says:

'In the work on Criminal Procedure we saw that the fundamental doctrine relating to the indictment, whether at common law or under a statute, the allegations must cover every particular element of crime entering into the punishment to be inflicted.'

"And in volume 1, Cr. Proc. 521, to which above reference is made, the author says:

'And that he knows certainly what each thing is wherewith he is charged, *all the facts which enter into his defense must, especially in felony, be set down by express averment, nothing to be left to intendment.*'

"The legal rule is tersely and accurately expressed in *Mears* v. *Com., 2 Grant* case (Pa.) 385-387, as follows:

"The general rule of pleading is that every fact or circumstance which is a necessary ingredient in the offense must be set forth in the indictment; otherwise it is defective."

'This doctrine is lucidly stated and discussed by Mr. Justice Garrison in *State* v. *Schmid,* 57 N. J. L. 626, 31 Atl. 280. From what has been said it follows that no valid judgment could have been pronounced on the defendant in the present case on the indictment in question, and for this additional reason the verdict must be reversed.' "

POINT TWO.

Assignment 3. Specification 3.

Because the Trial Court overruled the challenge of the defendants to the Array of Jurors, defendants alleging that Chapter 246 of the Laws of 1929 under which Chapter an Order was made for the striking of a jury for the trial of the indictment against the defendants, violated the constitutional provision respecting ex post facto law; changed the method of regulating peremptory challenges; is special and discriminatory legislation; substitutes a new method for striking and empanelling a jury; does not provide for repeal of any provision inconsistent with the Criminal Procedure Act of 1898; deprived the defendants of a right which existed in the law when the alleged crime for which they were indicted was committed; is unconstitutional because it is a statute passed by the Legislature after the commission of the alleged offense for which the defendants were indicted.

The challenge to the Array was put in writing and is to be found on pages 69-74 of the State of Case. The grounds urged in the motion to quash the said Array were the following:

1. Because Chapter 246 of the Laws of 1929, under which the order was made for the striking of a Jury for the trial of the said indictment against the said defendants, denies the said defendants due process of law.

2. Because the aforesaid Act violates the constitutional provision respecting *ex post facto* law, for the reason that the said Act:

(a) Changes the method of regulating peremptory challenges.

(b) Is founded upon an illusory classification, namely, murder cases, which in itself is special and discriminate legislation.

(c) If it is intended to be applied to murder cases because of the severity of the penalty, it does not include within its purview the cases of treason and assault of governmental executives which are likewise punishable with death.

3. The aforesaid Act of 1929 is entitled: "A further Supplement to an Act entitled 'An Act relating to Courts having criminal jurisdiction and regulating proceedings in criminal cases (Revision of 1898), approved June 14th, 1898", when in fact its context refers to selecting struck juries, which method is now repealed by reason of the Act of 1929 relating to the appointment of struck juries selected by the Sheriff and the Jury Commissioner.

4. The Act of 1929 provides for the striking of certain names "in the usual way", which under the law must mean the legal way. Is the usual way to be found in the present struck jury Act, or where is it to be found?

5. The aforesaid Act of 1929 does not provide in any way for any repeal of any provision inconsistent with the law passed in 1898.

6. The aforesaid law of 1929 substitutes a new method of striking and empaneling a jury, legislatively depriving the defendants of a right which existed in the law when the crime of which they are charged was committed.

7. The aforesaid Act of 1929 subjects the defendants to an illegal disadvantage which was legally non-existent at the time of the crime for which they were indicted and legally works manifest wrong and injury to them, because said Act

changed to their detriment and injury the number of peremptory challenges to which they were entitled.

8. The aforesaid Act is unconstitutional because it is a statute which was passed by the Legislature after the commission of the alleged offense for which the said defendants were indicted, and respecting the said offense and in relation thereto and its consequences, said Act of 1929 alters the situation of the defendants accused of the commission of the said offense to their disadvantage.

Even assuming for the sake of argument that the aforesaid Chapter 246 of the Laws of 1929 is a constitutional enactment and that the legislature may reduce or abolish entirely the peremptory challenges allowed to defendants, the defendants here contend that their case does not come under the operation of that Statute which purports to provide as follows:

> "When a rule for a struck jury shall be entered upon any indictment for murder, the court granting such rule may, upon motion of the Prosecutor, or of the defendant, or on its own motion, select from the persons qualified to serve as jurors in and for the country in which any indictment was found, whether the names of such persons appear on the list of jurors prepared and selected by the Commissioners of Juries of the persons qualified to serve as jurors in and for such county or not, sixty names with their places of abode, from which the prosecutor and the defendants shall each strike twelve names in the usual way and the remaining thirty-six names shall be placed by the sheriff in the box in the presence of the Court, and from the names so placed in the box, the jury shall be drawn in the usual way."

10. In this case the defendants have not been indicted for murder only, but they have been in-

dicted for murder, manslaughter and assault and battery, all of which offenses are alleged to have arisen out of the assault and slaying of Catherine McGee, and all of which are contained in the same indictment, and the mere appellation on the indorsement of the said indictment while taken to be true as far as it goes to describe the indictment as an indictment for murder, is inadequate, for the reason that the endorsement outside of the form and signature has no legal validity whatsoever. But if the endorsement has any validity whatsoever, it utterly fails to set forth the true facts of all the indictment contains, namely, that the said defendants in addition to being charged with murder are also charged with the crimes of manslaughter and assault and battery.

11. **If the Court were to construe the said indictment against said defendants as a plain indictment for murder, what would follow? Under the present struck jury law in criminal cases (Newman's Criminal Law, page 558), no struck jury can be had on the trial of an indictment for assault and battery. Under the first count in the indictment against defendants they could be tried under the law of 1929 on the charge of murder, but a rule could not be entered for a struck jury under the 1929 Statute, whereby the second, the manslaughter count, could be heard, but a struck jury might be taken from the list of struck jurors selected by the Jury Commissioners under the procedure found in Newman's Criminal Law at page 558. On the assault and battery charge a jury would be selected from the general panel selected and empanelled in the ordinary way by the Jury Commissioner under the Chancellor-Fielder Jury Act. On the murder charge defendants would be entitled to five challenges; on the manslaughter charge if the jury were struck under the Act as**

found in Newman's Criminal Law at page 558, they would be entitled to five challenges, and on the assault and battery charge ten challenges, all of which challenges being, of course, peremptory challenges.

12. Because under the 1929 Act there is no mention whatsoever respecting who is going to empanel or who is going to bring into Court for the trial of the said defendants the names of the jurors who have been selected. Paragraph Four, on page 1845 of the Compiled Statutes, respecting Criminal Procedure sets forth in detail the manner in which juries in criminal cases shall be struck, served and returned in the same manner as in the case of struck juries ordered in the trial of civil causes, except as otherwise provided.

At this juncture it is deemed important to invite the attention of this Honorable Court to the fact that the defendants in this case had been called for trial and were ready to go to trial on two other occasions, namely, on January 4, 1929, and on January 21, 1929, which was prior to the time of the passage of the 1929 Act, and on each of these occasions defendants were called to be tried by a common jury under Section 82 of the Criminal Procedure Act, (S. C. pages 12, 20, 28 and 31), no demand for a struck jury having ever been made by the Prosecutor prior to the dates heretofore mentioned on which the case was set down to go to trial. On both of those occasions the trial was postponed on the motion of and at the instance of the Prosecutor and over the objection of defendants.

By reason of the above facts it is respectfully contended that the constitutional rights of the said defendants were infringed by trying them before a struck jury under an Act passed by the

Legislature some six to seven months after their indictment for the alleged crime. They were entitled to twenty peremptory challenges under the procedure in effect at the times they were formerly called to trial, while under the Act of 1929 they were entitled to only five peremptory challenges. It is respectfully submitted that in view of the foregoing facts the action of the trial judge in ordering a struck jury under the 1929 Act, which defendants respectfully urge is *ex post facto* legislation as far as the formerly acquired substantial rights of the said defendants are concerned, was an abuse of judicial discretion, was arbitrary, harsh and oppressive, even although it was a matter of procedure alone. In the above connection we respectfully quote from the case of *Kring* v. *Missouri,* 107 U. S. 221:

> "The distinction between retrospective laws, which relate to the remedy or the mode of procedure, and those which operate directly on the offense, is unsound where, in the latter case, they injuriously affect any substantial right to which the accused was entitled under the law as it existed when the alleged offense was committed."

On page 227 of the same case, the Court further says:

> "It will be observed that here are grouped contiguously a prohibition against three distinct classes of retrospective laws, namely, bills of attainder, *ex post facto laws,* and laws impairing the obligation of contracts. As the clause was first adopted, the words concerning contracts were not in it, because it was supposed that the phrase *ex post facto* law included laws concerning contracts as well as others. But it was ascertained before the completion of the instrument that this was a phrase which, in English jurisprudence, had acquired, a signification limited to the

criminal law, and the words 'or law impairing the obligation of contracts,'—were added to give security to rights resting in contracts. 2 Bancroft's History of the Constitution, 213.

"Sir Thomas Tomlin, in that magazine of learning, the English addition of 1835 of his Law Dictionary, says:

"'*Ex post facto* is a term used in the law, signifying something done after, or arising from or to affect another thing that was committed before.'

"'An *ex post facto* law is one which operates upon a subject not liable to it at the time that the law was made.'"

The first case in which this Court was called upon to construe this provision of the Constitution was that of *Calder* v. *Bull,* 3 Dall. 386, decided in 1798. The opinion was delivered by Mr. Justice Chase, and its main purpose was to decide that the provision had no application to acts concerning civil rights. It, however, is important, as it discusses very fully the meaning of the provision in its application to criminal cases. It defines four distinct classes of laws embraced by the clause.

"1st, Every law that makes an action done before the passing of the law and which was innocent when done, criminal, and punishes such action. 2d, Every law that aggravates the crime or makes it greater than it was when committed. 3d, Every law that changes the punishment and inflicts a greater punishment than was annexed to the crime when committed. 4th, Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender."

Again he says:

> "But I do not consider any law *ex post facto,* within the prohibition, that modifies the rigor of the criminal law; but only those that create or aggravate the crime; or increase the punishment or change the rules of evidence for the purpose of conviction."

Accordingly, in a subsequent case tried before Mr. Justice Washington, he said, in his charge to the jury, that:

> "An *ex post facto* law is one which, in its operation, makes that criminal which was not so at the time the action was performed; or which increases the punishment, or *in short, which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage." United States* v. *Hall,* 2 Wash. 366.

Again in the same case on page 232:

> "The word 'procedure' as a law term is not well understood and is not found at all in Bouvier's Law Dictionary, the best work of the kind in this country. Fortunately a distinguished writer on criminal law in America has adopted it as the title to a work of two volumes. Bishop on Criminal Procedure. In his first chapter he undertakes to define what is meant by procedure. He says: 'S.2. The term 'procedure' is so broad in its signification that it is seldom employed in our books as a term of art. It includes in its meaning whatever is embraced by the three technical terms, Pleading, Evidence and Practice.' And in defining Practice, in this sense, he says: 'The word means those legal rules which direct the course of proceeding to bring parties into the Court and the course of the Court after they are brought in; and Evidence he says, as part of procedure 'signifies those rules of law whereby we determine what testimony is to be admitted and

what rejected in each case, and what is the weight to be given to the testimony admitted.'

"If this be a just idea of what is intended by the word 'procedure' as applied to a criminal case, it is obvious that a law which is one of procedure may be obnoxious as an *ex post facto law,* both by the decision in *Calder* v. *Bull,* 3 Dall. 386, and in *Cummings* v. *The State of Missouri,* 4 Wall. 277; for in the former case this Court held that 'any law which alters the legal rules of evidence and receives less or different testimony than the law requires at the time of the commission of the offense, in order to convict the offender' *is an ex post facto law;* and in the latter, one of the reasons why the law was held to be *ex post facto* was that it changed the rule of evidence under which the party was punished.

"But it cannot be sustained without destroying the value of the constitutional provision, that a law, however it may invade or modify the rights of a party charged with crime is not an *ex post facto law* if it comes within either of these comprehensive branches of the law designated as Pleading, Practice and Evidence.

"Can the law with regard to bail, to indictments, to grand juries, to the trial jury, all be changed to the disadvantage of the prisoner by state legislation after the offense was committed, and such legislation not held to be *ex post facto* because it relates to procedure, as it does according to Mr. Bishop?

"And can any substantial right which the law gave the defendant at the time to which his guilt relates be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot."

And then again on page 234 of the above case:

"Why is not the right to life and liberty as sacred as the right growing out of a con-

> tract. Why should not the contiguous and associated words in the constitution relating to retroactive laws, on these two subjects, be governed by the same rule of construction? And why should a law equally injurious to the rights of the party concerned, be under the same circumstances void in one case and not in the other?"

And then turning to pages 249 and 250 of the opinion aforesaid:

> "But in addition to these matters of procedure, which are specially protected against legislative change either for the past or the future, there may be others, in which changes with a retrospective effect are forbidden by the prohibition against *ex post facto* laws. Such we have already seen would be laws which authorize conviction upon less evidence than was required at the time of the commission of the offense, or which altered to the disadvantage of the accused, the nature and quantity of proof at that time required to substantiate a legal defense; or which, in other words, gave to the circumstances which constituted and attended the act a legal signification more injurious to the accused than was attached to them by the law existing at the time of the transaction."

WHETHER THE "STRUCK JURY ACT OF 1929" IS CONSTITUTIONAL OR NOT, THE DEFENDANTS WERE IMPROPERLY TRIED.

The 1929 "Struck Jury Law" is known as Chapter 246, P. L. 1929.

This act is either constitutional or it is unconstitutional.

If it is unconstitutional, we can add nothing to the arguments presented on that point in the various motions on this point, and therefore, the defendants were improperly tried.

THE EFFECT IF THE 1929 ACT IS CONSTITUTIONAL.

We can only indicate the argument on this point by indulging in some detail.

Omitting the 1929 "Struck Jury Act", a struck jury would have been selected in the following manner.

a) The Jury Commissioners file at least a list, known as the "Struck Jury List" with the County Clerk before the opening of each term. This list contains at least three hundred names at this time.

b) The list is made up by the Jury Commissioners to quote the Act verbatim, "of such persons as are most impartial and unbiased as between the State and the persons charged with crime, and best qualified as to talents, knowledge, integrity, firmness and independence to try such causes."

c) Upon motion of the Court, or of any person charged in indictment, or of the Prosecutor of the Pleas any person unqualified may be stricken from the "Struck Jury List" by the Supreme Court Justice.

d) Proper names are substituted for those striken off, and filed with the County Clerk.

e) The List is always available for examination in the County Clerk's Office by all interested.

f) The list is never allowed in Hudson County to be less than two hundred.

g) When a trial by "Struck Jury" is ordered, the County Clerk and the Jury Commissioners appear in open Court and the familiar numbered brass disks are handed in open court to the Judge for his examination.

h) When found proper, the disks are put into a box on an axis and quickly revolved, thoroughly intermixing the disks.

i) The disks are then drawn by one of the Jury Commissioners, one by one, until sixty are drawn.

j) The numbers on the jury list corresponding with the numbers drawn then constitute the "Struck Jury Panel" for that trial.

k) Each side struck out twelve.

l) On the trial both sides are allowed five peremptory challenges.

The above proceedings are provided for under Section 76 of the "Criminal Procedure Act."

We might also add that the jury commissioners are supposed to consult the registry list and the assessment rolls of the various municipalities in making up their jury list.

In counter distinction to this method the 1929 "Struck Jury Law" gives the Court granting the rule for a trial by a struck jury the right to place on the panel for such trials sixty names from all those eligible for jury duty in the County irrespective of the Jury Commissioner's List. From the Judge's list each side is allowed five peremptory challenges.

It will be noticed that while the Jury Commissioners are restricted to select qualified jurors of more than the average intelligence, the Judge is not bound by such commendable restriction, and may, if he so desire, in the language of the late Mr. Justice Dixon place on such jury list "the blind, the lame and the halt" and other incapables.

The names selected under the Jury Commissioner's list is done entirely by chance, and the personal equation in no wise enters into the list of selection of the panel; while under the 1929

Amendment the jury is selected by the Judge personally, with this personal protection to the defendant eliminated. Thus, the highly intelligent, absolutely impartial and positively fair method of selecting the "Struck Jury List" under the Jury Commissioners Act has been superseded by the 1929 Enactment, in Murder cases.

The foregoing is the reason for our technical analysis of the effect of the 1929 Enactment, from a strictly legal standpoint.

First: the title to Chapter 246 of the Laws of 1929 is as follows:

> "A further supplement to an act entitled 'Act relating to Courts having criminal jurisdiction and regulating proceedings in criminal cases' (Revision of 1898), approved June fourteenth, one thousand eight hundred and ninety-eight."

As far as existing legislation is concerned, this supplement would only affect the existing statutes which its provisions contradict.

It is very respectfully submitted that Section 76 of the Criminal Procedure Act of 1898 is not repealed, except that in murder cases the Court granting the rule for a "Struck Jury" need not, but he may, on his own motion, or motion by the prosecutor or by the defendant, select the struck jury list for the trial of murder, but if no such motion be made, the panel for the "Struck Jury Trial" is made up under the Jury Commissioner's List under the aforesaid Section 76.

The selection of the "Struck Jury List" by the Court is not made as of course. It requires a motion, for the Act says "the Court granting such rule may, upon said motion," etc. A careful scrutiny of the record in this case fails to disclose when and where a Court of Common Pleas resolved itself in the absence of the Supreme Court

Justice for the County into the Court of Oyer and Terminer, for the purpose of entertaining any motion for the selection by the Court of the Struck Jury list or panel to be used in the trial of these defendants.

It is a fair subject for contention as a matter of judicial procedure that counsel for defendants were entitled to notice of this motion and that the Court could not of its own motion select a jury for the trial in this cause, but that it could be done only upon motion in the regular way. There is no record of any such motion.

It is respectfully submitted to this Honorable Court that there is a plentitude of evidence that the defendants were tried from a panel of jurors, selected by the Court acting *ex parte*.

A jury panel selected by the Court can try murder cases only. "Struck Juries" selected from the Jury Commissioner's List may, on order, try for murder in any degree, arson, atrocious assault and battery, sodomy, burglary, manslaughter, rape and robbery, and no other. Unless the discretion set out in the 1929 Amendment is exercised, trials for murder must be by "Struck Jury" in accordance with Section 76 of the Criminal Procedure Act of 1898.

In the present case at bar the defendants were tried on an indictment containing three counts, viz., murder, manslaughter and assault and battery, the last count being abandoned by the Prosecution immediately before the Trial Judge's charge to the jury. As we have observed, the 1929 Amendment to the Criminal Procedure Act could not be used to select a jury for the trial of manslaughter or assault and battery. We therefore are confronted with this very apparent contradiction which involves a substantial right: the defendants were tried by a jury selected by the

Court, for murder. They were entitled to a jury selected from the Jury Commissioner's List.

The trial for all criminal causes in New Jersey can be had only under the "Criminal Procedure Act." That Act, as now amended, provides for the trial of murder by a "Struck Jury Panel" selected by the Court, if it exercises the discretion under the 1929 Amendment to said Act or by a Jury Panel selected from the Commissioner's Struck Jury List, if the Court does not exercise discretion.

The cases mentioned in the Statute permitting a "Struck Jury Trial" are tried by a Struck Jury panel from the Jury Commissioner's List. NOWHERE IN THE "CRIMINAL PROCEDURE ACT" DO WE FIND ANY PROVISIONS FOR THE TRIAL AT THE SAME TIME FOR MURDER, MANSLAUGHTER AND ASSAULT AND BATTERY BEFORE A STRUCK JURY SELECTED BY THE COURT.

AND SO COUNSEL MOST RESPECTFULLY CONTEND AND URGE UPON THIS HONORABLE COURT, THAT WHETHER DEFENDANTS HAVE ATTAINED ANY RIGHTS UNDER SECTION 82 OF THE "CRIMINAL PROCEDURE ACT," OR NOT, IF THE 1929 AMENDMENT BE CONSTITUTIONAL THERE IS NO PROVISION IN THE LAW WHICH PROVIDES FOR THE TRIAL OF THESE DEFENDANTS IN THE MANNER IN WHICH THEY WERE TRIED.

POINT THREE.

Because the Trial Court overruled the objection of defendants' counsel to the following question put to the witness Janicke by the Prosecutor: "Q. During the evening of November 6th did you witness any fight or disturbance around the school building or on the sidewalk in front of the building?" Assignment 4, Specification 4, (S. C., page 108.)

Because the Trial Court overruled the objection of defendants' counsel to the question put to the witness Janicke by the Prosecutor: "Q. What do you mean by fight, what happened?" Assignment 5, Specification 5, (S. C., page 109.)

Because the Trial Court overruled the objection of defendants' counsel to the question put to the witness Janicke by the Prosecutor: "Q. Did you or did you not disperse the fighters?" Assignment 6, Specification 6, (S. S., page 110.)

Because the Trial Court overruled the objection of defendants' counsel to the following question put to the witness Janicke by the Prosecutor: "Q. At the time of this fight, this general disturbance, as you called it, was there any vehicle of any kind standing at the curbstone in front of the school?" Assignment 7, Specification 7, (S. C., page 111.)

Because the Trial Court overruled the objection of defendants' counsel to the following question put to the witness Janicke by the Prosecutor: "Q. Now, did you see any men after you broke up this fight, as you said, did you see any men that had been in that fight get into this sedan?" Assignment 8, Specifications 8, (S. C., page 111.)

Because the Trial Court overruled the objection of defendants' counsel to the following question

put to the witness Janicke by the Prosecutor: "Q. Well, before it got to Fourth Street what happened to it, did it drive along Erie Street?"; and in refusing to strike out the answer to the said question. Assignment 9, Specification 9, (S. C., page 112.)

Because the Trial Court overruled the objection of defendants' counsel to the following question put to the witness Janicke by the Prosecutor: "Q. At any time that night did you witness anything unusual occur on the corner of Fourth Street and Erie Street?" Assignment 10, Specification 10, (S. C., page 113.)

Because the Trial Court overruled the objection of defendants' counsel to the following question put to the witness Janicke by the Prosecutor: "Q. Was there anything peculiar about the face or the dress or the arrangement of any one of them?" Assignment 11, Specification 11, (S. C., page 118).

Because the Trial Court refused to strike out all of the testimony adduced by the witness Janicke on his direct examination by the Prosecutor, counsel for defendants' urging that all of said testimony was immaterial, irrelevant and incompetent to the issue, not evidential against defendants and not in anywise binding them or any of them. Assignment 12, Specification 12, (S. C., pages 120-121.)

The viciousness of the foregoing questions and answers can hardly be appreciated unless all of the foregoing questions and the answers thereto are read. The witness was a police officer of the Jersey City Police Department and he was testifying regarding some alleged fight or disturbance that was alleged to have taken place in front of School No. 2, at or near Fourth and Erie Street, at some time on the evening of November 6th, the date of the alleged crime. All of the foregoing

questions were objected to and exceptions taken thereon by counsel for defendants on the ground that said questions were immaterial, incompetent and irrelevant and not binding on these defendants or evidential against them, because at no stage of the examination of the police officer Janicke by the Prosecutor was there any testimony whatsoever even remotely or otherwise adduced, that any of these defendants were present at the time of this alleged fight or disturbance testified to by the witness Janicke nor were they in or about this automobile that Janicke testified he saw in front of school No. 2 that evening.

The natural effect of allowing this testimony in the record and refusing to strike it out, despite the strenuous effort of counsel to prevent its introduction, was unquestionably to give to the jury the impression that these defendants were the ones guilty of or responsible for the creating of this fight or disturbance and were the parties who got into the automobile after the alleged fight or disturbance. The prejudicial effect of this testimony on the minds of the jury cannot be calculated.

In a final effort to remove this harmful matter from consideration of the jury, counsel then moved (S. C. pages 120-121):

> "Mr. Kavanagh: If your Honor please, I respectfully ask your Honor to strike out all the testimony of this witness on direct examination of the Prosecutor, on the ground, first, that all the testimony that was adduced by this witness is absolutely immaterial, irrelevant and incompetent to this issue. Second, on the ground that it cannot in anywise bind the defendants in this case. It cannot in anywise be evidential against them. Out of the mouth of this witness himself, on the question of Mr. Drewen the question is asked if he saw or could describe any of these four men

who were alleged to have got into the car. There was no mention whatsoever during the course of this direct examination on the part of the Prosecutor in respect to the questions he propounded to this witness and the answers that were submitted to those questions by this witness, whether any of these defendants were there at that time, that any of these defendants were in that car at that time, that any of these defendants participated or engaged in what he said was some kind of an altercation, and for those reasons I submit that this testimony is absolutely irrelevant, and absolutely incompetent, and absolutely immaterial; it cannot bind these defendants and is not evidential against them. For those reasons I most respectfully request your Honor to strike it out.

The Court: The Court will allow this testimony on the assumption that the Prosecutor hopes at a later hour to connect it up.

Mr. Drewen: Of course we will.

Mr. Kavanagh: I object and ask for an exception.

The Court: I will allow it."

It is respectfully contended that the trial court erred in overruling all the objections to the aforesaid questions and also in refusing to strike out the entire testimony of the witness Janicke, and for such action on the part of the trial judge this Court should reverse.

POINT FOUR.

Because the Trial Court refused to strike out the answer of the witness McFall to the question put to him on cross-examination by Defendants' counsel: "Q. Why didn't you speak to him that night if you knew him. A. Because I was not going to speak to him when he was out there causing a disturbance in the street"; for the reason that said answer was not responsive to the question and was an unwarranted assumption of fact, there being no evidence adduced by said witness that the defendant Donato was causing a disturbance in the street at any time. Assignment 15, Specification 15. (S. C., pages 148-149.)

Here was an attempt on the part of the witness by insinuation, implication and innuendo to have the jury believe that the defendant Donato had caused and was responsible for a fight or disturbance on the street out of which fight or disturbance the death of the little girl arose, when there was absolutely no evidence given by the witness McFall to the effect that the defendant Donato had caused or brought about any fight or disturbance whatsoever. It was a gratuitous violation of the principle of law well established that where an answer or part of an answer is irresponsive to a competent question, the examining party may move to strike out what is irresponsive, whether it be competent evidence or not, but if competent the adverse party has no right. See *State* v. *D'Adame*, 84 N. J. L. 386.

This answer having been allowed to stand produced the harmful effect of prejudicing the defendants in the minds of the jurors, and the refusal of the Trial Court to strike it out was errone-

ous and improper, and this Honorable Court should deem the said action of the Trial Court as an error causing manifest injury to the defendants, apparent on the record, and a proper basis for reversal of the conviction in this case.

POINT FIVE.

Because the Trial Court over the objection of defendants' counsel admitted in evidence an alleged written statement of the defendant Donato, which alleged written statement was wholly unsigned by the said defendant and the admission of which in evidence was erroneous, improper and manifestly highly prejudicial and injurious to the legal rights of the said defendant. Assignment 25, Specification 25, (S. C., pages 239-248).

Because the Trial Court over the objection of defendants' counsel admitted in evidence an alleged written statement of the defendant O'Keefe, which alleged statement was wholly unsigned by the said defendant, and the admission of which in evidence was erroneous, improper, and manifestly highly prejudicial to the legal rights of the said defendant. Assignment 26, Specification 26, (S. C., pages 259-261.)

Because the Trial Court over the objection of defendants' counsel during the course of the trial used the words "confession" and "admission" in referring to certain unsigned alleged statements of the defendants Donato and O'Keefe and signed alleged statements of the defendants Ormsby and McNally, when in point of fact the said unsigned alleged statements and the said signed alleged statements were not "confessions" or "admissions". Assignment 58, Specification 58, (S. C., pages 240, 247, 261, 265, and 384.)

Lieutenant Hoffman, a witness for the State was asked the following question by the Prosecutor (S. C., page 242) respecting an alleged statement by the Prisoner Donato:

> "Q. Was the statement signed by the prisoner after the answers were reduced to writing? A. It was not."

After other questions respecting the statement were propounded by the Prosecutor the said unsigned alleged statement of Donato was offered in evidence by the Prosecutor over the objection of counsel for defendants. At that time the Court used the following language (S. C., pages 243 and 244):

> "The Court: Under the well established law in this State confessions need only be voluntary, and as my authority for that statement I would refer you to the case of Roselle *v.* State, 62 N. J. L., page 216, where the question of the question of the admissability of statements is discussed at great length; also the case of the State *vs.* John Young, recorded in 67 Law, page 223; also the case of the State *vs.* Hand, 71 N. J. L. 137, in which among other things the Court said: 'The failure to caution a prisoner when he appears before a magistrate and makes incriminatory statements in answer to questions is no bar to their admission as evidence so long as it appears that the statements were voluntary and not the product of fear or hope incited by some word or act of those in authority. In this case at bar, which is the statement now offered in evidence it is even stronger than the case of the State *vs.* Hand reported in 71 N. J. L., to which I am referring you, because in the statement or in the alleged confession which is now being offered in evidence, it appears that the prisoner was cautioned as to his rights and there is nothing appearing before me affirmatively to show

> that the prisoner at the bar was in any wise intimidated nor was he led to believe by any blandishments or any hope of any indulgence on the part of the State or that anything would be done in his favor to secure that confession. This case does not come within the category of the cases where it is set up as a defense that the confession was secured by or what is well known in police circles as the third degree method, and this motion is not addressed to that character of confession. So that in the present position of the case, your motion will be denied and the confession received.
>
> "Mr. Kavanagh: May I be heard before your Honor denies that motion?
>
> The Court: I will indulge you to that extent."

Thereupon counsel for the defense went into a lengthy argument with the purpose in mind of convincing the Trial Court that the cases cited by it heretofore did not apply to the matter under discussion, as in those cases the written statements were signed by the respective defendants and were clear out and out confessions, whereas in the present case the defendant Donato had not signed any statement nor had he in the alleged statement made any confession whatsoever of his guilt or of the guilt of the other defendants. The Court nevertheless admitted the unsigned statement in as evidence of a confession of Donato's guilt over the objection of defendants' counsel, defendants' counsel excepting to the said statement being offered in evidence (State Case page 248).

It is most respectfully submitted and urged upon this Court that the action of the Trial Judge in admitting in evidence and placing before the jury this unsigned paper in which the defendant Donato is alleged to have been asked certain questions by the Jersey City police in reference

to the crime for which he was arrested worked irreparable injury to the case of all of the defendants, is reversible error and for which the conviction should be set aside.

Surely there was no warrant in law or in fact for the Trial Court to categorically state to the jury in the course of his remarks respecting the unsigned piece of paper that it was an admission or confession of Donato, when it was neither one nor the other.

> "A confession is a statement made at any time by a person, admitting or suggesting the inference that he has committed, or participated in the commission of, a crime".

Underhill's Criminal Evidence, 3rd Edition, page 211.

Until a person signs a statement he does not make that statement his so that it might be used as evidence against him, the writing on the paper itself without his signature adopting the writing or statements thereon are the veriest hearsay as to him. See *State* v. *Rombolo,* 89 N. J. L. 565.

To allow the statement itself in evidence to prove the truth of the facts written upon it is harmful error, since it is not hearsay, but *also deprives the defendant of the right to cross-examine the witness as to the extent of his recollection. State* v. *Young,* 117 Atl. 713.

As to the unsigned alleged statement alleged to have been made by Defendant O'Keefe (State Case, page 262) it is hereby respectfully submitted that the same arguments and decisions as heretofore advanced and set forth in Point 5 will apply in respect to the illegality of the admission of the unsigned alleged statement of O'Keefe into evidence.

It will be noted from an inspection of the record (State Case, pages 260-261) that counsel for

the defendants objected to the admission of the unsigned alleged statement of O'Keefe into evidence, urging the same grounds that were urged and set forth as to why the unsigned alleged statement of the Defendant Donato should not have been admitted into evidence and as to why the said unsigned paper should not have been characterized by the Trial Court as a "confession" of the defendant Donato.

> "Mr. Kavanagh: That is all. I object to the same, urging the same grounds that I set forth as to the alleged statement of Donato, embracing all of my arguments that I made in that case.
>
> The Court: The alleged confession will be received and marked in evidence. (Exception allowed, signed and sealed accordingly)".

POINT SIX.

Because the Trial Court over the objection of counsel for defendants at the close of the State's case refused to direct a verdict in favor of the Defendant Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe, alias Brasch, notwithstanding the fact there was no legal evidence adduced by the State and its witnesses to sustain the allegations contained in the indictment, and also no legal evidence adduced which in anywise connected any of the four defendants with the perpretration of the alleged crime charged. Assignment No. 27, Specifications No. 27. (State of case, pages 276-291.)

Because the Trial Court over the objection of counsel for defendants at the close of the State's case, refused to direct a verdict in favor of the Defendant Frank Donato, notwithstanding the fact that there was no legal evidence adduced by

the state and its witnesses to sustain the allegations contained in the indictment, and also no legal evidence adduced which in anywise connected this defendant with the perpetration of the alleged crime charged. Assignment No. 28, Specification No. 28.

Because the Trial Court over the objection of counsel for defendants at the close of the State's case, refused to direct a verdict in favor of the defendant Frank McNally, notwithstanding the fact that there was no legal evidence adduced by the State and its witnesses to sustain the allegations contained in the indictment, and also no legal evidence adduced which in any wise connected this defendant with the perpetration of the alleged crime charged. Assignment No. 29, Specification No. 29.

Because the Trial Court over the objection of counsel for defendants at the close of the State's case refused to direct a verdict in favor of the defendant George Ormsby, notwithstanding the fact that there was no legal evidence adduced by the State and its witnesses to sustain the allegations contained in the indictment, and also no legal evidence adduced which in any wise connected this defendant with the prepetration of the alleged crime charged. Assignment No. 30. Specification No. 30.

Because the Trial Court over the objection of counsel for defendants at the close of the State's case refused to direct a verdict in favor of the defendant Vincent O'Keefe, alias Brasch, notwithstanding the fact that there was no legal evidence adduced by the State and its witnesses to sustain the allegations contained in the indictment, and also no legal evidence adduced which in any wise connected this defendant with the perpetration of the alleged crime charged. Assignment No. 31, Specification No. 31.

The indictment against these four defendants consisted of three counts: namely for murder, manslaughter, and assault and battery. It is respectfully submitted from a careful reading of all of the testimony adduced on the part of the witnesses for the State, on the presentation of the State's case, (and there were some thirteen to fifteen witnesses who gave testimony for the State on its main case), that not a single witness sworn in behalf of the State to give testimony to sustain the allegations in the three counts of the indictment gave one jot or tittle of legal evidence that in any way connected these four defendants with the perpetration of the crime alleged in the indictment.

There were a number of witnesses sworn on behalf of the State who were actually present at the scene of the alleged crime, some standing four or five feet away from the corners of Fourth and Erie Street, and who from their own testimony must have had ocular inspection and ocular demonstration of everything that happened at the time the little girl is alleged to have fallen to the sidewalk. And, it is indeed a significant and important fact and circumstance in connection with the alleged proof to sustain the allegations in this indictment on the part of the State, that not one of the State's witnesses who were there present at the alleged scene of the crime, could identify or pick out as the assailant of the little girl or as the occupant of this car that is alleged to have passed the corner, as any one of these four defendants. Surely if any one of these four defendants struck the fatal blow or aided one another or abetted one another in the carrying out of this assault on the little girl, some one or other or more of the spectators among whom were many of the State's witnesses, would have immediately singled out that one Defendant or those Defend-

ants, and would have testified against him or them in Court.

It is most respectfully contended that there was not one particle or scintilla of evidence adduced on the part of the State to in any wise incriminate or couple up any of these four defendants with the death of this little girl, either from the attempted commission of some unlawful act the result of which might be bloodshed by any or all of them, or by any and all of them actually participating, assisting, aiding or abetting in the commission of any unlawful act whatsoever.

Of course it must be clearly patent and evident to this Honorable Court from an inspection, knowledge and thorough understanding of the decisions of all of the Courts of this State, that no one charged with crime can be held to answer to any charge or be adjudged guilty and convicted of any charge, be it of a high or low degree, on mere suspicion, surmises, assumptions, conjectures, inferences or speculations, but in all criminal prosecutions before a defendant is obliged to defend himself against any charge or accusation or indictment, a *prima facie* case must have been made out against him. This being so, no legal evidence having been presented by the State during the course of its case, sufficient to connect all or any of these defendants with the crime as charged, the Trial Court should have granted the request of counsel for the Defendants for a direction of a verdict in their favor.

Mere presence at the scene of the perpetration of crime does not render a person *particeps criminis*. There must not only be presence upon the scene of the crime, but also an actual participation, an aiding and abetting in the crime committed. Nor does the failure of the spectator to interefere make him a participant in the crime.

State v. *Fox,* 70 N. J. L. page 353.

It is therefore respectfully submitted that the said defendants suffered manifest wrong and injury by the refusal of the Trial Court to grant the motion of counsel for a direction of a verdict in their favor at the end of the State's case.

POINT SEVEN.

Because the Trial Court overruled the objection of defendants' counsel to the following question put to the witness Josephine Donato by the Prosecutor on cross-examination: "Q. And don't you know that on July 20th, 1928, you caused a warrant for his arrest to be issued out of the courts of this county and applied for it through the Probation Office for desertion?" Assignment 54, Specification 54, (S. C., page 345.)

Because the Trial Court overruled the objection of defendants' counsel to the following question put to the witness Josephine Donato by the Prosecutor on cross-examination: "Q. Don't you know that he was arrested on your warrant, charged with desertion, and that that arrest was made October 11, 1928?" Assignment 55, Specification 55, (S. C., page 346.)

Because the Trial Court overruled the objection of defendants' counsel to the following question put to the witness Josephine Donato by the Prosecutor on cross-examination: "Q. Do you remember that on the 25th of October he was arraigned on the charge of desertion before Judge O'Regan in the Hudson County Court of Sessions?" Assignment 56, Specification 56, (S. C., page 347.)

Because the Trial Court overruled the objection of defendants' counsel to the following question put to the witness Josephine Donato by the Prosecutor on cross-examination: "Q. Mrs. Donato, do

you know where the Probation Office is at Five Corners, Jersey?'' Assignment 59, Specification 59, (S. C., page 364.)

Because the Trial Court overruled the objection of defendants' counsel to the following question put to the witness Josephine Donato by the Prosecutor on cross-examination: ''Q. You went to the Probation Office, did you not, on October 9th, 1928, at the time that your husband was on probation?'' Assignment 60, Specification 60, (S. C., page 364.)

Because the Trial Court overruled the objection of defendants' counsel to the following question put to the witness Josephine Donato by the Prosecutor on cross-examination: ''Q. You went there for the purpose of complaining to the Probation Officer about your husband, did you not?'' Assignment 61, Specification 61, (S. C., page 365.)

These assignments and specifications can all be considered together since they all relate to the cross-examination by the Prosecutor of Josephine Donato, wife of the defendant, Frank Donato.

All of these questions were objected to by counsel for defendants and allowed by the Trial Court over objection with exceptions taken to all of them. The only purpose for the introduction of this evidence by the State, and the only effect of it, would be the harmful effect of prejudicing the Defendant Donato in the minds of the jurors, proving against him the prior crime of desertion and creating the probability in the minds of the jurors that he was a man who would not stop at the commission of a crime. It also tends to establish proof of a prior crime, which proof would be illegal unless it were by way of proof of a prior conviction, and therefore would have the effect of prejudicing and affecting the credibility of the defendant as a witness, as well as creating the improper presumption on the part of the jury

that the Defendant Donato was a man likely to commit crime.

Therefore it is strongly contended that the action of the Trial Court in allowing these questions over the objection and exception of counsel for defendants, particularly in a capital case, was erroneous and improper and that this Honorable Court should deem it as error causing manifest injury to the defendant, apparent on the record, and a proper basis for the reversal of the conviction in this case.

> 2 Comp. Statutes 2222;—husband or wife. "In any trial or inquiry in any suit, action or proceeding in any Court, or before any person or committee having by law or consent of parties authority to examine witnesses or hear evidence, the husband or wife of any person interested therein as a party or otherwise shall be competent and compellable to give evidence the same as other witnesses, on behalf of any party to such suit, action or proceeding; provided, *that nothing herein shall render any husband or wife competent or compellable* to give evidence for or against the other in any action for criminal conversation, except to prove the fact of marriage, *or to render any husband or wife competent or compellable to give evidence against the other in any criminal action or proceeding, except to prove the fact of marriage.*"

See also the case of the *State* v. *Herbert,* 92 Law 341, where the husband was allowed to give testimony tending to accuse his wife. This was held to be reversible error.

POINT EIGHT.

Because the Trial Court over the objection of Defendants' counsel admitted in evidence an alleged statement of the defendant McNally. Assignment 57, Specification 57, (S. C., p. 360.)

At page 360 of the State of the Case, the following colloquy took place between the Trial Court and counsel for defendant in respect to the admission in evidence of the alleged statement made by Defendant McNally:

> "The Court: Yes, but there was no objection to that.
>
> Mr. Kavanagh: I objected at the time.
>
> The Court: Well, what is your objection for the record?
>
> Mr. Kavanagh: My objections, then, were that there was not evidence that Mr. McNally had been warned of his rights, respecting the alleged charge against him. There are a number of others in the record in respect to that.
>
> The Court: I will give you the benefit of it and the Court will allow the alleged confession to be admitted into evidence.
>
> Mr. Kavanagh: Exception.
>
> (Statement marked Exhibit S-9 in evidence.)
>
> Mr. Kavanagh: Further, your Honor, I don't want your Honor to interpret me in any wise as being disrespectful in this manner——
>
> The Court: I don't.
>
> Mr. Kavanagh: But I object absolutely to the word confession as used by the Court. As I said before, there is absolutely no evidence in this case at all to connect Mr. McNally or any of the other three defendants with this crime, and this afternoon I objected to the use of the word confession by your Honor, and I objected to the use of the word

admission, which under our decisions and under our Law in cases of this kind should not be used, and I say at this time that there is no evidence in this case that there is any confession or any admission——

The Court: May I ask you then what you characterize this document to be?

Mr. Kavanagh: An ordinary piece of paper, if your Honor please.

The Court: An ordinary piece of paper?

Mr. Kavanagh: Absolutely, without any force or effect in law whatever.

The Court: You can argue that to the jury.

Mr. Kavanagh: Alright, but I except to your Honor's ruling, and I except to the use of the word admission and the word confession.

(Exceptions allowed and signed and sealed accordingly.)

The Court: The Court will direct the Prosecutor to read the alleged statement or the alleged confession or the paper writing to the jury."

We very respectfully submit to this Court that the characterization of the Trial Judge of the paper writing signed by McNally as an admission or confession of his guilt or participation in or aiding or abetting in the crime charged was injurious and harmful error and misled the minds of the jury as to the exact gist of the paper writing, because such characterization of said writing as an admission or confession was untrue, both in point of fact and in point of law, and clearly misled the minds of the jury to actually believe that such paper writing was an admission or a confession, and such action of the Trial Judge should surely lead to a reversal.

This alleged statement or confession of McNally is found at pages 361-363 of the State of the Case. After it was read to the jury the following colloquy took place between the Court and Counsel for the defendant:

> "Mr. Kavanagh: Now I submit to your Honor from the reading of this alleged statement or piece of paper, or document, or whatever name my friend Prosecutor Drewen may call it—where is there a confession in that statement by Mr. McNally? None whatever.
>
> The Court: That is a debatable question at this time. The Court has ruled. The Court has admitted it in evidence and further comment is unnecessary."

Surely, from a reading of the statement of McNally it will be clearly apparent to this Honorable Court that there is nothing whatsoever in the statement that incriminates McNally or any of the other defendants in the commission of this alleged crime nor connects any one of them by way of aiding, abetting or participation in any wise whatsoever in it.

The remark of the Trial Court "that is a debatable question at this time" in the face of the fact that all of the statement was read to the jury and all of them heard its contents constituted legal error and harmful error because it went to the very heart of the case on trial.

POINT NINE.

Because the Trial Court over the objection of defendants' counsel permitted the Prosecutor to abandon the count for Assault and Battery after the Prosecutor and counsel for defendants had summed up the case and immediately before the Trial Court charged the Jury. Assignment 63, Specification 63 (S. C., pages 371-374.)

While we have not been able to find citations against the abandonment of this count by the Prosecutor, neither have we been able to find any decisions justifying this procedure. It is however

respectfully urged upon the minds of this Court that this action on the part of the Trial Judge permitting the Prosecutor to abandon the third count in the indictment, namely, the count for assault and battery, after both counsel for the defendants and counsel for the State had summed up to the jury, was clearly erroneous and improper and constituted legal error and harmful error which we respectfully contend should lead to a reversal of the conviction of defendants. To permit the Prosecutor after all the evidence on the part of the State was adduced and all the evidence on the part of the defendants was adduced and when the entire case was closed and the defendants had already summed up for over an hour and the Prosecutor had already summed up for over an hour and the jury was about to be charged by the Court, then like a bolt from out of a clear sky a motion was made by the Prosecutor to eliminate the count for assault and battery, which was permitted to be done by the Trial Judge over the objection of counsel, was, to say the least an improper mode of judicial procedure and a grave abuse of the discretion resting in the Trial Court.

It is contended that this action of the Prosecutor sanctioned and confirmed by the Trial Judge was tantamount to the prosecution and the Trial Court saying to the jury:

> "These defendants are guilty of a higher crime, than mere assault and battery, therefore we do not want you to consider that charge at all."

The history of the practice of including assault and battery in murder indictments might be traced to the decision in the case of *The State* v. *Thomas*, 65 Law 598, in which it was held that a statutory manslaughter did not justify the finding of a verdict for assault and battery. Since that decision,

the count for assault and battery has generally been added.

The charge of manslaughter in this case was statutory in form and therefor assault and battery could not be brought in by the jury after the Court eliminated the third count. No one would seriously contend that the defendants did not suffer manifest wrong and injury by this action of the Trial Court, apparent on the record, as it completely eliminated a compromise verdict perhaps by the jury, which under the fact might seem to the jury entirely justifiable.

POINT TEN.

Because the Trial Court in its charge to the jury erroneously and improperly defined murder. Assignment 64, Specification 64, (S. C., pages 376-379.)

The definition of murder charged to the jury by the Trial Judge as found at page 376 of the State of Case is incomplete, erroneous and improper.

The statute, (Sections 106 and 107 of the Crimes Act) distinctly defines "murder" and any definition of "murder" given by the Trial Court to the jury should have been given in the language of the statute; and the Court in giving that definition of the statute should have explained the language used by the statute. In the case at bar the definition of "murder" given by the Trial Court to the jury was based on "any unlawful act against the peace of this State of which the probable consequence may be bloodshed". While this clause is included in the definition of "murder", it seriously conflicts with Section 107 of the Crimes Act, which reads as follows:

> "Murder which shall be perpetrated by means of poison or by lying in wait, or by any kind of wilful, deliberate and premeditated killing, or which shall be committed in perpetrating or in attempting to perpetrate any arson, burglary, rape, robbery or sodomy, shall be murder in the first degree."

It will be noted that while section 106 includes:

> "or any unlawful act against the peace of the State of which the probable consequence may be bloodshed" alone

that these words are omitted from section 107, and therefore under section 107 none of these defendants could have been found guilty of murder in the first degree.

It is most respectfully contended and submitted to this Honorable Court that upon a close inspection of all of the testimony in the entire case there is not a particle or scintilla of evidence adduced anywhere to even remotely show that any of these defendants ever committed any unlawful act in connection with the crime charged, or participated in or aided or abetted in the perpetration of the said alleged crime or ever intended or contemplated taking the life of an innocent child. Furthermore there is not a particle of evidence in the entire record that these defendants even knew of the existence of the child, or that they, or any of them, attacked or assaulted or attempted to assault or aided and abetted or participated in any assault or attack upon anyone at or about the time or place of the alleged commission of this crime.

At this point we beg leave to say to this Honorable Court that the trial court, taking into consideration the fact that there was no evidence whatsoever adduced by the State both at the close of the State's case against them and at the close

of the entire case, should have granted the motions of defendants' counsel for a direction of a verdict of "not guilty" in favor of these defendants.

Now as to the charge of the trial judge on second degree murder which is found on pages 378 and 379 of the State of the Case.

The trial judge practically admits its own error in this respect: on page 378 of the State of the Case, he says:

> "As to murder in the second degree, the law is that any person who, in committing any unlawful act against the peace of the State of which the probable consequence may be bloodshed, shall kill another, shall be guilty of murder."

Here the trial judge excludes murder in the first degree and admittedly emphasizes the fact that defendants are guilty of murder in the second degree. Since this was the logical conclusion of his legal interpretation of the different degrees in murder, the charge of murder in the first degree should have been abandoned specifically.

Again, the trial court in its charge to the jury with respect to the crime of "murder", says at page 378 of the State of the Case:

> "I charge you now, gentlemen, that the violent swinging of a baseball bat or similar heavy instrument at the head or body of another person with intent to do injury to that person is an act against the peace of the State, the probable consequence of which is bloodshed. And I charge you also that if as a result of such an act death ensues, the crime is murder, so that the killing here is presumed to be malicious and is therefore murder unless and until the person or persons by whom such act was committed produce the facts and circumstances from which justification, excuse or extenuation may arise."

It is most respectfully submitted to this Honorable Court that this statement of the law by the trial court constitutes grievous and manifest error, apparent on the record, was injurious to the defendants and is a proper basis for reversal of the conviction in this case. It is not sufficient, to constitute the crime of "murder", that one should attack another with "a baseball bat or similar heavy instrument" with intent "to do injury to that person". Something more must be intended by the person or persons making such attack.

As was said by Mr. Justice Kalisch in his dissenting opinion delivered in the case of *State* v. *Mosley,* 131 Atl. 292, at page 299 thereof;

> "Firstly, the intent must be to do grievous and not mere bodily, harm, in order to constitute murder in the second degree." * * *
>
> "The trial judge was placing before the jury two classes of cases in which a verdict of second degree murder could be rendered, under the evidence; the first class being where the intent of the accused was 'to do mere bodily harm, without intent to take life,' which he defined to be murder in the second degree, and the second class, 'where the act is done in the heat of passion, but without justification and lacking the other elements of the highest degree of crime, premeditation, deliberation, and wilfulness.' He obviously, by his erroneous definition of murder in the second degree, prejudicially influenced the jury not to find a verdict of murder in the second degree if it came to the conclusion that the intent of the accused was to take the life of the deceased. For he expressly told the jury that if the intent was to do mere bodily harm, without intent to take life, it was murder in the second degree. The term 'grievous bodily harm' has a definite legal meaning. It means a greater injury than 'mere bodily harm.' Worcester defines

'grievous' to mean 'in a generic sense atrocious, heinous, heavy.' This is also its meaning in a legal sense. *Rex* v. *John Cox,* British Cr. Cases, Russel & Ryan 362." * * *

"It seems to me that the natural result of the statement of the trial judge that 'murder in the second degree presents those classes of cases of murder which are intended to do mere bodily harm without intent to take life,' was to eliminate from the jury's consideration the issue whether or not the defendant was guilty of the lesser degree of murder; for if we give to what the court said a construction most favorable to the state, it was equivalent to saying that if the intent of the defendant was to do mere bodily harm, without the intent to kill, then it was murder in the second degree, but if his intent was to kill, it was murder in the first degree. An intent to take life is a constituent of murder in the first degree, though not a necessary element of murder in the second degree; for if the intent was to do only grievous bodily harm and the victim dies, it is murder in the second degree. To constitute murder in the second degree, it is immaterial whether the intent was to do *grievous* bodily harm or to take life; if the wound or hurt was inflicted with either intent, and the victim dies, it is murder in the second degree.

But the trial judge by instructing the jury that if the intent was to do mere bodily harm, without the intent to take life and death ensued, then that was murder in the second degree, practically charged the jury that under the law, as he expounded it, a mere slap in the face or any unlawful force which inflicted bodily harm, however slight, and death resulted therefrom, would warrant a verdict of murder in the second degree, provided there was no intent to take life or to do more than mere bodily harm, or where the act is done in the heat of passion but without justification, and in the absence of all the elements of murder in the first degree—premeditation,

wilfulness, and deliberation. This exposition of the law was palpably erroneous and prejudicially misleading.''

Taking into consideration the charge of the Trial Court to the jury in the case at bar, it is obvious that if the jury found as a fact that these defendants, or any of them, made an attack upon any person or persons, or attempted to attack such person or persons, and as a result thereof death ensued to Catherine McGee, then the jury must have found the defendants or any of them whom it believed to have made such attack or attempted attack or to have aided or abetted in or participated in the making of any such attack or attempted attack, guilty of second degree murder, even although they did not consider or believe that there was any evidence whatsoever in the case to indicate that said defendant or defendants intended to inflict any ''grievous bodily injury'' upon the object of such attack or attempted attack. To use again the language of Mr. Justice Kalisch, as above quoted, under the charge of the Trial Court, if the jury found, in the event that they believed there was evidence of an attack or attempted attack by any of these defendants upon any person with the intent to inflict ''any unlawful force which inflicted bodily harm, however slight, and death resulted therefrom,'' either to the intended object of the attack or any other person, the jury would have had under such erroneous instructions to find such defendants guilty of second degree murder.

Counsel for the defense respectfully present that the omission of the words ''grievous bodily injury'' by the Trial Court in that part of its charge to the jury now under consideration, is not, and cannot be cured, because the Trial Court charged that ''the violent swinging of a baseball

bat or similar heavy instrument'' at the head or body of another person with intent to do injury to that person is an act against the peace of the State, the probable consequence of which is bloodshed, and that if as a result of such an act death ensued, the crime would be murder. Counsel for the defense reiterate to this Honorable Court that there was no evidence whatsoever of any attack, either actual or attempted, by any of these four defendants at either the time when or the place where Catherine McGee was struck. There is evidence in the case that some person or persons, absolutely unidentified by any and all of the State's long array of witnesses, did employ a baseball bat in an attempted attack upon one Whelan. It is asserted that the jury could not possibly have properly or legally found, because of the total and entire lack of evidence to establish such fact, that these defendants or any of them employed such an instrument at the time and place in question. But even if the jury could have been possibly justified, from any evidence in the case whatsoever, that these defendants or any of them made or attempted to make an attack upon any persons and the death of Catherine McGee ensued as a result thereof, nevertheless the Trial Court grievously and patently erred in instructing the jury that the swinging of a baseball bat or other heavy instrument with intent to do bodily harm, death resulting therefrom to the intended object of the attempted assault or to any one else, was murder. The Court in so instructing the jury unwarrantably attempted to judicially determine that a swinging baseball bat was beyond any question of doubt a lethal weapon.

It is very respectfully contended and submitted to this Honorable Court that this determination on the part of the Trial Court as to the legal effect of ''the violent swinging of a baseball bat

or similar heavy instrument at the head or body of another person with intent to do injury to that person," to our mind was absolutely improper, illegal, erroneous, without warrant in law, and prejudicial to the cause of these defendants. As a matter of fact, it should have been left to the jury to determine, in the event that they found any evidence of the swinging of a baseball bat or other heavy instrument whether or not the use or attempted use of such kind of weapon constituted the use of a deadly weapon. In this connection attention of this Honorable Court is respectfully invited to the fact that the witness Whelan, who, it was contended by the State, was the object of an attempted assault by these defendants, they employing a baseball bat, and who, according to the Prosecutor in his opening statement, was actually struck by a baseball bat, shed no blood.

State v. *Albertalli,* 112 Atl. 724;
Crow v. *State,* 116 S. W. 52 (Texas, 1909).

POINT ELEVEN.

Because the Trial Court in its charge to the jury erroneously and improperly defined manslaughter. Assignment 65, Specifications 65, (S. C., pages 379-380).

Again it is very respectfully urged that the Trial Court fell into error when, on page 379 of the State of the Case, it defined manslaughter in the following manner:

"For the purpose of this case it is sufficient to say to you that manslaughter exists

> where one or more persons kill another upon a sudden transport of passion or heat of blood upon a reasonable provocation and without malice."

The jury failed to convict upon that definition of manslaughter when a minute before the Court said this:

> "And I charge you also, that if as a result of such an act, (swinging a bat) death ensues, the crime is murder, so that the killing *here* is presumed to be malicious."

It is respectfully submitted to this Honorable Court that under and by reason of the two aforesaid quotations from the Judge's charge to the jury, unless the defendants could prove an irrefutable alibi or that they acted in self defense, the jury was categorically and practically instructed to find them guilty as charged.

It is respectfully submitted that these misstatements had a harmful effect and were prejudicial to the defendants and because of their reference to important features of the case, they should constitute ground for reversal.

POINT TWELVE.

Because the Trial Court erroneously charged the jury in part as follows: "If you find from the evidence that the defendant Ormsby halted or slowed the motion of that car so as to permit the assailant to leave it, that he aided and abetted the crime and is therefore a principal. And I charge you also that if you find from the evidence that the defendant McNally was the occupant of the car who uttered the words about getting the fellow with the cap, or in any other way aided or abetted or urged the assailant on in their attack upon Whelan then he likewise is a principal." Assignment 68, Specification 68, (S. C., 382-383.)

The words of the Trial Judge in the above instruction was by inference a categorical declaration, innuendo or implication, although not put in so many words, that the defendant Ormsby halted or slowed the motion of the car and that the defendant McNally uttered the words about getting the fellow with the cap, when as a clear and absolute matter of fact there was not a scintilla or particle of evidence in the whole case to show that Ormsby halted any motion of any automoblie or that McNally uttered any words whatsoever. As a matter of fact there was proof abundant both from McNally's statement and also from many of the State's witnesses that McNally was not in the car or near the car at any time when the alleged crime happened. Certainly it cannot be said that this most erroneous, prejudicial and harmful instruction in the closing part of the Trial Judge in his charge to the jury must not have influenced their minds and worked irreparable injury not only to the case of Ormsby and Mc-

Nally, but also to the case of all the defendants. It is therefore most respectfully submitted that this one statement of the Trial Court reading as it does was highly prejudicial to the legal rights not only of Ormsby and McNally, but also of all the defendants on this trial, and as a matter of fact and of law vitiates the entire charge and is the strongest and most patent kind of reversible error.

"It is reversible error for a trial judge to make in his charge a misstatement with relation to a fact of moment."

State v. *Noel,* 133 Atl. 175.

"It is reversible error to charge that an incriminating fact has been proved where there is neither testimony or color of testimony to support it."

State v. *Diamond,* 86 Atl. 57, 84 N. J. L. 17.

State v. *Sandore,* 124 Atl. 528, 1 N. J. Misc. Rep. 537.

"A direction of the trial court which states as a fact proven in the case a condition of affairs which is not in the case, and not properly inferrable from the testimony, is not judicial comment and presents grounds for reversal."

State v. *Parks,* 115 Atl. 305, 96 N. J. L. 360.

"An erroneous instruction is not cured by the existence of correct instruction elsewhere in the charge, unless the illegal one is withdrawn."

State v. *Albertalli,* 112 Atl. 724.

State v. *Parks,* 115 Atl. 305, 96 N. J. L. 360.

State v. *Lovell,* 92 Atl. 376.

State v. *Erie Railroad Co.,* 87 Atl. 141.

State v. *Deliso,* 75 N. J. L. 808.

In the case of *The State* v. *Lang,* 94 Atl. 631, at page 634 (C. of E. & A.), Mr. Chancellor Walker in delivering the opinion of the Court said:

> "Certainly, when sentences, that is to say, parts of a charge, are erroneous and no proper qualification of them is to be found in the context or in the entire charge, then there is error; and this is so when, as in this case, the part of the charge pointed out as erroneous is, in and of itself, a particular qualification and limitation of language, which, without such qualification and limitation, is unobjectionable."

It is respectfully contended that this instruction of the Trial Court to the jury was absolutely and unqualifiedly erroneous, contradictory to and in conflict with the laws of evidence of this State and erroneous in fact and in law.

Again, with specific reference to that part of the charge above quoted directed to the defendant Ormsby, the Trial Judge fell into incontrovertible error. It will be noted that in that part of the charge the Trial Judge did not inform the jury that, assuming the defendant Ormsby to have been the driver of the automobile out of which it was testified by the State's witnesses, the assailants of Catherine McGee emerged, it would be necessary before finding that he aided and abetted the crime perpetrated by such person or persons, that they should find as a matter of fact that he, as the driver of said automobile, had knowledge of a specific criminal intent to commit a grievous bodily assault on the part of the person or persons leaving the automobile, and that it was with the intention of aiding them in their illegal purpose that he "halted or slowed the motion of that car."

POINT THIRTEEN.

Because the Trial Court erroneously charged the jury in part as follows: "Now as to flight: In a statement alleged to have been made by the defendant at the time of his arrest, there is contained an alleged admission by O'Keefe that after the killing of Catherine McGee he, with the party in the automobile went to Easton, Pennsylvania. That admission, if you find it to have been made by the defendant O'Keefe, can be considered by you only as against the defendant O'Keefe. And in this connection I charge you, if you find the fact to be that O'Keefe did actually go to Pennsylvania as the alleged admission purports to state that you may consider such facts as evidence of flight from the scene of the crime and as bearing upon his guilt." Assignment 69, Specification 69, (S. C., pages 383-384.)

Counsel for the defence respectfully invite the attention of this Honorable Court to the reasons heretofore set forth in Point Five *supra,* wherein it is contended that the admission of the paper writing unsigned by the defendant O'Keefe, and purporting to be a statement by him, was totally illegal, erroneous, improper and manifestly highly prejudicial and injurious to the legal rights of the said defendant O'Keefe. If this view of the law be correct, then it necessarily follows that any part of the Trial Court's charge based upon such paper writing is equally illegal and erroneous, and so manifestly highly prejudicial and injurious to the legal rights of the said defendant that it constitutes reversible error.

POINT FOURTEEN.

Because the Trial Court in its charge to the jury improperly and erroneously defined the term "alibi." Assignment 71, Specification 71, (S. C., page 386.)

In connection with the matter of alibi the Trial Court in its charge to the jury at page 386 of the State of the Case simply used this language:

> "The Court will *now* define an alibi. The word alibi means in plain English 'elsewhere.' That is to say, that the defendants claim that they were not at the scene of this crime, but they were elsewhere and consequently that they did not and could not have committed the crime charged against them."

It is most respectfully urged that the Trial Court did not give to the jury the proper instruction on the question of alibi and incorrectly stated the legal situation applicable to the evidence adduced at the trial.

In the case of the *State* v. *Sahazian,* 119 Atl. 780, at page 781, the late Mr. Justice Katzenbach, in delivering the opinion of the Supreme Court, spoke as follows:

> "The proper instruction to be given by a trial judge on the question of alibi has been stated in this court recently by Mr. Justice Parker in the case of the State *v.* Parks, 96 N. J. L. 360, 115 Atl. 305, in these words:
>
> 'The law is entirely settled in this State that where the presence of the defendant at the place of the alleged crime is essential link in the chain of proof, such presence, like any other essential fact, must be established beyond a reasonable doubt. Sherlock *vs.* State, 60 N. J. L. 31. In that case, it was said that, upon the interposition of an alibi, any one of

> three conclusions might be reached by the jury—(a) that defendant was present, notwithstanding such evidence; (b) that he was absent in which case he is said to have "proved his alibi": or (c) that the testimony may create such a degree of uncertainty as to his whereabouts that the jury are not satisfied beyond a reasonable doubt of his guilt of the crime in question; and that by puting the burden on him to prove his absence by preponderance of evidence, he is deprived of the benefit of that reasonable doubt.' "

On a comparison of the definition of alibi as known in the Law and set forth and established by the definition and doctrine laid down by Mr. Justice Parker in the foregoing case with the meagre and illegal definition of alibi as enunciated by the Trial Judge in his charge to the jury in the case at bar, it is respectfully submitted that the defendants herein suffered manifest wrong and injury, apparent in the record from such a meagre, misleading, erroneous and unsubstantial definition of alibi and a lack of clearness as to its meaning and importance in criminal cases.

POINT FIFTEEN.

Because the Trial Court erroneously charged the jury in part as follows: "I perhaps should say to you that whatever evidence of alibi is in this case is brought out not on direct examination by defendants' own counsel but on cross-examination by the Prosecutor. The defendants Ormsby and McNally have stated in their testimony that they were not present. Further than this, as to these two defendants, there is no evidence of alibi." Assignment 72, Specification 72, (S. C., page 386.)

It is respectfully contended that this part of the charge of the Trial Court to the jury is absolutely and unqualifiedly erroneous, contradictory to and in conflict with the evidence adduced in the case on the part of the defendants and erroneous in fact and in law. A careful reading of the testimony will convince this Honorable Court that in respect to that part of the charge aforesaid the Trial Court fell into error as there was not only abundant testimony given by all of the defendants respecting their absence from the scene of the crime and their not participating in or aiding or abetting it, but also plenary evidence was given by Josephine Donato, wife of the defendant Frank Donato, that he was at his home when the alleged crime is alleged to have taken place (see S. C., pages 343 and 344).

> "An erroneous instruction is not cured by the existence of correct instruction elsewhere in the charge, unless the illegal one is withdrawn."
>
> *State* v. *Parks,* 115 Atl. 305, 96 N. J. L. 360.

State v. *Tachin,* 106 Atl. 145, 92 N. J. L. 269;
State v. *Erie Railroad Co.,* 87 Atl. 141, 84 N. J. L. 661.

It is also contended here that material evidence was withdrawn from consideration of the jury by the aforesaid instruction of the Trial Court, and the charge considered as a whole was incorrect, conflicting and misleading. See case of *State* v. *Fuerstein,* 135 Atl. 894.

> "It is reversible error for a trial judge to make in his charge a misstatement with relation to a fact of moment."
>
> *State* v. *Noel,* 133 Atl. 275.

In the above respect it is respectfully urged that all of the defendants suffered manifest wrong and injury.

POINT SIXTEEN.

Because the Trial Court erroneously failed and refused to charge the second request of the defendants as requested: "It is your duty to consider the evidence as to each of the defendants and to base your verdict as to each of such defendants upon the evidence affecting such defendants respectively, and if the evidence fails to convince you beyond a reasonable doubt of the guilt of such defendants respectively, it is your duty to acquit each of such defendants as to whom you have a reasonable doubt of guilt." Assignment No. 76, Specification No. 76.

Because the Trial Court erroneously failed and refused to charge the eighth request of the defendants as requested: "Although the four de-

fendants are indicted and tried jointly you must consider each defendant's case separately, applying the evidence to his case which, under this charge, is admissible against or binding upon him, and if you find that the State has not sustained the burden of proving such one or more of the defendants guilty beyond a reasonable doubt, then such defendant or defendants is or are entitled to acquittal.'' Assignment No. 82, Specification No. 82.

Because the Trial Court erroneously failed and refused to charge the thirteenth request of the defendants as requested: ''The Court instructs the jury that it is the duty of the jury to consider the question of guilt or innocence of each of these defendants, bearing in mind that each defendant has the right to have the evidence separately applied to him, and that while the indictment charges them all jointly, the presumption as to each defendant is that he is innocent, and he has a right to have the evidence applied to him exactly as if he came to trial alone.'' Assignment No. 87, Specification No. 87.

Because the Trial Court erroneously failed and refused to charge the nineteenth request of the defendants as requested: ''If the jury shall find that the prosecution has not sustained the burden of proving beyond a reasonable doubt that the defendant Frank Donato is guilty, he is entitled to an acquittal.'' Assignment No. 93, Specification No. 93.

Because the Trial Court erroneously failed and refused to charge the twentieth request of the defendants as requested: ''If the jury shall find that the prosecution has not sustained the burden of proving beyond a reasonable doubt that the defendant Vincent O'Keefe is guilty, he is entitled to an acquittal.'' Assignment No. 94, Specification No. 94.

Because the Trial Court erroneously failed and refused to charge the twenty-first request of the defendants as requested: "If the jury shall find that the prosecution has not sustained the burden of proving beyond a reasonable doubt that the defendant George Ormsby is guilty, he is entitled to an acquittal." Assignment No. 95, Specification No. 95.

Because the Trial Court erroneously failed and refused to charge the twenty-second request of the defendants as requested: "If the jury shall find that the prosecution has not sustained the burden of proving beyond a reasonable doubt that the defendant Frank McNally is guilty, he is entitled to an acquittal." Assignment No. 96, Specification No. 96.

The foregoing assignments of errors and specification of causes will be argued together because they all involve requests addressed to the Court to charge the jury upon principles of law that are self-evidently correct from a reading of the requests themselves and were justified in each instance by the evidence in the case. The Court refused to charge each one of the foregoing assignments and specifications and (particularly in view of the erroneous statements contained in the actual delivered charge of the Court), it is respectfully submitted that the Court's refusal to charge them was harmful error to the defendants. Certainly in a case as important as the one on trial, every legitimate request to charge that was not covered by the main charge of the Court should have been granted.

At the trial the plaintiffs-in-error took, among others, exception to the refusal of the Court to charge certain requests to charge and took also a general exception to the entire charge. State of Case, page 392.

The requests in the present case contained a correct statement of the law, were applicable to the testimony and clearly material to the defendants' case, which they were entitled to have distinctly charged, and therefore it is respectfully urged that the failure and refusal of the Court to charge them constituted legal error for which the verdict in this case should be reversed.

The twentieth, twenty-first, twenty-second and twenty-third requests, being assignments of error numbers 93, 94, 95 and 96, were simple requests made on behalf of each defendant individually to have the jury charged that he was entitled to an acquittal, if the State had not sustained the burden of proving him guilty beyond a reasonable doubt. Nowhere in the charge did the Court specifically so instruct the jury, and as the evidence differs as to the various defendants, each one was entitled to this specific charge, particularly when requested.

In the case of the *State* v. *De Geralmo,* 83 N. J. L. 135, the Court said:

> "Where a request to charge calls for the application of a correct legal principle, is applicable to the testimony, and clearly material to defendants' case he is entitled to have it distinctly charged in such a way as not to leave room for mis-apprehension or mistake by the jury."
>
> "One of the most important duties of the Court is to declare the law applicable to a case to the jury when requested to do so. This should be done in such a way as not to leave room for mis-apprehension or mistake."

Citing (*Roe* v. *State,* 16 Vroom, 49).

> "We are of the opinion that the defendant was entitled to have the legal propositions requested distinctly charged, and that this was not complied with by the Court, unless

> the legal effect was sufficiently covered by its charge to the jury. (*Aldrich* v. *Beckman,* 45 Vroom 711; *Mellow* v. *Victor Talking Machine Co.,* 48 Vroom 670), and a careful examination of it shows that the precise point raised by the request was not adverted to by the Court in any part of its charge. Therefore the defendant is entitled to have this judgment reversed and a new trial granted, and it is so ordered."

16 *Corpus Juris,* 1061, in respect to Proper Requests refused:

> "Where proper request is made for an instruction which correctly expounds the law and is warranted by the evidence and pleadings in the case and which has not already been covered in other instructions, it is the duty of the Court to give it, and the refusal thereof will constitute error. The refusal of a concrete instruction is error although an abstract instruction on the same point has been given."

12 *Cyc.* 666, in respect to Proper Requests refused:

> "It is reversible error to refuse to give a proper instruction which is requested and justified by the evidence and which has not already been given."

State v. *Tanzarello,* 1 Misc. Rep. 375. Before Chief Justice Gummere and Justices Swayze and Trenchard. It is *Per Curiam*:

> "At the trial the plaintiff-in-error took, among others, exception to the refusal of the Court to charge certain requests to charge, and took also a general exception to the charge."
>
> "The main insistence here is that the Court wrongfully refused to instruct the jury on the law of alibi, notwithstanding he was expressly requested so to do and notwithstand-

ing alibi was the defense set up by the defendant, and notwithstanding that in this case there was overwhelming evidence tending to support the alibi of the defense."

POINT SEVENTEEN.

Because the Trial Court erroneously failed and refused to charge the sixteenth request of the defendants as requested: "The Court further instructs the jury that if the jury in a prosecution for homicide, which this case is, are not satisfied beyond a reasonable doubt, upon and after a consideration of all the evidence adduced in the case that the death of the little girl Catherine McGee, was not an accident in the legal sense of that term, and was not caused and brought about by reason of some misadventure on the part of the little girl, then the jury should acquit the defendants." Assignment No. 90, Specification No. 90.

Because the Trial Court erroneously failed and refused to charge the seventeenth request of the defendants as requested: "The Court further instructs the jury that it is the duty of the State to prove beyond a reasonable doubt that the intent to commit or perpetrate some unlawful act, of which the probable consequence might be bloodshed existed in the minds of the defendants at the time that the little girl Catherine McGee is alleged to have been struck, and if the State does not sustain this burden, it is the duty of the jury to acquit; and moreover it is also the duty of the State to prove beyond a reasonable doubt that such alleged striking was not an accident in the legal sense of the term, and also that it was not caused or brought about by some misadventure on the part of the deceased." Assignment No. 91, Specification No. 91.

Counsel for the defense respectfully submit that these two requests to charge contain, in each instance, a correct statement of the law. The cases and reasoning cited and employed in point sixteen immediately preceding apply here with equal force and effect. Furthermore, in view of the fact that in the entire case there is no evidence whatever on the part of a single state witness that any one of these four defendants was the person who employed the weapon which, it is alleged, struck and caused the death of Catherine McGee, the refusal of the Trial Court to charge to the jury these two requests to charge was erroneous and highly prejudicial to the legal rights of the said defendants. Even assuming that on the evidence the jury could have been possibly justified in finding it as a fact that the person or persons who left the automobile on Fourth Street with the weapon or weapons in their hands was or were one or more of these defendants, it cannot be said that they could properly have found that the said person or persons caused the death of Catherine McGee, for from the evidence it might very well have been that after such person or persons left the automobile the weapon might have been wrested from their hands by other parties who in turn might have struck and killed the little girl. There is no evidence whatever to indicate that the persons who left the car with the weapons in their hands, whoever they might have been, were the same persons who wielded the fatal blow. The jury, in its determination that these defendants were responsible for the death of Catherine McGee, could not in their deliberations on this point have risen above the realm of conjecture. If conjecture is to be indulged in, why might it not as well with as much force and logic have been assumed either that persons other than the two men who it was testified left the automobile

might have struck the fatal blow after they had wrested the weapon from the hands of the original assailants, or, indeed, that somebody else at the scene of the crime, in an excitable or overanxious moment, might himself have inflicted the fatal blow with a blackjack or other similar weapon which he might have had concealed upon his person?

Not a single state's witness of all those who were at or near the place of the assault upon Catherine McGee, identified any of these defendants as being at that place at the time when such assault was made. Further, not a single state's witness, of those who testified that they saw two men leave the automobile on Fourth Street with weapons in their hands, identified any of these defendants as being in the car or as being either of the persons who left the car in question. Again, not a single state's witness of those who testified that after such persons left the car, they saw them approach the corner at which Catherine McGee was struck, said or could say that the fatal blow was struck by the persons whom they saw leave the automobile.

Counsel for the defense respectfully contend that in view of the incompleteness, inadequacy and defects in the testimony of the state's witnesses, that the jury were not justified in finding that Catherine McGee was killed by a blow struck by any of these defendants, nor that her death was not the result of accident or misadventure, and that therefore the failure and refusal of the Trial Court to charge the two charges quoted herein, as requested, was so manifestly prejudicial to the legal rights of these defendants, that it constitutes reversible error.

POINT EIGHTEEN.

Because the Trial Court erroneously failed and refused to charge the tenth request of the defendants as requested: "The jury is instructed that the indictment in this case is of itself a mere accusation or charge against the defendants, and creates no presumption whatever of their guilt and is not of itself any evidence of the guilt of the defendants who are presumed to be innocent in spite of the indictment." Assignment No. 84, Specification No. 84.

This request to charge was merely a proper request to instruct the jury as to the non-effect of the indictment upon the presumption of innocence. In its charge to the jury the Court mentioned nothing whatsoever respecting the above proper instruction that should have been clearly and definitely charged to the jury, although the Court did in very definite terms read the indictment in its entirety to the jury. It is respectfully submitted that the defendants were legally entitled to have a full statement of the law in respect to the above matter of the indictment in itself being of no evidential value against the defendants charged as requested. And for this fatal omission of the Trial Court in so vital and important a matter lying at the foundation of the entire case, manifest wrong and injury was suffered by all of the defendants.

POINT NINETEEN.

Because the Trial Court erroneously charged the jury in part as follows: "In this connection, however, gentlemen, I deem it incumbent upon me to inform you that the Court of Pardons of this State now has the power to change or reduce or abolish or set aside whatever results you may have arrived at in this matter whether you fix the penalty at life imprisonment or not. The Court of Pardons can reduce or change it but it cannot make the punishment any greater than you make it." Assignment No. 106, Specification No. 117.

Counsel for the defense beg to say that they are fully cognizant with the doctrine of this Court as laid down by the learned Presiding Officer of the Court of Errors and Appeals, Mr. Chancellor Walker, as enunciated in the case of the *State* v. *Mosley,* 131 Atl. 292, respecting references to the pardoning power of the Court of Pardons by the Trial Judge in a charge to the jury in a criminal case. But we very respectfully submit the above excerpt from the Judge's charge in the case at bar with reference to the Court of Pardons was absolutely irregular and legally unjustifiable. We contend that the jury had absolutely no right to take into consideration the fact that another Court other than the Court trying the case could change their verdict and leave the prisoners go unpunished or perhaps lessening the penalty. From the above deliverance of the Trial Court it is respectfully submitted that the jury might assume that whatever error they might fall into or might commit in respect to their verdict against these defendants would be corrected by a higher Court to which these defendants might resort if they were dissatisfied with the jury's verdict.

The reference by the learned Trial Judge in this connection "whether you fix the penalty at life imprisonment or not" was legally unjustifiable, taking into consideration the fact that all throughout the whole case there was not one particle or scintilla of evidence spread upon the record of this case by the prosecution to connect any of these defendants with the crime of murder, either of the first or of the second degree, the penalty for which might be imprisonment for life.

We beg leave to submit to this Honorable Court that we are in hearty accord with the views expressed by Mr. Judge White as set forth in his dissenting opinion in the case of *State* v. *Mosley, supra,* at page 298, where he uses the following language:

> "* * * I am somewhat at a loss to understand how, under the Act of 1919 the Court of Pardons is a matter in any way relevant to the matter thus to be decided by the jury from the evidence. My own impression is that an inquiring jury might very properly be told that the functions of the Court of Pardons was a subject with which they had no proper concern in the rendition of their verdict, and that most emphatically in the absence of an inquiry from the jury the Court should not volunteer any suggestion upon the subject no matter how fairly made."

POINT TWENTY.

Because the Trial Court declined to grant the motion of the defendants for an arrest of judgment and a new trial upon one or some of the following grounds. Assignment 98, Specification 98 (S. C., pp. 414-420).

1. Because Chapter 246 of the Laws of 1929 under which the jury was impaneled and struck for the trial of the indictment against the said defendants, which indictment contained three counts, viz., murder, manslaughter and assault and battery, operates to deprive the defendants of liberty and property without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

2. Because the aforesaid statute is also unconstitutional by reason of the fact that it is an *ex post facto* law, inasmuch as it changes the method of regulating peremptory challenges and reduces the number thereof to which the defendants were entitled at the time of the alleged commission of the alleged crime, and which subjects the defendants to an illegal disadvantage which was legally non-existent at the time of the alleged crime, and consequently works manifest wrong and injury to the said defendants.

3. Because the amended indictment and the verdict thereon operate to deprive the defendants of their rights to enjoy life and liberty within the first section of Article One of the Constitution of the State of New Jersey and the Fourteenth Amendment to the Constitution of the United States, the defendants never having been called upon, by proper process to appear and answer to the said amended indictment nor to plead thereto,

and never having been given an opportunity by due process to defend the charge made in said amended indictment.

4. Because the amended indictment and the verdict thereon operate to deprive the defendants of their rights secured to them by the Constitution of the State of New Jersey to a trial by jury.

5. Because the amended indictment and the trial of the amended indictment and the charge of the Court, after the summing up of counsel, and the verdict of the jury, and the action of the Trial Court in allowing the Prosecutor to abandon the third count in the indictment, namely, the count of assault and battery, after the trial had finished and all of the evidence was in and the case was about to go to the jury, operate to deprive the defendants of the rights secured to them by the Fourteenth Amendment to the Constitution of the United States to be secure in their liberty and property unless proceeded against by due process of law, because the effect of the charge of the Court in the light of the amended indictment and the trial and the abandonment by the Prosecutor of the third count in the indictment was to unwarrantably and illegally remove from the consideration of the jury an offense for the alleged commission of which the defendants had also been indicted, and hence to deprive the jury of the opportunity of finding the defendants guilty of a lesser crime than either of those crimes named in the verdict of the jury.

6. Because the defendants were tried by a jury unlawfully empanelled, said jury being empanelled in pursuance of Chapter 246 of the Laws of 1929, which Statute the defendants urge is unconstitutional. The said Statute is unconstitutional because: (a) It is an *ex post facto* law, inasmuch as it operates to reduce the number of peremptory

challenges to which the defendants were entitled at the time of the alleged commission of the alleged offenses named in the indictment, thus operating to deprive the defendants of substantial legal rights which they already acquired; (b) because the said Statute does not confer upon the defendants the benefit of due process of law; (c) because the Statute is based upon an illusory classification and is discriminatory in its affect. There are but two classes of crimes recognized in the criminal jurisprudence of the State of New Jersey, namely, high misdemeanors and misdemeanors. The crime of murder is but a single species of high misdemeanor. The Statute above referred to seeks to set out a special method of selecting juries for the trial of defendants charged with the high misdemeanor known as murder and seeks to place a different and a greater burden upon defendants charged with the commission of that crime than is imposed upon defendants charged with the commission of any other high misdemeanor. If, however, the Statute be regarded as constitutional, nevertheless in the instant case it has been applied without warrant of law inasmuch as the jury created under its provisions and which was the jury which tried the defendants on the murder count in the indictment had no authority and no basis in law for undertaking the trial of the defendants on the count in the indictment for manslaughter nor on the count for assault and battery in the same indictment.

7. Under a strict construction of the law as applicable to this case assuming that the aforesaid statute is constitutional, nevertheless the Court in proceeding with the trial of these defendants on the second and third counts in the indictment, namely the counts for manslaughter and assault and battery, deprived the defendants of the benefit of five peremptory challenges to which they

would have been entitled had they been tried by a struck jury under the provisions of Section 76 of the Criminal Procedure Act (Revision of 1898) under which section only a struck jury could have been legally empaneled to try these defendants on the charge of manslaughter as contained in the indictment, and to further deprive them of the ten peremptory challenges to which they were entitled to in any trial of the count against them for assault and battery, there being no provision in law whatsoever for their being tried by a struck jury on the assault and battery charge. Therefore in the trial of these defendants by a jury empanelled pursuant to Chapter 246 of the Laws of 1929, on all three counts in the indictment, on the counts for manslaughter and assault and battery as well as on the count for murder, the defendants have been deprived of due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States and the first section of Article One of the Constitution of the State of New Jersey.

8. Because the verdict of the jury is inconsistent and illegal, the jury having found two of the defendants guilty of second degree murder and two of the defendants guilty of manslaughter on evidence arising out of the same set of facts and circumstances.

9. In view of the state of the pleadings, the indictment having been amended, and the third count of the indictment having been abandoned, and in view of the form of the verdict of the jury, the verdict of the jury cannot be applied to the amended indictment and the count abandoned therein, nor can the verdict of the jury be applied to the original indictment because the original indictment was not before the jury, it having been amended and the third count for assault and bat-

tery having been dropped and abandoned after all the evidence of the entire case had been adduced and after counsel had summed up.

10. Because of the condition of the pleadings at the close of the case and the charge of the Court and the verdict of the jury it is manifest that the defendants did not have a fair trial guaranteed to them by the Constitution of the State of New Jersey nor were they proceeded against by due process of law as guaranteed to them by the Fourteenth Amendment of the United States and the first section of Article One of the Constitution of the State of New Jersey.

11. For all of the reasons urged during the course of the trial for the dismissal of the indictment, the objections to the amended indictment and the objections to the abandonment of the third count, to the various motions to direct a verdict of not guilty in favor of the defendants, on account of all these and for all the previous causes and reasons advanced, it is respectfully submitted that there should be an arrest of judgment and a new trial.

For all of the above reasons it is respectfully submitted to this Honorable Court that the learned Trial Court should have arrested judgment in the case at bar and granted to the defendants a new trial, and as a result of his refusal to do so, manifest harm and injury plainly apparent upon the record was suffered by the said defendants, which it is deemed should cause a reversal of their convictions.

POINT TWENTY-ONE.

"Because manifest injustice was done to the defendants by the whole charge of the Court." Specification No. 99.

POINT TWENTY-TWO.

"Because the Court failed to charge and it was impossible for the jury to learn from the charge of the Court what facts, if proved to their satisfaction beyond a reasonable doubt, would warrant the jury in convicting the defendants."

An examination of the charge reveals that nowhere did the Trial Court tell the jury what facts, if proved to their satisfaction beyond a reasonable doubt, would warrant the jury in convicting the defendants. Nowhere did the Court state in effect that if the defendants were proven beyond a reasonable doubt to have struck the fatal blow, or were present aiding or abetting, that then the jury should convict such persons against whom such facts were proven beyond a reasonable doubt, of murder in the first degree, of murder in the second degree or manslaughter; and that if the evidence failed to satisfy them of these facts beyond a reasonable doubt, then that the defendants were entitled to an acquittal.

POINT TWENTY-THREE.

"The defendants further assign as error that there was no credible testimony to support the verdict." Specification No. 102.

Counsel for defendants beg leave to say to the Court that in previous points this specification has been set forth and argued at considerable

length in respect to there being an absolute paucity of testimony and lack of evidence to connect any and all of these defendants in any manner, shape or form, either by action, participation or aiding or abetting in the crime charged. Counsel here reiterate their previous arguments that there was absolutely no creditable testimony to support the verdict and respectfully present that on a careful reading of the testimony adduced in the case that their argument is strongly borne out and confirmed that the jury's verdict of second degree murder against the defendants Donato and O'Keefe and the jury's verdict of manslaughter against Ormsby and McNally is not and cannot be based upon not only any creditable testimony in the case but there is no testimony or evidence whatsoever on which such verdicts can be founded or rested.

POINT TWENTY-FOUR.

Because in other respects the verdicts and judgments were erroneous. Specification No. 103.

Because the charge of the Trial Court to the jury was confusing, inconsistent, contradictory and misleading. Specification No. 104.

Because the charge of the Trial Court was calculated to produce in the minds of the jurors misapprehension and mistake as to the law of the case. Specification No. 105.

The verdict of the jury was contrary to the evidence in view of the contradictions, improbabilities and insufficiencies in the testimony. Specification No. 108.

POINT TWENTY-FIVE.

Because the evidence could not satisfy a considerate mind beyond a reasonable doubt that the defendants Vincent O'Keefe and Frank Donato are guilty of murder in the second degree, and that the defendants George Ormsby and Frank McNally are guilty of manslaughter. Specification No. 106.

POINT TWENTY-SIX.

The verdict of the jury is repugnant, conflicting, inconsistent, contradictory and illegal, for when the evidence introduced by the State against all of the four defendants to sustain the allegations in the indictment filed against them, is examined, scrutinized, studied and considered, it must be clearly patent and manifestly plain that the verdict of second degree murder against the defendants Vincent O'Keefe and Frank Donato and the verdict of manslaughter against the defendants George Ormsby and Frank McNally is absolutely without any legal justification and without any basis in law or in fact. Specification 107.

POINT TWENTY-SEVEN.

The defendants specify as causes for reversal under the provisions of Chapter 349 of the Laws of 1921, that the verdict was against the weight of the evidence. Specification 101.

It is respectfully submitted that an examination of all of the evidence in this case leads to the inevitable conclusion that the verdict was against the weight of the evidence, and that upon

this ground there should be a reversal of the convictions of the defendants.

While the argument that the verdict is against the weight of the evidence is always to be considered a jury question and which the Courts are loath to disturb, yet, however, in cases where there are sufficient facts to show the contrary or where the jury must have been guided by some other circumstance as to give rise to the inference that it was the result of mistake, passion or prejudice, then in such case the Appellate Court will reverse the verdict and remand the cause for a new trial. In the case at bar it is respectfully submitted that the verdict of the jury is clearly against the weight of evidence, and counsel for the defendants write down for the consideration of this Court a list of reasons to sustain this contention and to convince the Court that this Specification is well taken and is founded on facts that are incontrovertible.

It is very respectfully submitted and contended to this Honorable Court that out of all the numerous witnesses testifying for the State there was not one who testified in any manner, shape or form respecting the participation of any of the defendants in the alleged crime. Of all the numerous witnesses who testified for the State and who were present at the scene and location of the alleged crime and who surely must have had ocular inspection and demonstration as to who committed the crime, not one single witness gave the slightest particle of evidence identifying these defendants either as the actual assailants or participants, aiders or abettors in the crime.

The witness Janicke produced testimony that cannot by the longest stretch of the imagination, be dignified as "evidence" as to who committed this crime. Indeed his testimony was of no value in establishing that the crime itself had been com-

mitted. In effect he stated, amid a mass of contradictions, that he saw six or eight persons in a general affray about 8:30 P. M. on the night of November 6th, 1928; he saw a closed car in front of the school on Erie Street; he saw four men that had been in the previous melee get into that car. He saw the car immediately start in a northerly direction towards Fourth Street, but was unable to say which way the car proceeded after it had reached the corner of Fourth and Erie Streets. He did not see the car turn into Fourth Street, nor did he have any knowledge as to whether the car turned at all. He stated that two or three minutes later he saw the same car near Grove Street, while he himself stood at the corner of Fourth and Erie Streets. Next, he saw a commotion at Fourth and Erie Streets, and noticed a "large crowd" thereat.

As to identification he testified as follows (S. C., page 117):

> "Q. Can you describe any of these men you saw get into the sedan in front of the entrance? A. Not positively, no, sir."

The only other testimony given by this witness was to the effect that at the time he saw the men who had been in the earlier fight get into the automobile he noticed that their hair was disarranged, that two of them had handkerchiefs up to their faces, one of which had blood upon it.

It seems to counsel for the defendants that the above testimony of the witness Janicke establishes nothing in any way material to the issue involved in the present case. It in no way tended to prove or to disprove either the innocence or guilt of any of the defendants in the case at bar, and shed absolutely no light upon whether or not the crime charged had even been committed. It was totally and palpably irrelevant.

At the conclusion of the direct examination of this witness counsel for the defense moved that the Trial Court order that it be stricken out (S. C., page 120). The Trial Court improperly and erroneously denied the motion, stating as follows (S. C., page 121):

> "The Court: The Court will allow this testimony on the assumption that the Prosecutor hopes at a later hour to connect it up."

It is respectfully contended before this Honorable Court that this assumption on the part of the Trial Court was equally unwarrantable in law and in reason. A reading of the testimony of Officer Janicke leads immediately to the conclusion that it was so alien to the issue involved in the trial of these defendants that it was utterly impossible that it could have been connected up by any later testimony produced at the trial, bearing upon the question that was before the Court and jury. The witness did not see the crime committed, he did not identify any of the defendants as being among the men whom he saw during that entire day, and that is the sum and substance of all that he had to say upon the witness stand.

The next witness produced by the State was Officer McFall of the Jersey City Police Department. McFall was unable to testify that there had been a fight taking place in and about No. 2 School on Erie Street. At about 8.30 P. M. he came out from the school basement, where he had been on duty, and saw a car standing about twenty-five feet north of the entrance to the school. He saw the defendant Donato in the middle of the street directly in front of the school and walking in an easterly direction towards the automobile which was standing in front of the school. Inside the car he saw "four or five fellows", and according to him, Donato got into the rear seat of this car

which already contained "four or five fellows". The car started in a northerly direction and he saw it turn east from Erie Street into Fourth Street. After about a half-minute from the time when the car disappeared around the corner into Fourth Street he saw a man coming around the corner from Fourth Street onto Erie Street carrying a child in his arms. The man did not come up to Officer McFall, but the Officer ran up to him and Patrolman Porter and leaving the man with the child in his arms with Patrolman Porter, he himself went up to the corner of Fourth Street. The car that he saw Donato enter was a sedan car. The defendant Donato, according to McFall's testimony, had got into the back seat of a car at the left-hand side thereof, the car already containing "four or five fellows." McFall was unable to identify any of the other occupants of this car (S. C., page 135):

> "Q. Did you know any of the men in the automobile? A. No."

Here again we find an absolute lack of identification of three of the four defendants in the case at bar, and the totally inadequate statement that the defendant Donato got into a car already containing "four or five fellows", and that he sat on the left-hand side of the rear seat of this car. The witness McFall could not testify as to a single incident of the alleged crime. He did not witness the commission of any crime, he does not know who were the occupants of the car which he saw turn onto Fourth Street from Erie Street, and is of course utterly unable to state that the car from which it was testified by other witnesses, one or two persons got out with the intention of attacking somebody with baseball bats, was the same car which he saw the defendant Donato enter, and which later he saw turn onto Fourth Street.

The next witness produced by the State was Officer Bulwicz of the Jersey City Police Department.

The witness testified that he knew the defendant Donato and had known him about seven years; that on the evening of November 6th, 1928, at about 8.25 P. M., he saw the defendant Donato getting into a car that was parked on the east side of Erie Street in front of School No. 2. He had been on duty in the basement of School No. 2, and just before 8.25 P. M. had come from out the school-basement, at which time he saw Patrolman Janicke dispersing a crowd, which he himself aided in doing. The automobile which he saw parked on Erie Street was standing about twenty-five feet north of the point of his observation. The defendant Donato got into the car on the left side thereof, the car being a closed car. The witness saw a man seating at the wheel of the car, but he could see no other occupants thereof. He was unable to identify the man seating at the wheel (S. C., page 154): "Q. You know the man that was seating at the wheel? A. No, sir." Here again there is no identification of any of these defendants at the scene of the crime alleged to have been committed, but on the contrary the witness stated positively that the only other defendant whom he knew besides Donato, was the defendant McNally, and that he did not see McNally seated in the car which he saw the defendant Donato enter (S. C., page 154):

> "Q. Do you know any of these other defendants here? A. I just know one fellow.
> Q. Who is he? A. That is McNally.
> Q. Did you see McNally that night? A. I did not."

Counsel for the defendants contend that the remarks applied to the testimony of Officers Janicke

and McFall apply with equal force to the testimony of the witness Bulwicz. The only additional observation which it is thought necessary to make is the fact that the witness Bulwicz corroborates the testimony of the witness McFall as to the fact that the defendant Donato entered a closed automobile on the left hand side. This testimony is important in one respect only. The jury in their verdict, after there had been some evidence, that two persons had got out of the *right side* of an automobile on Fourth Street, with baseball bats, and proceeded to make an assault upon one Whelan, found the defendants Donato and O'Keefe guilty of second degree murder, for which offense they were sentenced by the Trial Court to thirty years at hard labor in the State Prison. Certainly a natural and entirely logical inference that the jury in arriving at this their verdict, regarded it as a fact that the defendant Donato was one of the two persons who got out of an automobile on Fourth Street on the *right side.* There is no evidence whatever in the case to indicate that Donato sat on the right side of any automobile, but here there is positive evidence from the lips of witnesses produced by the State itself that the defendant Donato was seated on the left side of a closed car, and a car which according to the testimony of the witness McFall, already contained "four or five fellows" at the time that Donato entered it on the left side. By what process of reason, by what logical operation of the mental faculties could any person or any jury arrive at the fact that the defendant Donato, being placed by positive testimony on the left hand side of a closed car, containing in addition "four or five fellows", there being no evidence on the part of any witness that he at any time was seated on the right side of an automobile, was one of the two who emerged from the

right side of an automobile on Fourth Street prior to the attack or attempted attack being made upon the witness Whelan? Nothing but the barest conjecture and guesswork could have been the foundation of such a finding of fact.

Now we come to the testimony of Officer Porter of the Jersey City Police Department. This witness testified that he was on duty in the upper part of School No. 2 on the evening of November 6, 1928. He was allowed to describe a fracas that took place in the hall of the school building at about 7:15 P. M. on that evening, about an hour and a quarter earlier than the fatal assault which resulted in the death of Catherine McGee is alleged to have taken place. After the aforesaid fracas he saw the defendant Donato run out into the street, whence the witness brought him back into the school building. At the time he went into the street for the purpose of bringing back Donato to the school building, he saw McNally "standing around". He made them put back into place a fire hose that had been pulled off its rack, and then "went back and resumed getting the count" (i. e., the count of election ballots). Witness testified that he had known Donato for five and one-half years, and the defendant McNally "a good many years".

Counsel for the defendants respectfully contend that all of the evidence of the witness Porter that has been adverted to up to this point was clearly irrelevant, immaterial and incompetent. It so far preceded the time when the alleged crime at issue was supposed to have been committed that it could not validly have been regarded as a part of the *res gestae*. And certainly it in nowise tends to shed any light whatever upon the identity of those who about an hour and a quarter later, and at a point at least one hundred feet away from where this witness testified that he saw

Donato and McNally, the defendants, are alleged to have engaged in an assault resulting in the death of Catherine McGee.

This witness testified further that at about 8:30 P. M. on the same evening he was again called to the street in front of the school where he held a conversation with his superior officer, Inspector Casey. After the conversation was concluded, the witness, according to his testimony, saw nothing take place in front of the school building, nor during such conversation was there any commotion going on in front of the school. Witness saw an automobile standing in front of the school between twenty and twenty-five feet north of the main entrance thereto, and on the east side, that is the school side of Erie Street, he saw the defendants Donato and McNally in the auomobile. Though he knew the defendant Ormsby by sight, he could not state that Ormsby was in the car, nor at the trial could he identify the defendant O'Keefe as being among its occupants (S. C., page 171):

> "Q. After you got out on the street you saw the car standing; did you see Donato and McNally? A. Yes, sir.
>
> Q. Where were they then? A. In the car.
>
> Q. Who else was with them, can you tell us? A. No, sir.
>
> Q. You do not know? A. No, sir.
>
> Q. Do you know this defendant Ormsby? A. I know him by sight.
>
> Q. Can you tell us whether or not Ormsby was in the car at that time when you saw Donato and McNally in the car? A. No, sir.
>
> Q. You cannot tell? A. No, sir.
>
> Q. And is the same thing true of the defendant Brasch alias O'Keefe? A. Yes, sir.
>
> Q. You cannot tell us whether or not he was in the car? A. No, sir."

The attention of this Honorable Court is respectfully invited to the fact that while Officer

Porter stated that he saw the defendant Donato in an automobile on the east side of Erie Street, he does not in any way contradict the testimony of Officers McFall and Bulwicz to the effect that Donato was seated on the left side of the automobile.

Like the preceding witnesses Officer Porter can shed no light whatever upon the manner in which Catherine McGee came to her untimely end. After he saw the automobile in which he had seen Donato and McNally seated, go north on Erie Street and thence turn east on Fourth Street, he heard nothing, saw nothing and knew nothing concerning the occurrence of the tragedy until after the attack had taken place when, having gone toward Fourth Street and reached the grocery store at the corner of Fourth and Erie Streets he saw a man carrying a little girl in his arms, ran over and helped him with her and asked him what was the matter.

Here again it is respectfully urged upon this Honorable Court that there is no evidence of any kind in this witness' testimony sufficient in law to warrant the conviction of, nor even to incriminate in the slightest degree all or any of these defendants. And what has been said with respect to the incompetency and immateriality of the witnesses whose testimony has been summarized above, applies as well to the testimony of Officer Porter.

Now we come to the testimony of Inspector Casey, also of the Jersey City Police Department.

Inspector Casey was in and about School No. 2, among other times, at about 8.35 P. M. on the evening of November 6, 1928. While there at that time he saw Officers Porter, Bulwicz, McFall and Janicke. He has known the defendant McNally practically all of the latter's life. He has known the defendant Donato for an equally long time. Despite the fact that he testified that it was

around 8.35 P. M. that he was at the school (S. C., page 181):

> "Q. About what hours in the evening were you there altogether? A. I was there several times during the day. Around that time, it was around 8.35 that I was there."

He stated that at about 8.30 he saw Donato and McNally sitting in the back of a car, a sedan "parked about twenty-five feet from the entrance going north of No. 2 School, toward Fourth Street." There were two men seated in the front part of that car, neither of whom he could identify. He saw the car start up Erie Street and turn thence east into Fourth Street. As in the case of the preceding witnesses, he is unable to shed any light either upon the commission of the alleged crime, or upon the movements of the occupants of the car in which, he states, the defendants Donato and McNally were seated. Here again, it will be observed, there is no testimony by Inspector Casey contradicting the affirmative testimony heretofore given by two State witnesses that the defendant Donato was seated on the left side of the automobile in which it is stated he was seated.

The next witness sworn by the State was James Joseph Whalen. He is the first of a number of witnesses who testified for the State, and who according to their testimony were at or only a short distance removed from the place where the fatal blow which resulted in the death of Catherine McGee was struck, at the time when she was struck. No witness produced by the State up to this time could give any legal evidence whatever about the identity of the persons striking the blow, or occupying the automobile from which the persons who are assumed to have struck the blow emerged, or even as to the fact that any such blow was actually struck.

Mr. Whalen testified that of the defendants, he knew only the defendant Ormsby by sight. On the evening of November 6, 1928 "around 8.30 or 8 o'clock" he was at the southeast corner of Fourth and Erie Streets. There had been a disturbance prior to that time and he "was standing there to see what was going to happen." He was explaining the cause of this disturbance to a young boy, when, he states, a car pulled around the corner and stopped. His evidence both as to the place where he was standing and the place and direction whence the automobile mentioned by him came, is utterly contradictory for having stated that he was standing on the corner of Fourth and Erie Streets "when a car pulled around the corner and stopped". He later testified as follows with respect to the direction in which the car was proceeding and the point from which it had come (S. C., page 191):

"Q. I show you again picture S-2 in evidence and ask you to tell me from the picture from which direction the automobile came that turned the corner? A. I do not know.

Q. Where was the automobile when you first saw it? A. I seen it coming down and stop, coming along the southerly curve of Fourth Street.

Q. How far from the corner of the southeast intersection, this corner where the man is standing in the picture, did the car get before it stopped? A. About where that X is, I guess.

Q. Right where the second X is? A. Yes.

Q. Right where the X is I make a ring around, is that correct? A. Yes.

Q. Is it? A. Yes.

Q. Speak up. How long had the car stopped when you say you saw the door open and some people get out? A. A couple of seconds.

Q. And about how far from the corner were you standing when it stopped? A. About 15 feet, I guess."

As a matter of fact, the very definite answers of the witness Whalen to the very definite questions put to him by the Prosecutor, both of which have just been quoted, indicate clearly and positively that the witness did not see the automobile about which he is testifying turn any of the corners at the intersection of Fourth and Erie Streets, and does not know from which direction it was proceeding beyond the fact that when he saw it it was between the southeastern corner at such intersection and the point where he was standing, namely, about 15 feet east thereof, and was proceeding towards him in an easterly direction. Nothing in the testimony of this witness can possibly be spelled out to indicate, much less to establish, that the automobile which all of the police officers testified they saw in front of No. 2 School on Erie Street was the same automobile which Whelan testified to seeing, and which he said stopped in front of him at the southerly curb of Fourth Street.

The rest of the witness' testimony is as follows: A couple of seconds after the car in question stopped in front of him the door of the car was opened and he heard somebody say: "Get that fellow in the cap." He himself was wearing a cap at the time. He looked up and down to see what was going on, looked back toward the car and saw a person coming toward him with a baseball bat. He turned around and retreated about eight or nine steps, and then heard what he described as "a crash". He thinks that more than one got out of the car, but does not know who such persons were. He did not identify any of the defendants as being such persons, nor did he identify them as being among the occupants of this car which, he stated, stopped right in front of him.

He returned to the corner (though the attention of the Court is then invited to the witness's

contradictory statements about where he was standing with respect to the corner), where he saw the little girl lying down on the ground. By this time a crowd had gathered; the witness ran around the crowd and after the automobile.

The witness presented no testimony that the voice which shouted "get that fellow with the cap" was the voice of any occupant of the automobile which he described. On the contrary, he did not know who said it (S. C., p. 192):

> "Answer. As the door opened I see somebody getting out and crouching. When I seen that, at the same time I looked at this fellow crouching getting out of the car, I heard somebody yelling 'get that fellow with the cap'.
>
> Mr. Kavanagh: I object and asked that it stricken out.
>
> The Court: You want stricken out 'the man said, "get that fellow with the cap" '? Was that one of the men that got out of the automobile?
>
> The Witness: I do not know who said it."

It is respectfully pointed out to the Court that the witness Whalen, like all of the preceding State witnesses, though in the closest proximity to those who, it is alleged, struck the fatal blow, which it is found killed Catherine McGee, and to the other occupants of the automobile which they left just prior to their alleged assault upon the little girl, which car, the witness stated, stopped directly in front of him, positively failed to identify any of these defendants as having been among the occupants of such car or as having been present at the corner of Fourth and Erie Streets at or near the time when the little girl was killed. This witness was apparently the intended object of whatever assault those who left the car intended to perpetrate. He vividly described the manner

of approach of the alleged assailant who held in his hands the baseball bat with which it is alleged the fatal assault was made. He saw him crouching, saw him advancing, was close enough to him to know from the expression on his face and the posture of his body that he intended to commit upon him, the witness Whalen, a harmful assault, and yet in full view of all these four defendants, he was unable even to intimate that alleged assailant was among them.

The witness Reilly also gave no aid to the State in tending to establish the guilt of the four defendants. Though he knew the defendant Ormsby, and though he himself was in and about No. 2 School on several occasions during the course of November 6, 1928, he did not meet nor see Ormsby in the vicinity. His testimony consists solely in the statement that he saw some people congregated at the corner of Fourth and Erie Streets, indicating that there was something amiss, that he went to the corner, saw the child lying there, picked her up in his arms, proceeded south on Erie Street and went with the child to St. Francis' Hospital.

Certainly, it is unnecessary to attempt to establish that this witness' testimony was not such as could possibly aid the jury in concluding that these defendants, or any of them were guilty of the crime charged. In addition, this Honorable Court will note that the witness Reilly states with absolute conviction and in contradiction of preceding state witnesses that the little girl was carried by him, after she had been struck by the blow which caused her death, at 7.25 or 7.30 P. M., an hour before the time at which the police, officers and Inspector Casey state that they saw the defendant Donato and McNally seated in an automobile in front of the school on Erie Street.

Raymond Mylott was the next witness called by the State. He testified that he has known the defendant Ormsby, though not personally, for about ten years; that in the evening of November 6, 1928, he was in the vicinity of School No. 2 on Erie Street and that he saw the defendant Ormsby around the school that evening. He could not state at exactly what time he saw him (S. C., page 215):

> "Q. What time of the evening was it you saw Ormsby? A. Well, that I do not know.
> Q. Can you give us some estimate of the time, say 8.30, 7.30? A. I have no estimate of the time at all.
>
> The Court: Were you present at the time the polls close?
> The Witness: Yes.
> The Court: With respect to the closing of the polls was it after that or was it before that?
> The Witness: Just about around that time."

The witness knows Anthony Cina, who, he stated, was at the polls that day. At about 7.10 P. M. he heard a conversation between the defendant Ormsby and the said Cina outside No. 2 School to the effect that now "he" (Ormsby) "knows now it is Andy's gang and he is going to get them for it," the Andy in question being the same Cina. He stated that prior to the time when this conversation took place there had been a few free-for-all fights; that the last of these preceded the aforesaid conversation by about two or three minutes. This conversation took place while Ormsby was standing "right outside of the school, at the front entrance, right outside of the Chinese, on the side entrance nearest Fourth Street." Ormsby was about in the center of the sidewalk and his automobile was standing at about twenty-five feet south of where Ormsby was. After the

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conversation referred to ended, the witness walked towards the corner of Fourth and Erie Streets, where he stood. He saw a car stop "upon the center of the street on Fourth Street" and saw someone come out of the car holding a bat in his hand, and having a rag hanging from his mouth. As the door of the car opened he heard somebody in the car say: "Get that fellow with the cap." He was uncertain as to the exact nature of the weapon carried by the person leaving the car. (S. C., page 219):

> "Q. What kind of a bat? A. It must have been one of these banister sticks.
>
> Q. Was it a bat or what? A. Well, it was a bat all right.
>
> Q. You mean a baseball bat? A. No, it was not exactly a baseball bat."

The witness, as he started to run, saw the person who left the car pass him and go towards the witness Whelan. He heard a noise and saw the person who had left the car step away and start to run towards the car. He thinks it was only one person who left the car. He later saw Catherine McGee lying on her face on the sidewalk. Though he had seen the man with the bat swing it at Whelan, and though he heard the noise which apparently accompanied the impact of whatever weapon struck Catherine McGee, it is a highly important fact that the witness states that he did not see the child struck. The witness states, contradictory of the witness Whelan's testimony, that the car which the man with the weapon (whatever it might have been) in his hand left, did not stop on Fourth Street, but it was kept in first gear at the time and was just creeping along all the while. The man with the weapon went back and got into the car, which went east on Fourth Street towards Henderson Street.

Like the witness Whelan, this witness, also present at the very scene of the crime, was unable to state that the car which he described as playing a part in the tragedy which occurred at the place where he was standing, had proceeded onto Fourth Street from Erie Street. (S. C., page 224):

> "Q. When you first saw this automobile, turning the corner as you say, where were you standing? A. Turned the corner.
>
> Q. Turned the corner of Fourth and Erie Streets? A. I did not say I seen it turn the corner of Fourth and Erie.
>
> Q. All right. Then I will ask you this: When was it when you first saw it? A. It was stopped, that is, moving slowly down the middle of the street."

Counsel for the defense respectfully invite the attention of this Honorable Body to the fact that the testimony of the witness Mylott corroborates that of the witness Reilly concerning the time when the assault upon Catherine McGee took place. While he states in answer to the direct question put to him by the Prosecutor concerning what time he was in and about No. 2 School on the evening in question that he cannot estimate the time, in response to further questioning on the part of the Trial Court he states that it was "just about around that time", meaning by "that time" the time when the polls closed. This Honorable Court will, no doubt, take judicial notice of the fact, first, that November 6, 1928, was the day on which the general election was held throughout the State of New Jersey, and, secondly, that the polls close on that day at 7 P. M. That this is the meaning of the witness Mylott is further evidenced by his testimony placing the conversation between Ormsby and Anthony Cina as about 7.10 P. M. It was after the conclusion

of this conversation, which the witness stated lasted for only a few seconds, that the witness proceeded to Fourth and Erie Streets, where he witnessed the attempted assault upon the witness Whelan.

Another extremely important fact which Counsel for the defendants urge this Honorable Court to take into consideration in substantiation of the contention that the verdict in this case was against the weight of evidence, and could have been arrived at only as a result of mistake, prejudice, and partiality, consists in this, that while the witness Mylott had testified that he had known the defendant Ormsby, though not personally, for ten years, that while he had seen him in conversation with Cena at about 7.10 P. M. on the evening in question, that while he was so well acquainted with the automobile of which Ormsby was a part owner, that he could state positively that it was standing on Erie Street at a point so far away from where he was standing as twenty-five feet south of where Ormsby was holding the conversation with Cena, and to which he was listening, and further that though he observed the movements of the automobile out of which the alleged assailant of Catherine McGee proceeded as to be able to testify that it was moving slowly all the time, being kept in first gear, and while he could testify that it kept going towards Grove Street and that everybody ran after it, he gave not a single word of testimony to indicate that the car which he saw on Fourth Street was the same car, Ormsby's car, which he previously stated was parked on Erie Street near No. 2 School, nor did he indicate in any the slightest way that the defendant Ormsby whom he had seen but a few moments before, and who, it may be assumed would therefore have all the more readily been recalled to his mind, was among the occupants of the automobile

which he described with such definiteness and about whose movements he testified with such positiveness. Of course, it is needless to invite the attention of this Honorable Court to the fact that like all previous state witnesses there was absolutely no identification nor even an attempted identification by the witness Mylott of any of these defendants as being at or near the corner of Fourth and Erie Streets at the time when the child was struck nor at any other time prior or subsequent thereto. (S. C., page 225):

> "Q. Can you tell whether or not any of these defendants were in that car? A. Well, sir, I do not know.
>
> Q. Can you identify the man who came out of the car with the bat? A. Well, I do not know; I do not think I can."

Now as to the next witness for the State, Thomas Black. Sometime in the evening of November 6, 1928, he states he was standing at Fourth and Grove Streets. In response to some information that he got from somebody he went to Fourth and Erie Streets. At what time of evening this was he is unable to state. There were some people at the corner of Fourth and Erie Streets. He saw an automobile turn the corner from Erie Street onto Fourth Street and proceed down Fourth Street "nearer to the left hand side of the street" in an easterly direction toward Henderson Street. As the car turned into Fourth Street he saw "a couple of fellows" leave the car, run over toward the corner and make "a swing at Whelan". Then these persons returned to the car and "beat it away." This witness too, saw the attempted assault upon Whalen but can give no testimony relating how the girl Catherine McGee came to her death. (S. C., page 230):

"Q. They made a swing at Whalen? A. Yes sir. It seemed to be a slight glaze that passed Whalen and struck the girl.

Q. It struck the girl where? A. I could not see where it struck the girl."

It will be noted that this witness produced the first testimony to indicate that the automobile out of which the alleged assailants got, turned into Fourth Street from Erie Street. But there is absolutely nothing in his evidence to indicate that it was the same automobile which the police officers, including Inspector Casey, state they saw parked in front of No. 2 School (S. C., page 231):

"Q. Did you see where the automobile started up from? A. Started up from Erie Street.

Q. Started up from Erie Street; did you see it start from a standing position on Erie Street or where it came from originally? A. Well, it——

Mr. Kavanagh: I object and ask that that be stricken out.

Mr. Drewen: I consent.

The Court: Strike it out.

Q. Can you tell us, Black, whether or not you know where the car started from before it went on its way toward Fourth Street? A. It was about here.

Q. Where you indicate? A. Yes, there were about three or four cars there."

It may readily be conceded by the defendants, without in anywise injuring their case, that it was one of these three or four cars parked on Erie Street that proceeded thence onto Fourth Street and out of which those persons proceeded who attempted to assault Whalen. Nothing whatever in this testimony indicates that such car was the car on which it was testified, the defendants Donato and McNally were seated.

Further, nothing appears in the testimony of the witness Black to off-set or cast-out upon the testimony of the witnesses Reilly and Mylott that the attempted assault upon Whalen to which he was a witness occurred nearer to 7.30 P. M. on the evening in question than to 8.30 P. M., the time at which it was testified the defendants McNally and Donato were seated in an automobile parked in front of No. 2 School. Nor did the prosecution at any time attempt to have the witness Black definitely fix the time of evening when he witnessed the incidents described in his testimony.

State's witness Anthony Cena was next placed upon the stand. He testified that he has known the defendant Ormsby about ten years; that on the evening of November 6, 1928, he had a conversation with Ormsby while standing outside the laundry on Erie Street a little to the north of No. 2 School. He places the time of day at which the conversation took place as "about half past eight at night or a little earlier." The conversation was a brief one, Ormsby saying to him, "I know you Tony and I am going to get your bunch." That is the only time Cena saw Ormsby on that day. He had had no trouble with Ormsby or with anybody else that day. He did not see Ormsby's car anywhere at that time. He does not know where Ormsby went at the conclusion of the conversation in question, not being able to state even the direction which he took. About two minutes after the aforesaid conversation was ended, the witness heard a scream, walked up towards the corner, "and just then somebody passed by with a baby in his arms."

At the time Ormsby was talking to the witness Cena, the latter observed a sedan car parked at the easterly curb of Erie Street, about fifteen feet from where he was standing. It was from that direction that Ormsby had come. The witness

saw and knew nothing further that could impart any material information to the jury.

Surely, it would be a work of supererogation to undertake to argue to this Honorable Court that the statements of the witness Cena, devoid as they are of any identification whatsoever of these defendants as being at the place where Catherine McGee was fatally struck, lacking identification of the automobile out of which the alleged assailants of Whalen emerged as well as of those assailants themselves and the other occupants of the car, not knowing anything of the motions of the car which he states he saw parked fifteen feet from him on Erie Street nor whether said car was put in motion or not, being unable to state the direction which Ormsby took at the conclusion of the remarks which he addressed to him, do not and cannot constitute evidence upon which the jury could possibly have predicated a verdict of guilty in the case of any of these defendants or from which they could with even the lowest degree of reason or show of common sense or logic, not to speak of justice, concluded that their verdict was justified.

The next witness called by the State was Lieutenant William Hoffman of the Jersey City Police Department.

This witness produced a paper writing, alleged to contain statements corresponding to oral statements made by the defendant Donato in the presence of the witness. The paper writing was unsigned by the defendant Donata, and the reasons why counsel for the defense consider the Trial Court to have illegally and erroneously admitted this paper writing in evidence, are set forth in Point Five, *supra.*

As to the statements themselves, which, it is claimed, are similar in all respects to the oral statements alleged to have been made by the defendant Donato, and which the witness Hoffman

testified he transcribed, it is respectfully submitted that they contain nothing incriminatory in character and effect, and could have afforded no basis in law or in fact, for the jury's verdict against the defendant Donato, or any of the other defendants. The contents of the alleged statement may be read on S. C., pages 248-249.

The State introduced Lieutenant Charles Ballarene, also of the Jersey City Police Department. He testified that he took a statement from the defendant Ormsby relative to the crime charged in the indictment in this case, at Inspector Casey's office in the 2nd Precinct Station House, Jersey City, on November 8, 1928. He testified that the defendant Ormsby signed the statement as introduced by the State. The statement was admitted into evidence by the Court. It appears on S. C., pages 256-258.

The attention of this Honorable Court is invited to the fact that the testimony of Lieutenant Ballarene establishes that none of the other three defendants was present at the time when, he alleges, the statement admitted into evidence was made by the defendant Ormsby. It is respectfully urged that, of course, in this view of the matter, nothing contained therein could have been available as evidence against such other defendants. This is certainly a well established and universally recognized rule in our criminal jurisprudence.

But furthermore counsel for the defendants contend that there is nothing in the statement itself which warranted in finding the defendant Ormsby guilty of manslaughter or any higher degree of crime. A reading of the statement indicates indeed that Ormsby was the driver of a car that turned from Erie Street on to Fourth Street, that three men riding in the car with him jumped out of it, and that they had bats in their hands; that the same three after an interval of

time had elapsed came running back to the car and got in, and that they drove along Fourth Street in an easterly direction. But where is the evidence, even admitting that this statement was made, that indicates that Ormsby had any part in the actions of the three men who left the car, either at the time they left the car or subsequently thereto, or any knowledge of the purpose which they may have had in mind when they left the car? Where is the evidence that Ormsby urged or caused them to take up base ball bats, or other weapons, at the time that they left the car, or that he knew or had any idea of the use that they intended to make of them? The first question addressed by Ormsby, to these persons, whoever they may have been, upon their return to the car indicates that he was not apprised of their reason for leaving it, "What happened? What did you fellows do there?" These questions appear to counsel for the defense to indicate that Ormsby was not cognizant of the intention of these alleged assailants, and being puzzled was seeking information from them as to what purpose they had had in leaving the car.

Again how can it be said that Armsby was possessed of a *mens rea,* of a guilty intent to aid and abet the perpetration of an unlawful killing, in the light of the fact that the statement alleges that upon the return of the men who had left the car, he asked of one of them, "Did youse hit that child?" and was answered, No, that the child was knocked over in a rush in the fight. In the alleged statement, Ormsby is quoted as stating that he believed the answer and did not learn until later that the child had been hit with a bat.

It is respectfully submitted to this Honorable Court that there is nothing contained in this alleged statement, even granting freely that the jury were justified in believing it to have been made

by Ormsby under circumstances that would not have rendered it inadmissible, despite the subsequent denial of the defendant Ormsby when on the witness stand, that he ever made such a statement, which justified the jury in believing that Ormsby had any knowledge whatsoever that an outrageous assault had been attempted or was designed upon anybody, that resulted in the death of Catherine McGee, and that in the light of the information which he possessed at the time of the return of the alleged assailants to the automobile he was fully justified in driving away with them from the scene of the alleged crime. No other testimony was developed by the case, which considered together with the statements contained in this alleged confession, could have warranted the jury in believing that Ormsby knew that a fatal attack had been made upon anybody, or had any part in the alleged attempted assault upon the witness Whalen.

The next State witness was Detective Walton of the Jersey City Police Department who produced a paper writing which the Trial Court admitted into evidence over the objection of counsel for the defendants, and despite the fact that it, too, was unsigned by the defendant whose statements it was supposed to contain. Argument as to the admissibility of this paper writing in evidence has been made in Point 5, *supra*. The alleged statement appears on S. C., pages 262 to 264. Nothing whatever in this alleged statement is of an incriminatory nature as against the defendant O'Keefe. He states that hearing that "a crowd" was looking for him and his friends with blackjacks he had earlier in the day bought some baseball bats at a store on Erie Street; that after seven P. M. on the night of Nov. 6, 1928, he in an automobile in company with Ormsby and Slim Donato left No. 2 School and rode out to Bayonne,

and thence to Easton, Pennsylvania, returning to Jersey City on the afternoon of November 7th. Having left No. 2 School at the start of this journey the automobile in which he was riding turned around the corner at Fourth and Erie Streets, going toward Grove Streets, at which time he fell out of the car being dizzy from a blow which he had received in a fracas that had taken place about 7 o'clock P. M. in front of School No. 2.

Of course it is unnecessary to advert again to the general rule that nothing in this alleged statement, which if made at all, was made in the absence of the other three defendants, could have been binding upon any or all of such other defendants, even assuming further that the alleged statement was admissible into evidence.

The State introduced other evidence through Walter Yeiser and Andrew Blake, which needs only to be read to be utterly disregarded as offering not the slightest proof of any fact material to the issue in this case.

In rebuttal the State recalled Lieutenant Ballarene to testify that he knew the defendant McNally, and that he questioned him on November 8, 1928. He produced a statement which, he testified, McNally had made in Inspector Casey's office in the Second Precinct Station House on that date. The statement was admitted into evidence by the learned trial court over the objection of counsel for the defendants and appears in State of the Case, pages 361 to 363. Like the statement of the defendant Ormsby, if made at all, it was made in the absence of the other three defendants, and hence, cannot bind them. In this alleged statement McNally is purported to have said that after the polls closed on the evening of Nov. 6, 1928, he left No. 2 School to get some cigarettes. He saw a man lying on the sidewalk, whom a policeman picked up. There were about forty men en-

gaged in a fight. McNally proceeded to a Sedan car owned by Ormsby and the witness Reilley. He sat in the car being at that time its only occupant. Thereafter "Slim Donato, Vincent Ormsby, Danny Reilly came and got in the car". McNally then got out of the car which Ormsby later drove away. He had been seated in the back seat of this car, which was a Chandler Sedan.

Nothing whatever appears in this statement which by and of itself possibly justified the jury in determining that the defendant McNally was guilty of manslaughter or any other crime. In his statement he states that he left the car, before the car itself left the spot on Erie Street where it had been parked. There is nothing whatever on the part of any other state witness which taken in connection with anything contained in this alleged statement by McNally, "which statement McNally, on the witness stand "denied ever having made, could possibly have justified a jury not swayed by mistake, passion, prejudice or partiality, in finding this defendant McNally guilty of the commission of any crime.

Finally and to sum the whole argument on this Point, there is no evidence which regarded independently, or cumulatively, identifies a single one of these defendants as a participant in the alleged attack upon Whalen from which it is argued by the State that Catherine McGee died. And this is true, despite the fact that nearly every witness for the State testified that he knew one or more of the defendants, either personally or by sight, and that some of them testified that they knew them all.

The jury could not possibly have arrived at the conclusion that these men were guilty of any crime in connection with the death of Catherine McGee from the lawful use of any evidence that was adduced before them throughout the trial.

Inspecting the evidence, noting throughout the entire lack of identification of any of these defendants as being among those present at or near the place where the crime occurred, taking into consideration the conflicting nature of the testimony, it being stated by some that the crime occurred about eight-thirty P. M., and by others equally reliable as having taken place at about seven-thirty P. M., noting the failure even of witnesses who although they were not friendly with those of the defendants whom they knew, and had known for a long period of time, and who were within a few feet of Catherine McGee at the time when she was struck, to identify such of the defendants as they knew as being among those engaged in the alleged fatal attack, it is a fair inference that the jury, in order to find these defendants guilty of crime, must have made an illegal and erroneous and egregiously harmful use of exhibits introduced in the form of alleged statements of these various defendants and particularly of the alleged statement of the defendant Ormsby, despite the very fair, clear and positive instructions of the learned Trial Court to them that they were not to, and must not, do so.

On the whole case it is evident that some outstanding influence, passion or prejudice or partiality must have prevailed upon the jury in arriving at its verdict convicting the defendants Donato and O'Keefe of second degree murder and the defendants Ormsby and McNally of manslaughter, because it is inconceivable how a jury in the face of the entire lack of evidence found in this case to couple up or connect any of these defendants with the perpetration of the crime charged, especially in view of all the testimony to the contrary, including the witnesses for the state, the denials of the defendants themselves and the witnesses in support of the defendants' alibi, could find these men guilty.

Counsel for the defendants feel that they should ask the pardon of this Honorable Court for going into such minute and lengthy detail in respect to the examination of the evidence and the extreme length of their argument on this last point, but, after all, counsel are chargeable with a solemn duty to all of these defendants, and in view of the patent weakness of the State's case and the meagre and illegal evidence introduced against these defendants to attempt to sustain the allegations in the indictment, they feel that what they have done in the above respect will meet with the approval and approbation of this Honorable Court.

The Court is therefore most respectfully and earnestly requested to consider the whole case and the strength of the defendants' case as compared with that of the State, pursuant to P. L. 1921, page 951.

State v. *Karpowicz,* 98 N. J. L. 546;
State v. *Mosley,* 131 Atl. 292;
State v. *Fiore,* 108 Atl. 363;
State v. *Tmmerari,* 115 Atl. 394.

Finally, we most respectfully submit that for the errors assigned and for the specifications of causes for reversal set forth in this brief, and also from a careful reading of the testimony contained in the entire record, it will be disclosed to this Honorable Court that the defendants have suffered manifest wrong and injury, apparent on the record, and therefore that the conviction of these defendants ought to be set aside and a new trial granted.

Very respectfully submitted,

William A. Kavanagh,
Attorney for and of Counsel with Plaintiffs-in-Error, Frank Donato, Frank McNally, George Ormsby and Vincent O'Keefe, alias Brasch.