2— Crim. No. 475.

33 C.A. 426

In the District Court of Appeal

OF THE

STATE OF CALIFORNIA.

IN AND FOR THE SECOND APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

M. A. SCHMIDT,
Defendant and Appellant.

Appellant's Opening Brief.

Volume I.

Subjects:

1. Introduction.
2. The Motions to Quash the Indictment.
3. The Selection of the Trial Jury.

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Charles Hagerty met his death in a catastrophe in which the building occupied by the Los Angeles Times, a newspaper, was destroyed by fire, following a terrific explosion. In this disaster, twenty persons other than the deceased lost their lives. It was the theory of the prosecution that the explosion was caused by dynamite placed in the Times Building by one J. B. McNamara with the felonious intent to destroy the building, knowing that destruction of life would almost inevitably result. It was not contended by the prosecution and there was no evidence introduced that tended to show that the defendant Schmidt set off the explosion or that he was present aiding and abetting McNamara. It was alleged, however, that he aided and assisted McNamara in procuring the dynamite with which the latter caused the explosion, knowing the purpose for which it was to be used, and that he aided in planning and devising the act. While the general features of the Times horror were, and probably still are, matters of common knowledge, it may be well at the outset, in order to explain and clarify the numerous issues involved on this Appeal, to set forth briefly the principal details of the disaster and the events leading up to the accusation and prosecution of this defendant.

The Los Angeles Times is and was at the

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time of the catastrophe in which the deceased lost his life, a daily newspaper published in the City of Los Angeles and having an extensive circulation in the County of Los Angeles and throughout the State of California. The publication offices and mechanical departments of this newspaper were located in a building situated at the corner of First Street and Broadway in the City of Los Angeles. To speak more accurately, the Times plant and office were located in two adjoining and connecting buildings; one being four and the other six stories in height. At the time of the explosion General Harrison Gray Otis was President and Managing Editor, Harry Chandler was Assistant General Manager and Marian Otis Chandler was Secretary and Treasurer, and these together with Frank D. Pfaffinger and one McFarland constituted the officers and directorate of the corporation which published the newspaper. For a number of years prior to the time in question the Times, under the direction of General Otis, had taken an antagonistic attitude toward trades unions and organized labor in general, both in its editorial and in its news columns. During the summer preceding the disaster various strikes and labor difficulties were pending in Los Angeles, and the Times was extremely out-

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spoken in its condemnation of the labor unions for their policies in reference to these difficulties. Animosity against the Times and against General Otis for his opinions on labor and economic questions is the only motive suggested by the prosecution for the commission of the horrible and barbarous crime, if the catastrophe was caused by a criminal agency.

At approximately 1 o'clock on the morning of October 1st, 1910, a terrific explosion occurred in that portion of the Times building commonly designated as Ink Alley, an alleyway about twelve feet in width which ran westerly through the center of the building from Broadway. At the time of the explosion there were about one hundred and five to one hundred and ten persons employed in the building. Charles Hagerty, the deceased, was a core trimmer, who was at work in the basement of the building at the time that the explosion occurred. A witness who was standing within an arm's length of him at the time was knocked down by the force of the explosion, and everything was in complete darkness. No one seems to have afterwards seen Hagerty alive, and the theory of the prosecution was that he met his death instantly from the debris that fell upon him. It is a significant fact that although most of the witnesses who were pres-

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ent in the building at the time testified as to only one explosion, a witness who was approximately a block distant from the building testifies clearly and with great detail as to two explosions. The prosecution did not attempt to explain this conflict, which is of great significance in view of the fact that there is no direct evidence in the record as to the cause of the explosion, the evidence in that behalf being entirely circumstantial and founded for the most part upon the opinions of alleged powder experts. Following the explosion, fire spread with almost incredible rapidity throughout the building, which was totally destroyed. In the explosion and in the ensuing fire twenty persons lost their lives and one sustained fatal injuries in leaping from a window. All of the bodies taken from the building with the exception of the body of Hagerty were so charred or consumed by the fire as to be incapable of identification. The body of Hagerty was found several days later buried under a pile of timbers, iron beams and other debris in the basement of the building.

A description of the scenes of horror and destruction which followed the explosion is a difficult undertaking and as we desire to be faithful both in letter and in spirit to the record contained in the transcript, we believe

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that the story of the disaster can best be told by summarizing the testimony of the witnesses who testified in the Court below. In the following summary we believe that we have set forth all of their material statements and we have used their exact words wherever this could be done without impairing the orderly sequence of the narrative.

MARCUS S. BENTLEY.

DIRECT EXAMINATION, (pages 2459-2465 Rep. Trans.):

> The witness was Mechanical Superintendent of the Los Angeles Times and had occupied that position for eighteen years. Had known the deceased, Charles Hagerty, about two years prior to his death. The witness saw the deceased for the last time about seven o'clock on the night of September 30th, 1910, the night before the explosion. The deceased at that time was working at the color press in the front part of the Times press room. Quite a few days after the explosion the witness found the body of the deceased in the ruins of the building. The body was lying on the press room floor. The heavy glass side-walk was lying over his leg, and the witness dug under and uncovered as much of the body as he could, but being unable to get the body out, procured derricks and removed the timbers and heavy iron beams and took him out. That was on the 5th or 6th of October, 1910. The body was not badly burned.

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The witness knew positively that the body to which he referred was Charles Hagerty. An alley way ran through the center of the building and the body was found about six feet south of the alley, about forty feet from Broadway. The alley spoken of by the witness leads in from Broadway to the first floor and was over the basement. The witness assisted in the removing of the debris at that point. The body was covered with cement, bricks and iron beams and was immediately covered by the frame of the glass sidewalk.

On CROSS-EXAMINATION (pages 2465-2475) the witness testified:

I was not present at the Times Building that night—I was at home and did not hear the explosion. The mouth of the alley at Broadway was ninety feet from First Street, and ran into the building to the West from Broadway. The alley was twelve feet wide. North of the alley was a wall running from the floor of the building up. The witness found the body of Hagerty eighteen feet from the wall on the north side of the alley. The head was pointing toward the south. Half of the floor of the alley was composed of cement, a strip five feet wide running east and west on the north side of the alley, and five feet of glass running on the south side of the alley floor. Two or three feet of the iron frame lay on Hagerty's body. Part of the steel frame was intact. Not much glass was in the frame. There were a few little glass squares set in the frame. Some of them were unbroken.

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More than half, the witness supposed, were broken. The frame was bent and twisted as far as the witness could see. The witness thought the frame was of steel. The six-inch beam that ran across and that held it up was broken in two. The breaking of the beam would release this piece of glass and the iron floor and let it fall. Around Hagerty's body were lying bricks and different pieces of iron and dirt and dust. I think there were a few barrels of ink and empty boxes in the alley before the accident. I suppose there were about four to six barrels of ink, not over ten barrels full of ink. I testified before the Grand Jury, I think I said, I remember now of saying there were ten barrels as far as I remember, there were from six to ten barrels. The beam that was broken held this plate glass and steel up. It was one of the supports. It connected with the beams running east and west and the twelve-inch beams running north and south. This six-inch beam that I found broken in two covered up the sidewalk, the glass sidewalk, and the cement; it ran east and west and it was tied in to a twelve-inch beam on every side; that twelve-inch beam ran across the brick wall into a big twenty-four-inch beam, over the pressroom, and this short beam that held up the sidewalk was broken in two and swung around, tore the twelve-inch beam out of the brick wall and this piece was still hanging on to the twelve-inch beam after being torn out of the wall, and the next beam east of that twelve-inch beam had dropped down on top of that afterwards, showing that they went down first and threw the glass

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ahead that swung underneath and fell down on Mr. Hagerty.

RE-DIRECT EXAMINATION (pages 2475-2477):

The basement floor immediately surrounding the body of Mr. Hagerty was pretty well covered up. This glass was on top of him. There was nothing underneath the body at all. He was lying right on the floor. The floor was clean, nothing was directly underneath him. The floor immediately surrounding him was all covered up with brick and iron from the building. The steel was bent and broken. Some sections were broken clean or bent, it was all torn up. That steel was very light stuff. The tie beam that I spoke of was broken in two. It was bent toward and swung around to the north.

RE-CROSS-EXAMINATION (pages 2477-2478):

There was a partition wall in the building running North and South near where I found the body. That was about four feet from the body, that is, four feet from the wall running North and South. His body lay East of the wall.

CHARLES J. HAGERTY.

DIRECT EXAMINATION (pages 2479-2482), testified as follows:

I was the father of Charles Hagerty. He is dead. I last saw him alive on the night before that explosion occurred about eleven o'clock. The explosion to the best of my

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recollection occurred on Friday night and I saw him on Thursday night at eleven o'clock. I refer to the explosion of the Los Angeles Times building in the City of Los Angeles. It was the morning of October 1st. My son lived with me. His age was twenty-three, he would have been twenty-four the 4th of the same October. Immediately preceding his death my son was employed at the Los Angeles Times. He had been there employed about a year, I think. I think they called the work he was doing "stripping cores." I last saw him about eleven o'clock on the night before that. I think that must have been Thursday night; I never saw him again.

DAVID S. DOUGLASS.

DIRECT EXAMINATION (pages 2482-2491), testified as follows:

I am located with the Los Angeles Record in the press room in the capacity of a pressman. On the 30th day of September, 1910, and the 1st of October of that year, I was working in the press room of the Los Angeles Times. I was mostly on the packers, that is, taking the papers from the machine as they are printed. I had been employed by the Times in the neighborhood of about five months. I was there on the night of September 30th, 1910, and on the morning of October 1st, in the building of the Los Angeles Times in the City of Los Angeles. I was there at the time of the catastrophe that occurred on that date. I knew Charles Hagerty in his life time. He

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is dead. I last saw him alive on the night of the explosion. It was probably as far as my recollection goes somewhere about ten minutes to 1 Saturday morning, the 1st of October, 1910. I was within an arm's reach of him at the time of the alleged explosion. I probably came to work, say about half past twelve or twenty minutes to one. After going to my locker, getting into my overalls, I went to the rear of the press room and was at work on the baler, which was baling waste paper. Charles Hagerty was stripping cores on a bale on the northwest corner. I was talking to him at the time because he was working overtime. I don't recollect just when he came to work, but I know he was working overtime, and it seems that his run was almost finished and he was stripping those cores. I was kidding him about his overtime—asking him why he didn't bring a bed or a hammock or something if he liked the place so well and stick around. He says: "Why Jeff, I am never going home." I says, "all right Charley," I had my hand on his shoulder and I said: "this is a pretty good place, lets you and I stick around," and then this explosion happened. After that why I have no definite recollection, only that I was knocked almost completely out and I had a hard time to collect or get myself together in order to get out of the building. To my recollection it was over my head, but not directly. I didn't see anything—things to me were in complete darkness. I did not see anything with reference to Hagerty after I had spoken to him in that way. I did not know at that time what became of him. I never heard a word from him, in fact I

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tried to call him; I tried to speak to him but I never heard a sound. He was standing probably not directly under the center of this alley, but probably about two feet underneath the alley on the west wall of the press room, that would be the Northwest corner. His closest point would be about two feet under the alley. He was not directly underneath it. I understand the ceiling is eighteen feet from the floor of the press room and he probably was off to one side say four or five feet, that is, four or five feet from the point of the explosion or the closest point. I never saw a thing until I began making my way out, and I reached the stairs going to my press room, then I looked back and partly saw what I came out of. There was a great deal of smoke coming down from the ceiling. I never paid any particular attention to any other part of the press room at all. I did not see any flame at that time. When I got in the stereotype room and found that the exit I was making for that I couldn't get to it, I came back and then thought I would try to go through the press room. Then I saw over in the corner this white waste box where I left was burning. When I got in the stereotype room and saw I was stopped and couldn't make the exit I said: "what will we do" and it was my belief that Frank Scott says: "let's try the stock room." That is the stock room under the Baumgarten Building, and that is the way we got out. I was only injured slightly; my right leg bothered me to a certain extent, and there were pieces of concrete or brick or cement that penetrated my arms. There was some of it taken out at the receiving hospital.

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Cement was blown into both of my arms, probably mostly on my right side and along my head. The sound of the explosion to me was not a very loud sound. It was more of a quick thud you might say, like if you would tap a bass drum, something like that. It was a quick report. I only heard one report. I know there was a hole in the roof of the basement, after the explosion because I saw smoke at this particular time coming down through it. The second time I looked it seemed to be more of a draft because all this was going back through. That was at the time I saw this blaze in this paper box. I couldn't say as to the exact dimensions of the hole. It must have been somewhere around 4 x 6, something like that. That hole was in the roof, that is the floor of this Ink Alley, and probably a foot or two east of the ink tank. I should say it was thirty or forty feet from the sidewalk on Broadway. I haven't the slightest idea how long I remained down. I was not completely unconscious. My first sensation was I thought Charlie Hagerty played a joke on me. I know I had to do a great deal of talking to myself, telling myself to keep calm, to keep cool. I know that I tried to call Hagerty. My mouth was twisted over on one side, and I had difficulty getting it back in place so that I could speak, and I had sensation of my eyes rolling up in the top of my head. I called Hagerty and he did not answer. I never saw him again. I was spatted or covered with ink at that time. It was smeared all over; it was heaviest from my waist up. The explosion was about eighteen feet over my head and I was about four feet to one

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side of that particular point. None of the ink that covered my clothing was afire and no fire reached me in any way. I saw a flame after I reached the stairs going into the stereotype room. That flame was over in the corner I had just left. It seemed to be coming with this smoke from this hole in the ceiling. I didn't suppose that could have been more than two or three minutes after the explosion that I saw the flame.

CROSS-EXAMINATION (pages 2491-2496):

I was standing with Mr. Hagerty under the south side of Ink Alley. There is a wall on the north side of the alley running east and west. I was about eight or ten feet from the wall, and I was standing about four feet from the hole that was caused by the explosion. I was east from the hole. The blow knocked me down. I called for Mr. Hagerty and I heard no sign at all. I could not see. The first thing I saw when I came to the hole was smoke coming down. The hole was probably about 4 x 6 running east and west the longest way. It was nearest to the north side of the alley, about two feet from the north wall. There was an ink tank hanging near the ceiling of the alley and the north end of that ink tank was next to the north wall. At the time I got my bearings the ceiling of the alley was intact excepting the hole. I never saw any hole at that present moment. As I was leaving when I got to the steps going to the staircase was when I looked back and could see the smoke coming down through the ceiling. That could not have been more than a couple of minutes after the explosion.

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The ceiling of the basement is the floor of the alley and that was still intact as far as I know when I went around to the staircase and looked back and saw the smoke coming down through the hole, at least it had not fallen. The smoke coming down is what attracted my attention to the hole. I did not see it before. I believe the color press was running just immediately before the explosion. There was electric lights in the basement. When I became conscious everything to me was in darkness. I saw no lights in the press room. I don't believe I was knocked entirely unconscious. I was stunned. Before the explosion there were some boys working on the baler behind Mr. Hagerty and myself. The baler was about eight feet from where Mr. Hagerty and I were standing when the explosion occurred. I noticed them at that place just a few minutes before the explosion occurred. I don't know whether or not the tank was still in place when I saw the smoke coming down through the hole. I was not under it.

WILLIAM WILBUR.

DIRECT EXAMINATION (pages 2497-2506):

I am a stereotype man and was employed by the Los Angeles Times upon the night of September 30th, 1910, and the morning of October 1st, 1910. I was in the basement at that time. I was in the east end of the stereotype room, the north end of the basement. Our basement was about four or five feet higher than the press room basement. I was on the north side of Ink Alley,

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I expect about 100 feet from Broadway and about twelve or fifteen feet from the eastern end of the Times Building and about eighteen inches from the north wall of Ink Alley. We were sitting and talking and as near as I can remember I heard this noise and I did not realize what it was; I walked toward the west end of our room and I could see dust and one thing and another flying up around our metal pots and everybody rushing to the end where I was. We used to have an opening that went into the alley from there into the building. I was facing south, facing the north wall of Ink Alley. I couldn't describe the particular sound that I heard; it sounded awful, I know that. I saw dust and one thing and another flying in the air and then, of course, everybody running to where I was, everybody in our room. There must have been eight or nine of us. We ran back and climbed up on the metal stored in that end of the room and we all turned and started back to where the explosion was and some of the boys went out through where they used to let paper down a paper chute out of Baumgardts' basement. The only person I saw after we passed that opening was Mr. Cary and myself. Mr. Cary was an employee of the Times and worked in the basement at that time. He seemed to be ahead of me and he went around behind the metal pots and I followed him, and finally when he got around behind the metal pots turned around and he says: "for God's sake lets get out of here," and I turned around and ran for my locker in the north wall of our room and I broke open the door on my locker and grabbed what clothes I could get

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ahold of and went out through the Baumgardt basement. The explosion seemed to me near our metal pot. That was standing right at or near the north wall—northwest corner of the press room. There was a door behind our metal pot that opened into the press room and it seemed to me it was just about that point. After I got to the metal pot I could get an unobstructed view of the press room and I could see the press room through the door. All I could see was fire at that time. It was not over two minutes at the most after I heard the report before I saw fire. I did not see a hole in the floor of Ink Alley. When I came to the door of the press room I couldn't see the floor of Ink Alley. I could see fire, that is about the only thing I could see in the press room, and our wall hid the alley from us. I did not have any ink thrown upon me. I did not have any debris thrown upon me. After the explosion I heard something such as falling machinery. It must have been something heavy falling. That was within two or three minutes after the explosion. After I got my clothes I went to that paper chute and went up there and went out through the Baumgardt basement. I was not injured in any way. Immediately after the explosion I heard a scream which seemed to come from the west end of our room somewhere from the direction of the explosion. I last saw Hagerty alive about ten o'clock on the night of September 30th, 1910. I never saw him again. I saw quite a few others whom I never saw again on that occasion, Grant Moore and Howard Cordway and I guess that is all I saw that night that I never saw again. I think I

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knew all the men who worked in the basement that night. The point where the explosion took place seemed to me about 20 or 40 feet east of Broadway and on the south side of the north wall of the press room. The ink tank was in that corner of the press room, the northwest corner, and it seemed to me the explosion was right at that point.

CROSS-EXAMINATION (pages 2506-2509):

I was in the stereotype room just north of the alley. The job office used one side of the room and we used the other part. I was in the east end of the room. I did not see any fire until I came up in front of the press room. I could see it as soon as I got there. First I went to the east end of the room, then to the west end, and then came back and went out through the basement of Baumgardt Building. I left the main building where I was working to the north side of the building. The explosion sounded to me as if a gasoline tank or something like that had blown up. I knew of two gallons of gasoline that they used to keep upstairs. I have heard explosions in gasoline, and the explosion sounded something like that. I did not testify before the grand jury.

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MARCUS S. BENTLEY.

RECALLED BY THE PROSECUTION TESTIFIED ON RE-DIRECT EXAMINATION (pages 2510-2520).

I testified yesterday that I found the body of Charles Hagerty lying on the basement floor of the Times Building on the 5th or 6th day of October, 1910. The body was dead at that time. The original Times Building to which I have refered in my testimony was situated on the northeast corner of First and Broadway, Los Angeles, and consisted of four stories and a basement. The first ninety feet back from First Street, the ninety feet back on the north alley the wall ran up to six stories high. The other portion was the old building and it was four stories and a basement. This front part was used for newspaper publishing. No high explosive of any nature was used in the publication of the newspaper or for any other purpose. No dynamite was ever kept there. I assisted in removing the debris from the dead bodies after October 1st, 1910. I suppose I was there and saw taken out sixteen or eighteen bodies all together. These bodies with the exception of Hagerty's were mostly burned and in pieces. I was working about the place assisting in removing the bodies about ten days. We found most of them in the northwest part of the building, the basement. It would be in the north part of the building around the elevator. The elevator is situated in the northwest part. There were three or four of them we found near the elevator, right at the elevator; some we found where they

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got around the presses down below, the job department, crawled underneath, laying down there along the north wall where they had followed the wall around. I suppose there were three along there. One body was found around what we call the elevator control valve. Instead of coming down the elevator direct, it came down in the shaft on the control valve—followed the cable down, probably, and was right around the cable, hugging around the elevator control. His arms were around it. I couldn't say whose body it was. It was partly covered with debris. On the second floor we found two bodies where the floor had dropped down and they were in behind it; couldn't get out. They were lying down and badly burnt; part of their bodies were burned away. I did not positively recognize any of the bodies that were taken out of the building with the exception of Hagerty. To my knowledge there was nothing of the nature of dynamite or any high explosives kept in the Times Building for any purpose whatsoever. I do not know of any high explosive or dynamite having been placed or brought within the Times Building previous to September 30th, 1910, and up to the time of the destruction of the building or immediately preceding that time.

RE-CROSS-EXAMINATION (pages 2520-2532):

I was told to come here this morning by the District Attorney's office. I testified before the grand jury in this matter. I read over that testimony previous to testifying here yesterday. I can remember all that

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stuff. I did not have to read it. The next day, October 1st, I was at the Times Building about an hour and fifteen minutes after the explosion. The elevator to which I refer in my testimony is a hydraulic elevator. It ran with an electric starter what we call an electric hydraulic, that is, the electric starts the apparatus going and the water either raises or lowers it. The elevator was in the basement when I arrived on the scene. The bodies were on the side and around the elevator in the basement. The elevator was stopped very near even with the floor of the basement, a little bit higher. There was a pit about two feet deep underneath the elevator. No bodies were found in the pit. They were lying in the basement, some of them lying near the elevator north of the elevator and others were six or eight feet from it. I suppose we found three or four around there. No bodies were found in the vicinity of the elevator shaft on the second, third or fourth floor. There was a body found clinging to the rope. That body was in the basement. It was clinging to what we call the tiller rope, that controls the valve. The rope runs around this valve instead of the elevator and the shaft next to the elevator, and the other rope goes down in the elevator shaft. This party was over on the other side. This was an open elevator but had no guards on it, just a flat platform that was pulled up from a cable at the top. There were no high explosives in the building to my knowledge. There was gas there. Three gas mains came in the building. The highest one was about two and one-half inches and another about one and one-half

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inch and one about one inch. I suppose the pressure ordinarily was about eight or ten ounces. We did not have a pressure gauge there. The three mains came in on First Street. Around some of the linotype machines there were gas jets burning continuously every night when the machines were in operation. The paper itself probably goes to press about half past two, and the linotype operators quit, I suppose at half past one or two o'clock. The ink barrels run about 450 pounds to the barrel. That ink is not an explosive. It is composed of lamp black, linseed oil and varnish. That ink when very fine under pressure might ignite. There was gasoline kept in the building in small quantities on different floors. I left the Times Building at seven o'clock on the night of September 30th. The highest quantity in gasoline we ever kept in the building was four gallons; in one place on each floor. There was one ink tank directly underneath Ink Alley in the basement. The capacity of the ink tank was about six or eight barrels. One end is supported by the north end wall and the other is on the south end of the alley. It went right across. There was a four-inch pipe in the ceiling of the basement, which is also the floor of Ink Alley, letting the ink from the barrel into the tank. I did not notice a hole in the floor of the alley afterwards when I examined the ruins. The building was all caved in when I got there. I couldn't distinguish whether there was a hole or not in Ink Alley. The entire alley was broken in by the time the rescuers got to it, or the wrecking crew. We took the

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tank down after the explosion. It was still intact against the ceiling, wedged in between the two walls. I noticed the condition of that ink tank. I found on the east side where it was caved in—indented in. On the south half we had a manhole in there always kept open. That was to allow fumes to rise off if any should rise. The pipes that run from Ink Alley down into this ink tank had a screen covered first and had a board cover over that to keep anything from coming down. There was no cover screwed on. Merely a screen and a board laid on top. This tank was about twelve feet by three and ran across the alley. Only one side was dented in. I refer to the long side. The west side was free from indentation. This ink tank started forty feet back from the Broadway entrance. It was made of about one-quarter inch steel.

SIMEON CRABILL.

DIRECT EXAMINATION (pages 2532-2547):

I am the Manager of the Times-Mirror Binding House at 118 South Broadway, and have been employed by the Los Angeles Times for twenty years and a half. On the night of September 30th and the morning of October 1st, 1910, I was foreman of the composing room. I was there at the time of the catastrophe. At the time of the explosion I was on the second floor of the composing room. Just before the explosion I had passed from the old building into what we term the new building and was probably about the center of that

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building with a proof in my hand on the way to one of the machines when the explosion occurred, and I had the sensation of being lifted, not off the floor, but sort of a vibrating upward movement, and had the feeling of settling again, and I turned around instantly, wondering what had caused this explosion, and as I turned around I saw a sheet of flame shooting up from the floor, seemed to be coming right up out of the floor, and seemed to be a wall of fire all the way across the opening from the old building into the new, and we had an elevated desk in there called the copy desk, at which there was a copy cutter, as we term it, sitting, and I saw him standing up with his hands up like that (showing), with the flames shooting up between where I was standing and where he was. Just at that time I turned around, I saw these things in a mass of flames and I started across to the Broadway side, that is, to the fire escape, thinking that possibly I could get through, but there seemed to me everybody was rushing to that side, all the employees, to the west side of the building, the Broadway side, and in order to get through I had to run around the end of the machines, which were in rows, a number of machines there—I believe three rows of them, and I ran around towards the elevator, which was in the corner of the building, and as I passed there the boys were all running, it seemed to me, for the elevator, thinking they could get out, I suppose. Close to the Broadway window (there was a window in that elevator) and as I passed there I got in the crowd and was carried

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off my feet into the elevator shaft and in falling my head struck something or other (I don't know what), and partially disabled me for a few minutes, and I wandered around in there and heard everybody hollering and calling and trying to find a way out, and I worked my way through in what they call the mailing room which was just the shallow partition, wooden and glass, between the two rooms, and as I went to go through there, I knew where the door was, but I couldn't get through the door; it seemed to me it was full of debris and stuff that either had fell in there or had filled up there, or something, and I had to crawl over the partition to get through; at least, I imagined I had to; that is the way I got through anyway, and from there I worked my way over to the paper lift that they had for lifting papers from the mailing room up to the Broadway grade, the sidewalk, and finding every other means of escape shut off, I tried to go up this chute, but there was a big, wide leather belt, and when I got on it, it worked back and I thought I wasn't going to make it, but finally I realized there was a wood frame there and I got one knee on each side of it and pulled myself up to that entrance which was all a mass of flames when I got up there, and from there I went into the sidewalk and from there one of the officers pulled me off the sidewalk on to the street, and after waiting there a few minutes I went over to the hospital, but I didn't see, only in a general way, of course, I recognized some of the boys as they were running, but I did not, I could not recall now,

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I don't suppose, just what people I did see. Of course, I saw practically all of them at that time. I had minor burns around the head, around my face, my ears and my hands. Going through the sidewalk I cut my hands by the glass on the walk. I knew some twenty men working in the building that night that I never saw afterwards. Among them Hagerty, who was employed in the press room in the basement. In the basement I should judge there were about ten or twelve men at that hour of the morning, possibly more. On the first floor there were only two employed at that hour of the morning. There was the clerk in the business office and the stenographer for the business manager's office. And on the second floor of the composing room, the proof rooms, would vary from eighty to ninety, but on that particular morning, on Saturday morning, there were about eighty on that particular floor. On the third floor on that particular morning I don't think there were more than five. In the engraving department on the sixth floor of the new building on this particular night I think there were about seven. In the entire building at that time there was about one hundred and five to one hundred and ten men employed. The building was used for the purpose of producing a newspaper, the Los Angeles Times. At the time of the explosion Harrison Gray Otis was President and Managing Editor, Harry Chandler was Assistant General Manager and Marian Otis Chandler was Secretary and Treasurer, and Mr. McFarland and Frank D. Pfaffinger; they composed the officers

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of the company for a good many years prior to October 1, 1910. No dynamite or any high explosive of any other nature was used in getting out the newspaper or brought into the building at any time to my knowledge. On the night of the catastrophe I was attempting to go over to the fire escape, that was my first thought. I saw that the way of escape was shut off in every other direction, apparently that was the situation and there didn't seem to be any fire on the Broadway side so I tried to rush over to the Broadway fire escapes. I went down the elevator shaft. The elevator was apparently on the lower floor in the basement. I dropped two stories. I did not strike the elevator floor, it seems to me I was thrown against people in the elevator. They seemed to be hanging on to the sides, to the cable and everything else, and it seems to me I was shoved right off among a lot of people in the elevator. That was the sensation of the fall. I couldn't tell you how many there were, it was dark. The darkest night on earth right at that spot. I did not recognize any of the persons in the elevator or recognize any of their voices. I heard talking and hollering. I heard no individual name spoken that I remember. At the time I heard the explosion I turned and looked toward the point of the explosion. About twenty feet away as it appeared to me. The flame was shooting up, just a sheet of flame shot up from the floor and kept continuing, kept growing, increasing. I did not notice any opening in the ceiling of the floor that I was on. The flame as it looked to me was just spreading across

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the room in a sheet. Just seemed to be rolling right after you. Following me up. The faster I tried to get away the faster the flame followed me. I don't believe I could describe the first sound I heard. I can hear the sound in my mind but I wouldn't know how to describe it. It seemed to me like a muffled sort of an explosion, just kind of jar you inside; just seemed to be a muffled kind of an explosion. I couldn't give you a description of it that would be accurate at all. I realized that it was necessary to make all the exertion that was in me to get out. I did not suffer any physical discomfort at the time except the shock of the thing. Of course, it was a sharp report, but I wouldn't know how to describe it at all. I imagined I heard several reports. I don't know whether I did or not. The whole building seemed to kind of shake or move, I don't know what you would call it—but nothing fell right where I was. I was not rendered unconscious at that time. As I went down the elevator I was stunned, I was not unconscious at all. I saw the flames shooting up from the floor directly over Ink Alley and east of the Broadway Street line twenty-five or thirty feet when I first noticed it.

CROSS-EXAMINATION (pages 2547-2559):

I was standing on the second floor; that floor extended from the First Street side right through both of the buildings and all of the type setting was done on that entire floor. The linotypes were there. They were partly in the south of the alley

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and partly to the north. I was standing to the north of the alley, probably twelve or fifteen feet from the north side of the alley. I wouldn't be exact in that statement because I couldn't say. It would be about twenty-five feet from the Broadway side. When I first heard the explosion I was walking toward the north and I whirled around instantly, and the flames had just commenced to shoot up. The feeling I had was that the floor seemed to rise with me, like the whole building was raising up. From where I was I did not notice any of the linotypes topple over from the raising of the floor. The sensation was that the floor seemed to just rise up and then settle down again into its natural position. I have no idea of the diameter of the flame that was shooting up. It kept increasing every minute. It seemed to be a rolling appearance to me, up and out, it seemed to me to be spreading through all the rooms. As I testified before, my first thought was to go over to the Broadway side fire escapes, which were on the Broadway side on that part of the building, and in passing around the end of these machines, there was an alley went around, the crowd rushing carried me off my feet, and I was shoved off into the elevator shaft. The flames seemed to spread in every direction. I testified before the Grand Jury. After the flames started they spread all over the place. That is the impression I had—call it bursting or what. I did not try to cause the elevator to rise. I was not running for the elevator at all; somebody bumped into me, I suppose, and as I was shot down the elevator and

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I fell in the elevator shaft. The elevator shaft was enclosed and had doors on. There were doors to open and shut to keep the elevator shaft closed, to keep people from walking in when the elevator was not there. This time the doors were open. Of course, somebody had opened the doors. I presume I was pushed in there by the crowd. That is my impression. When I left the elevator after I had fallen I wandered around in there for a few minutes, looking for a way out. I thought I knew exery exit there was in the building, but I just couldn't locate any, I suppose, being in a dazed condition. I was not able to locate the place I was looking for but I finally tried to get through the door of what I supposed was the door into the mailing room, but I couldn't get over on account of the debris, and stuff being piled up there. The mailing room was in the old part of the building on the north and west. There was a partition of wood and glass, and I tried to get through there, and I looked up and saw a window, and I picked up a stick and knocked the glass out and went through to the other side or rather fell over the partition into the other side. I got up and looked around for a place to get out and I found this lift that they used there for carrying the papers, and I made my way out through that.

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LOUIS A. CARY.

DIRECT EXAMINATION (pages 2561-2568):

I am a stereotyper employed by the Los Angeles Times and was in the building of the Los Angeles Times on the night of the explosion. I was in the stereotype room in the basement. I was standing in the east end of the stereotype department talking to Wilbur, and all of a sudden there was—well it felt to me like the end of the world, that is the depressed feeling I had, and there was dust and dirt and stuff falling from the ceiling at that time; the boys from the other end were running back to where we were. We all scrambled into the back end, which used to be the old entrance to the building; it had been closed up a short time before this, and it seemed as though our first instinct was to go to that opening that we had been using, when someone hollered for the stock room, we knew we could get out through the stock room entrance; so we started back for that way; on the way back I was thinking it must be our new metal pot or something that broke, that caused it, and I was going up to see and as I got up to near the metal pot I could see through the opening in the press room, the archway, I could see flames. So I started then for the fire hose, but when I got about close enough to the opening and I looked through, I could see that the ceiling had gone from the press room; the fire was above the ceiling in there. Then I heard screaming and hollering, everybody running through, and seen Douglas come

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out with ink all over him and Jeff Douglas had ink all over him, scrambling out through the press room door. Well, I says to Calder, "It is time for us to get out, let us beat it." On the way out we stopped at our lockers and got our clothes and went out through the stock room. I did not see anyone injured in the basement at that time. I did not see Charles Hagerty at that time. I knew Charles Hagerty in his life time. I did not see him again after the catastrophe. I was possibly thirty feet east from the point of the explosion. The explosion was probably seventy feet from Broadway; it seemed to be right at the archway that ran into the press room from the stereotype room. It came right from Ink Alley. The floor of Ink Alley seemed to be gone. There was no ink thrown on me. I didn't observe the flame until I got up by the metal pot and then I seen the flame. There were a good many persons in the building that night that I have never seen again. Hagerty, Sallada, Tungstall, Flynn and Frink and ten or fifteen others.

CROSS-EXAMINATION (pages 2568-2571):

I was standing in the east end of the stereotype room with my face to the west. Wilbur, the gentleman who testified here yesterday, was with me. My first thought was it must be the metal pot or something; it happened around that, and I went up to it and it was situated right close to the archway; well, when I got up to it and seen it was all right I could see a flame up through this ceiling, then I went a little

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closer to the fire hose and it looked to me like the ceiling was gone and the building was burned down and I thought it was time to get out. I didn't notice any disturbance until I looked up through the hole, when I was there in the archway. There had been no disturbance in my room so far as I know. The archway was apparently intact and I could see nothing on the floor. It seemed as though I could look past where the ceiling ought to be, and then I could see the flames.

CLAYTON S. McKEE.

DIRECT EXAMINATION (pages 2572-2579):

I am a pressman; and have been employed a little over twelve years by the Los Angeles Times. I was in the Times building on the early morning of October 1st, 1910, in the press room in the basement. I was working on the press in the north end of the room, the nearest to the alley and I was standing on the frame facing towards the alley when the explosion occurred. The noise was hard and sharp and very penetrating anyway; that is, it seemed to go through me, the shock seemed to strike all through me and when I looked up at the ceiling it was splintered and blackened. I got down off the press first, and then looked up, because the first sound that I heard was glass, shattered glass falling around me. I started towards the front end of the room, which was all the way of getting out, that is, towards First Street, and then looked back again and two of the other

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boys, Harvey Ray and Harry Scott, came from around the press and came down with me, and we went towards the First Street entrance; the three of us went in the locker room, which was under the sidewalk, after our clothes,—a cloud of smoke came in almost immediately and drove us out and we went through a hole, which had been made in the east wall, into an adjoining basement, and out through that store room on to First Street. I noticed that the floor of Ink Alley had been shattered and broken. I didn't notice how big a hole had been blown in the floor of the Alley. When I first looked in that direction I didn't see any flame. I saw and heard debris falling, brick and concrete, dust and glass. The explosion came from the northwest corner of the room in a direct line about twenty or twenty-five feet from me. A little ink, just small drops atomized, was thrown on me. My hair was full of brick and concrete dust. I had a little welt on the forehead, I don't know just what from. The last I had seen of Hagerty, a few minutes before, he was right back of the press on which I was working. He was almost immediately under where I judge the explosion occurred. I did not see him after the explosion. I have lived for several years in a mining camp and have heard explosions both above and below ground.

CROSS-EXAMINATION (pages 2579-2591):

I had been working at that place seven years at the time of the explosion. I lived in a mining camp in Mineville, New York,

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a place of about two thousand people. I am thirty-two years old. I left Mineville, New York, in 1902. There are quite a number of iron mines located there. I was employed as a supply clerk. I have been under ground when they fired shots. I have heard lots of explosions. I have heard surface shots when I was anywhere from one hundred yards to a mile away. I never pretended to distinguish the explosion made by dynamite exactly as dynamite. I think we used 50% dynamite. I don't know as I can distinguish between the sound of a gas explosion and one made by dynamite.

HERBERT LEONARD.

DIRECT EXAMINATION (pages 2593-2596):

I am night clerk of the Los Angeles Times, and was in the business office on the First Street side upon the ground floor when the explosion occurred. I was standing in the advertising department in the business office when the explosion occurred. I was slightly cut on the head and cheek. The lights went out instantly, and I made my way out to the street through the First and Broadway corner entrance; after I got to the street I re-entered the building again, but came right out, and about twenty minutes afterwards I went up to the Receiving Hospital. As I recall now I was facing towards the west when the explosion occurred. The report seemed to come from under my feet. I don't think I saw any flames when I re-entered the building but I did when I came out. I did not see any

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one in the building after the explosion. I saw one of the proof readers come out of the building—I noticed that he had blood on his back. I knew Mr. Reeves, the manager's secretary and stenographer that worked on the first floor but I never saw him again. He was killed.

CROSS-EXAMINATION (pages 2596-2600):

I don't remember whether I saw fire as soon as I got out of the building or not, but very soon after the explosion I saw fire. I testified before the Grand Jury. I don't think I made the statement that the floor seemed to rise. I do not remember that the floor seemed to rise up. I was about eighty feet from Ink Alley. I had been in the employ of the Times seventeen years. I was injured by flying glass mostly. There was no flame about me at any time. I only saw it after I got to the street.

CALVIN HARTWELL.

DIRECT EXAMINATION (pages 2601-2603):

I am County Coroner of Los Angeles and held such position on the 1st of October, 1910. I assisted in removing the bodies from the Los Angeles Times Building. Either my deputy or myself was there practically all the time. The bodies were found in various places, but mostly on the bottom floor of the basement—scattered around in practically what I would call the back part of the building. I think we took out nineteen, if I remember right. Some were

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in bad condition, just the torso was left. Others were not so badly burned. Some of the legs and arms were gone. We were several days in removing the bodies.

GRANT L. SALLADA.

DIRECT EXAMINATION (pages 2603-2613):

I was employed as a linotype operator in the Times Building on October 1st, 1910. At the time of the explosion I was about at the middle of the center row of machines on the Broadway side of the second floor. My brother was on the next machine to me about five feet away and Fred Llewellyn was behind me probably eleven feet away. Clarence Galliher was about ten feet south of me on the same row of machines; I happened to be looking over towards the machinist's room—that would be about thirty feet from my machine; and of course, I heard the explosion before it came through the floor, and I kept looking in that direction and saw it—well, it looked like a cyclone come in, boards and everything else, and not much light at that time, carrying straight up to the roof. I was knocked down, but I felt the wave of the floor, give me a kind of a shock. I was about thirty feet northwest of the explosion. I noticed everything went right straight up through our floor, through the ceiling. I had the impression that all the lights in the machines went out the minute it struck. On the east side of the building about sixty or seventy feet from where my machine was there was a door that went

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out the back way upon a little porch and the jump would be about two feet over to some one story roofs of small houses over to First Street and over to Spring, and I intended to try and go through that way but by the time I got to the back end of the machine toward the explosion the flame came and hit me in the face and drove me back. I remember shutting my eyes and shutting my mouth trying to stop breathing. I started to go to the point of the explosion about twenty feet north, and by the time I had gone about ten feet from where I sat, the flames all spread right out and hit me in the face and they chased me right back to where I originally sat, and I went back to the elevator. I was going to grab the rope first and try to swing across, but I didn't and stepped back a couple of feet and made a jump and caught the window across the shaft. That was on the second floor. When I caught the window I crawled over and jumped in the street. My hand was cut up a little and my face was burned around the head and the right side of my cheek. I don't know what became of this brother I spoke of who worked there by my side. I never saw him again. After the explosion I saw Mr. Galliher sitting in his chair like he was looking at his machine. He had not moved out of the machine at all. I never saw him again. I had some experience with dynamite when I prospected in the hills for two or three months a year for eight or nine years. It wouldn't amount to much. I would tunnel twenty-five or thirty feet or sink a shaft about the same distance. The number of

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shots it would require would depend upon the rock. If it was in hard lime it would require about a thousand shots. My partner and I worked together for months. We always had to do ten feet of assessment work a year to hold the claims. I am familiar with the sound made by dynamite when exploded under ground. From my experience I formed the opinion that dynamite caused the explosion that night in the Times Building.

CROSS-EXAMINATION (pages 2613-2622):

The first sensation I got was the noise, and the next was the raising of the floor, of the disturbance of the floor, and at the same time I saw the debris going up through the ceiling, and the next thing was the flames, all within a few seconds. The volume of fire and smoke passed right up through the machines. It was mostly flame filled with dirt. I don't know whether the gas went out or not. My impression is that the electric lights went out upstairs. I never heard a gas explosion no more than a little pipe in a small gas stove that didn't do any damage. From my experience with dynamite its ordinary effect is to crack everything it can get a-hold of right close to it. It has been my experience that the effect of the dynamite explosion is equal in all directions from the point of the explosion. I observed the fire coming out of most of the windows on Broadway. As near as I can remember most of the Broadway wall was intact. This shot of flame arose about thirty-five or forty feet east of

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the Broadway wall, it wouldn't amount to a second hardly—not a second and a half, I suppose, between the time I heard the shot and the time I saw the flame. It was a crack and a roar at the same time. I have never heard a gasoline explosion.

CHARLES VARCOE.

DIRECT EXAMINATION (pages 2622-2632):

I am a contractor or foreman of construction work. In the early morning of October 1st, 1910, I was in the City of Los Angeles between the Times Building and Spring Street on First Street when I heard the report—I was one hundred or one hundred and fifty feet away from the Times Building. First there was a column, you might say of dust and debris went up from the roof of the back part of the Times Building for two hundred and fifty feet in the air possibly. Following the first explosion was another explosion of a different quality, different tone and with that almost immediately following the second one, came the burst of flames and big puff of smoke. There were two separate upheavals as I remember. The first upheaval, there was dust and debris, following the first explosion, and right before that had time to drop back came the second muffled explosion; then came the flame and the smoke. I should say the explosion was right over where Ink Alley was. I turned and ran back toward the Times Building. I came back over on the north side and ran up by the First Street entrance of the Times

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Building just as the men were pouring out of there. As I remember they were coming from a stairway that led from the press room down stairs, and then from another stairway that led back upstairs into the building, coming both ways. They were coming from both entrances on First Street. There was an entrance at the east end of the building on First Street—east corner. There was a stairway that came down leading from upstairs that would point approximately north, and then there was another stairway that would point at right angles to that, west, leading down into the basement. I don't know how many people I saw coming from that building. I didn't count them—four or five, maybe a dozen, I don't know. None of them were injured that I could see. I went around on the Broadway side of it and the fire was all shooting up in the back part of the building, spreading very rapidly. Got so hot I had to move away. At that time there was a big crowd there. When I first went around the corner I didn't see anybody. I was practically by myself. I saw several persons in the building after the explosion. I saw one I will always remember, that hollered for help and fell backwards into the fire as the fire closed about him. I do not know who that was. Then I saw another man drop from the second story and in front. He afterwards died. That was Mr. Elder. The windows across the street on the Broadway side where the typewriter store was were blown in, they were all shattered to pieces. I have had experience in the use of dynamite, nitroglycerin, nitro-

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gelatin and other high explosives. I saw a good deal of it handled when I was in the mines and used a good deal of it myself. The better part of two years we were using a good deal of it four times a day. By a good deal I mean a ton or two tons a month. The character of the work I was doing was gold mining. The percentage of nitroglycerin in that dynamite was forty or sixty. I am using now what is known as the 25%, in blasting out stumps. The extent of my experience in that regard is the matter of a few months. From the experience that I have had with these explosives I formed an opinion as to what caused the explosion in the Times Building. I imagine it was the result of some nitro explosive, a high power explosive. My opinion now with relation to that matter is the same. The debris that shot up above the roof was in a column you might say. There was boards, pieces of brick and dust.

CROSS-EXAMINATION (pages 2632-2650):

I was standing on First Street very close to Spring about, I might say, between the Times Building and Spring Street. I had crossed out into the street to see if I could see a car coming. I was going home. I contemplated taking this car on the northeast corner on the same side of the street that the Times Building is on. I had been looking in the basement window of the Times Building for possibly ten minutes. When I heard the explosion I looked up and saw a tower or column of debris that

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extended up in the air quite a distance over the roof of the building. There wasn't any flame connected with it. I wouldn't say that the column of debris was directly over Ink Alley. It was in the back part of the building, that is as near as I can say with any degree of accuracy. The column of fire followed right on the echo of the second explosion. The first sound was very much sharper than the second. The second was more of a muffle; and of greater volume. The first explosion was a quick, sharp report and the second was a very much duller and of heavier volume. The flames went up quite a way in the air. The dynamite that I am now using is a compound; it is 25%. It is powerful but it is a slow acting powder; the gas does not form so quickly as it does in higher grades. The powder that I used before in mining was 40% and 60%, very little 60, more 40. 40 is commercial dynamite. I have heard gas explosions only in a small way, a hot water heater. I let too much gas in it, and stuck a match in it. The explosion was muffled with a burst of flames in it, it was a hot water heater like they have in bath rooms. I never heard any gasoline explode. I never heard any ink explode and I don't know whether it will or not. The first explosion I heard must have come up about 200 feet because from where I was in the middle of the street my angle of vision would hit over the top of the intervening buildings which are about two stories in height.

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JOHN S. HENRICKSON.

DIRECT EXAMINATION (pages 2650-2657):

I am a special policeman. In the early morning of October 1st, 1910, when I was on the southwest corner of Washington and Figueroa Streets I heard a loud report. I jumped on my bicycle and went towards town, and went to Seventh Street, crossed Seventh to Broadway, and went directly down Broadway to First street to the Times Building. I arrived there not longer than 5 or 6 minutes after I heard the report. The place was in flames, the engines were just beginning to arrive. I saw several men coming from the building at that time, going back and forth. I went over to the building on the First Street side; saw several coming out of the front door and some out of the side door. Then I went back on the Broadway side, crossed the street and went above it, north on Broadway to the north end of the building, and crossed over on the same side of the street with the Times building. I there met—there were two or three men standing there at an alleyway that was at the back of the auxiliary building, or the Times-Mirror building. As I remember it, there was an alley way there, just a driveway. I went into that driveway or alleyway where they drive in to deliver goods. There was a small window on the right hand side of the Times Building or right on the right hand side of this alley that entered into the Times Building. I believe the window came from the basement of the building. It was rather

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a low window approximately three feet high and was as much wide. There was a man there; there was a grating over the window. I believe from the condition of the man inside struggling he was tearing away something from the inside of the window, attempting to get out. I went there and tried to pull the grating away, or help him, and after he had struggled there and cried, I couldn't get anything intelligent from him at all. He seemed apparently injured. It was sometime I talked with him there, but probably—told him to go back the other way, to find some other way out. I didn't know anywhere there there was a place to get out or I would have directed him. But he simply hung there at the window grabing at this piece of wood or a barrier of some description, on the inside of this grating, and just finally he dropped back into the building and went the other way. I supposed he was going out. I went out then into the street and assisted with the keeping of the crowd back, and the other things. I saw several men carried from the building. I helped one man over to the station that was wandering around in a dazed condition. The fire was coming from the second story, that is the story above the street. It was inside of the building about the center of the two buildings that I spoke of, the Times Building on the corner and the Times-Mirror Building, a red brick building, directly back of it on Broadway, and it was about midway between these two buildings, and directly over Ink Alley. I have had some experience with dynamite. In 1886-7-8 I was timekeeper

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at the construction of the Bear Valley dam —that is, the completion of it, and at that time we were blowing off the face of the overhanging rocks, and there was a great deal of dynamite used in blowing off the face of those rocks. In 1888, after I came down to Redlands, I went to work for the Southern California Sandstone Company, and there joined in and assisted in the blowing off the face or facing up ledges for the purpose of cutting out sandstone. The faces of the rocks were uneven, and we would blow them off. In cutting out the sandstone itself we used the wedge and feather continually. I was there about eighteen months at that place. I worked on the clearing of the Los Angeles Olive Growers' Association, a tract of eighteen hundred acres in the northern part of the San Fernando Valley. I also have a ranch there at the extreme end in the mountains. In building roads we used dynamite for the blasting of rock and surface facing of rock, and also in Pacoima canyon, in blasting open a way for a wagon road. That lasted over a period of four years. I was not using dynamite there constantly every day, but every little while we used considerable of it. Sometimes we would use ten, fifteen or twenty-five pounds on my ranch. In Bear Valley I have seen them put in shots there of probably one hundred lbs. or more. While I didn't handle the dynamite at Bear Valley I heard explosions of dynamite in other places in my immediate vicinity at distances that were perhaps from one-quarter of a mile to five miles. From the experience I have related I formed the opinion as to what caused the

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explosion that I heard in the early morning hours of October 1st, 1910. My opinion is that it was a dynamite explosion.

CROSS-EXAMINATION (pages 2657-2667):

I was standing on the southwest corner of Figueroa and Washington Streets facing north approximately a mile and a half from the Times Building. My wheel was right there and I immediately jumped on it and started down toward the explosion. I met no one until I reached the Times Building. I stayed there right through until the next noon. When I reached Seventh Street I could see the reflection of the flames in the sky. I did not tell anybody to go back with me into the alley and break the bars that stood between me and the man who was trying to get out. I believe the man understood my directions to go some other way. I testified in this case before the Grand Jury and said nothing about the incident. It wasn't asked me.

JOHN M. BECKWITH.

DIRECT EXAMINATION (pages 2668-2676):

I was a newspaper reporter on the Los Angeles Examiner on October 1st, 1910. At the time of the disaster of the Times Building I was at the Central Police Station on First Street between Broadway and Hill. I was sitting in the reporters' room shortly after one o'clock with the other two reporters who were on duty there. We heard a terrific explosion which kind of

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jarred us from our seats. We ran out of the front door and down towards Broadway. I saw that the explosion had occurred at the Times Building. I turned and ran for a telephone and called my office and then went immediately back to the corner. I was approximately two hundred and fifty feet from the Times Building when I first heard the explosion. When I arrived at the Times Building there was a great cloud or pillar of smoke immediately above the roof of the building, about the center, and there was a show of fire in the window on the second floor and a great pillar of flames coming out of the entrance to what we call Ink Alley. I ran to the telephone and called my office, which fortunately I got. After telephoning I went right straight back to the scene. I ran over to the corner and we saw a crowd of people in a window just back of the tower on the Broadway side, and at that time Sergeant Spellman and two other people were on the sidewalk below that window hollering to some people that were up in the window. The flames were spouting out of the window next to them and on the other side, and Spellman was calling to the boys in the window up there to jump and they would catch them. Just at that time there were four sailors came down First Street (they were United States sailors but from what ship I was never able to find out). They rushed around the corner and one of them ran across the street to the Tajo Building and jumped up and grabbed an awning and cut the canvas out of the awning and crossed the street and we used that as part of a life

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net for the boys to jump from the window. There were five or six there. There was Tribet, Lovelace, Crane, and Harvey Edler and one or two more, I don't recall who they were. Tribet jumped and got through all right. He hung and dropped and struck and got off all right. He was not hurt any. Lovelace came next, I think, and he was injured somewhat, at least he was in the hospital a day or two, and in the meantime there were one or two others showed up there and Edler was standing there urging them, seeming to urge them to get out, and then one of the other boys jumped and then Crane turned back for some reason or other and as he disappeared from my view there was a crash and a shower of sparks and fire flew up right back of where he had disappeared, and then Edler crawled out of the window and hung by his hands and dropped. He struck the edge of the canvas and broke through and he broke his left leg and I helped carry him to the hospital. He was badly burned from his waist up. He is dead. I never saw Crane again alive. I saw his body lying on the sidewalk alongside of what had been the Times Building on a canvas. After I helped carry Edler to the hospital I came back to the corner and the building was then a mass of flames from the front to the back with the exception of the business office in the far side of the building on First Street. We could hear screaming and hollering in there and I ran down, knowing there was an entrance on First Street, and I walked up in there and there was smoke pouring out but there did not seem to be much fire. And I ran up as far as I could on the

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stairway toward the second floor and I could hear men hollering back in there and I had a flash light in my pocket and I pulled it out and turned it on and commenced hollering "this way out boys," "this way out," and I could not see that my light made any impression on the mass of smoke that was in there, but they evidently saw the light because there was five or six persons came out that entrance and things got too hot in there, and I got out myself. These five or six people were practically not injured. I believe some of them were burned somewhat, but they were all plastered with ink, and I directed them to the hospital where the ink was washed off of them and they were taken care of. I saw nothing else, except the building burning and the police keeping the crowd back and the firemen working, the flames shooting out of all the windows except in the very front part of the business office.

CROSS-EXAMINATION (pages 2676-2684):

I am not employed at all now. I never worked for the Times. When I first saw the flames, I saw a great pillar of flame rolling out of the entrance of Ink Alley. There was some flame coming out of a window approximately right over Ink Alley. At that time there were no other windows vomiting smoke or flame. When I got back from telephoning the flames were spouting from a number of windows on every side. The flames came out of the windows waving just as though driven by a draft. The fire seemed to spread from one window to another immediately. The hospital is a

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little over a block from the Times Building. The men who jumped from the window were not covered with ink.

CHARLES E. LOVELACE.

DIRECT EXAMINATION (pages 2686-2693):

On the morning of October 1st, 1910, I was country editor of the Los Angeles Times. That is, I handled all the news on the Coast outside of the City limits. I was present at the time of this catastrophe. I was on the third floor at the City Editor's desk in the rear of the City Room. I should judge I was about three feet from the Broadway wall of the building. I was talking with Mr. Elder and had just seated myself in the City Editor's chair. Mr. Elder was about six feet from me at his own desk. There was a sharp, short crashing explosion which vibrated the building, and I leaped to my feet and Mr. Elder exclaimed, "My God, they have got us." Later I started down the stairway to the second floor. We heard the men calling for help and we started down the stairway and ran into the smoke so thick that we decided it would not be safe, and came back to the third floor, and when we started to enter the city room, the city room had filled with smoke and we were afraid to go into the city room and we turned to the left in an editorial room there at the corner of First and Broadway, looking for a fire escape, and we closed the door after us to keep the smoke out and went around to the windows and found there was no fire escape in that room, and then we started

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back towards the city room to that door and found that the flames and smoke filled the hall and we could not get out of this corner room; so I hung myself out of the window, holding a handkerchief over my nose after the heat became so intense. Elder stood beside me and later they got a net below and told me to jump, and I wasn't in a position to jump, so I merely relaxed my hold and fell out of the window, but the net was not sufficiently strong to stop me, or the elasticity was too great, and I struck the walk. I was very severely injured, that is my right hip was crushed and I was taken to the Receiving Hospital and later spent several weeks in the California Hospital. My hand was burned and my left leg was burned up to the knee.

LOREN L. STARRY.

DIRECT EXAMINATION (pages 2696-2700):

At the time of the Times disaster I was a stereotyper in the employ of that newspaper. At the time of the explosion I was in the composing room on the second floor. I heard one explosion and that is all, it was a deafening sound. It seemed as though the floor burst right up through, and just instantly after the boards came up it seemed like everything fell back, and then the flames came up through. I should say I was about thirty feet from the point where the explosion came through the floor. I should say that point was about fifty feet in from Broadway and directly over Ink Alley. I started upstairs and there was a fan that was supposed to act as a draft

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there and it was still running. The flames were coming out through this fan. I saw I couldn't get upstairs, and I came back down and jumped across on the roof of a restaurant or rooming house there, and got out that way.

CROSS-EXAMINATION (pages 2700-2704):

The floor came up at the explosion but not hard enough that I could leave it. Then it settled back down again. The flames followed the explosion at a very short interval.

THE PURSUIT OF THE DEFENDANT.

It is no exaggeration to say that the entire country was horrified by the disaster and words are utterly inadequate to convey any impression of the feeling aroused in the community in which the catastrophe occurred. It appears from the examination of several persons summoned as jurors in this case that at the beginning there was a marked difference of opinion as to the cause of the explosion. Some persons ascribed it to criminality while others regarded it as accidental especially in view of the fact, which we shall discuss later, that the explosion had many of the characteristics of a gas, as distinguished from a dynamite, explosion. General Otis, however, used no deliberation. Upon the very day following the explosion an article appeared over his

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signature in the Los Angeles Times charging that the building was destroyed by Organized Labor and the members thereof and that he was in the possession of absolute proof to that effect. Articles of a similar import appeared in the said newspaper from time to time thereafter, and the influence of such articles upon public sentiment in the community in which the defendant was afterwards tried is easy of conjecture.

On the day followng the disaster a mass meeting, composed of delegates from the Chamber of Commerce, the Merchants & Manufacturers' Association, the Founders & Employers' Association and the Times-Mirror Company, was held for the purpose of discussing and devising ways and means of bringing to justice the persons responsible for the destruction of the Times Building. At that time suspicion does not seem to have been directed to any particular individuals. The moving spirit in the following investigation was Earl Rogers, one of the leading lawyers of Los Angeles, who had been counsel for the Merchants & Manufacturers' Association and the Founders & Employers' Association during the labor troubles of the preceding summer. He now, as *deus ex machina,* leaped into the arena and led the chase. William J. Burns,

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the Hawkshaw of real life, who had acquired much celebrity by reason of his own self laudatory reminiscences in the public magazines, was also employed, and the lawyer and detective set out upon their investigations. Two unusual incidents which occurred upon the day of the disaster, and concerning which testimony was permitted (erroneously as we shall show later) at the trial of the case, furnished them with the desired clue.

During the forenoon of October 1st, 1910, a package was found against the wall of the house and under the sleeping quarters of F. J. Zeehandelaar, who was at that time Secretary of the Merchants & Manufacturers' Association of Los Angeles. A street car motorman who was called by Mrs. Zeehandelaar and the house maid, removed the package from the house. This package was taken charge of by Police Officers and detectives of the City of Los Angeles, and inside of the package was discovered sixteen cylindrical sticks of what the prosecution contended was nitrogelatin. Inside of the package was a machine consisting of an alarm clock and a dry battery with wires making a circuit through a percussion cap which was embedded in one of the sticks of nitrogelatin. Testimony was given to the effect that the alarm of that clock had been set for

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one o'clock. At the time the package was found, the clock was running and it was the theory of the prosecution that the alarm had been wound too tight and therefore had not produced the explosion. Mr. Noel, special counsel for the prosecution in this case, in his opening statement to the jury (pages 2279, line 19,—2281, line 8) discussed the mechanism of this machine as follows:

> "It was an ordinary alarm clock—the ordinary cheap alarm clock—that was fastened to a board, about 8 inches long, and at one end of the board, right next to the alarm clock was a battery—a dry battery—capable of producing an electric current whenever a circuit was made. The clock and this dry battery were put in a circuit, and in the circuit was a wire, probably three or four feet long, and as a part of that wire and completing the circuit was a percussion cap, the percussion cap was placed inside of one end of a stick of nitrogelatin. The alarm clock was set running at about the correct time, set about right, as we say, and the alarm was set so that the alarm to that clock would go off at 1 o'clock on the morning of October the first. Attached to the post, that is wound when the alarm arrangement of such a clock is wound in that clock, was soldered a piece of copper, arranged so that when the alarm went off and the post revolved that it turned that piece of copper around and made a connection with a piece of copper on the board by the electric battery and

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completed the circuit, and in that circuit, when completed was the clock, the dry battery with this electric current and the percussion cap inside of the stick of nitrogelatin."

About noon of the same day an employee at the home of General Harrison Gray Otis in Los Angeles found beside General Otis' house among the shrubbery, but not concealed by it, a suit case. Officers were called and they took the suit case into West Lake Park across the street from the house of General Otis. One of the officers commenced to open the suitcase from the side by cutting along its edges with a knife. As he did so, a whirring sound was heard like a clock running down when the alarm is set off, and the officers immediately ran as rapidly as they could. By the time that they had run a distance variously estimated at from forty feet to a hundred yards (one of the officers testified that he must have made the distance in ten flat) an explosion occurred which tore a hole in the gravel drive, filled the air with dust and debris and shattered some of the windows in the house of General Otis. No one was injured by this explosion.

The Zeehandelaar package was taken to the police station in Los Angeles and examined. It was observed that on the wrappers on the sticks was a stamp of the Giant Powder Com-

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pany, indicating the date upon which the article was sold.

The scene of the investigation was accordingly shifted from Los Angeles to San Francisco and vicinity. Meanwhile large rewards had been offered by the City of Los Angeles, by the Merchants & Manufacturers' Association and by various other bodies in the City of Los Angeles. The sum of $20,000 was offered for the arrest and conviction of every person implicated in the destruction of the Times building. These large rewards spurred the efforts of the public officers of the law, and naturally aroused the cupidity of private detectives and investigators. The investigation made in San Francisco resulted in the issuance of statements in the newspapers accusing the defendant Schmidt together with one David Caplan and one J. B. Brice, afterwards identified as J. B. McNamara, of having committed the crime.

The testimony shows that for several months prior to October 1st the defendant Schmidt had been living in San Francisco and the vicinity, part of the time at the house of Mrs. Belle Lavin on Mission Street and part of the time in Corte Madera, a village in Marin County, where the defendant had assisted in the construction of a house for Mr. Anton

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Johannsen, a prominent labor leader. During his stay in San Francisco he had associated to some extent at least with various labor leaders. There is testimony in the record which if believed by the jury was doubtless sufficient to have warranted them in believing that Schmidt had associated with McNamara on comparatively intimate terms during the early part of the month of September, 1910, and that in company with Caplan and McNamara he assisted in purchasing five hundred pounds of 80% nitrogelatin from the Giant Powder Company, which conducted a powder plant at Giant in Contra Costa County. He was also identified by a witness employed by the company as being one of three men who secured the powder at the plant of the company in a launch known as the "Peerless" or "Pastime." This evidence will later be discussed with more detail and the present statement is purely introductory in character. It may be well, however, to say at the present time what we shall hereafter be obliged to discuss with considerable elaboration, namely, that the testimony as to the movements of the defendant Schmidt in San Francisco prior to the destruction of the "Times" building is extremely contradictory, and that several of the most important witnesses produced by the prosecution

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failed to identify him, one of the witnesses in the employ of the Powder Company even asserting in positive terms that he was not the man. It must also be borne in mind that there is no direct evidence that anybody placed dynamite or any other explosive in the Times Building, the evidence in that behalf being purely of a circumstantial nature, and while it was the theory of the prosecution that the explosion was actually produced by J. B. McNamara, there is no direct evidence of any kind to that effect. It may also be said in passing that it was not claimed by the prosecution that the defendant Schmidt exploded the fatal charge or that he was present aiding or abetting in the commission of the crime. These considerations can not be too strongly insisted upon at the outset, as they will have an important bearing upon the main question involved upon this appeal, namely, the question as to whether certain numerous erroneous rulings of the trial Judge were of such a character as to have deprived the defendant of a fair and impartial trial and to have resulted in a miscarriage of justice. As was said by the Supreme Court of this State in *People* vs. *Fleming,* 166 Cal., 370:

> "While the provision of our constitution restricting the jurisdiction of appel-

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late courts to 'questions of law alone' (Const., art. VI, sec. 4) has not been in terms amended, the amendment adopted in 1911, being section 4½ of article VI, undoubtedly makes it the duty of any appellate court in considering the questions of law presented on an appeal in a criminal case to consider the 'entire cause including the evidence' for the purpose of determining whether any error or erroneous procedure complained of has resulted in a miscarriage of justice. If the Court be of the opinion that such has been the effect, it must reverse the judgment. It is plain, of course, that the evidence in a case while technically sufficient to sustain a finding of guilt, may be so unsatisfactory as to render what in a plain case would be an absolutely harmless error one of vital importance, one affording ample ground for the conclusion that it has resulted in a miscarriage of justice. Under this amendment to our constitution an appellate court must necessarily be vested with a large discretion in determining the effect of errors, and each case must depend upon its own circumstances."

The investigation conducted under the supervision of Detective Burns and Earl Rogers in San Francisco and the vicinity resulted in a search for the three persons alleged to have taken part in the cruise of the "Pastime" to Giant and about the bay of San Francisco. The search for the time being was unproductive of any result. The defendant Schmidt was not found, although the then Sheriff of Los An-

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geles County testified that with the customary ingenuity of a police officer he did not look for the defendant in any of the places in which he might have reasonably been expected to be found, namely, at the home of his mother or at the home of his sister or in the company of any of his known friends or associates. In any event he was not apprehended until nearly five years later, when he was arrested on Broadway in New York by a Police Captain and several private detectives. It was admitted both by Burns and by Donald Vose Meserve, who, in the entire transaction played the contemptible part of the spy and the informer, that the whereabouts of the defendant were known for a considerable period of time prior to the making of the arrest. The defendant when arrested and taken before a magistrate in the City of New York, freely admitted his identity, waived his right to a writ of habeas corpus and the formalities of extradition procedure and came voluntarily to Los Angeles in the company of the authorized agent of the police of that city.

We must now turn back for a moment in our narrative to the events in Los Angeles that culminated in the indictment of the defendant. After the destruction of the Times Building a special grand jury was impaneled for the pur-

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pose of investigating the catastrophe. The presentation of the evidence to this grand jury was conducted almost entirely by Earl Rogers, the paid attorney for the Merchants & Manufacturers' Association, who was acting as private counsel and prosecutor in the matter for the purpose of securing indictments against persons affiliated with trades unionism upon whom it was sought by the proprietors of the Times and by the commercial and manufacturing interests of Los Angeles and elsewhere to fasten the alleged crime. After an extremely protracted session and the examination of one hundred and eighty-one (181) witnesses, the grand jury upon the 5th day of May, 1911, returned an indictment accusing M. A. Schmidt, J. B. McNamara, J. J. McNamara, William Caplan and four fictitious defendants of the murder of Charles Hagerty. It was upon this indictment that the appellant was tried and convicted.

QUESTIONS INVOLVED ON THIS APPEAL.

It is the contention of the appellant in this case that his fundamental constitutional and legal rights were disregarded in the most flagrant, arbitrary, prejudiced and unfair manner from the time of the impanelment of the grand jury that returned the indictment against him down

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to the time that the trial jury brought in its verdict of guilty. The particulars in which we shall show that the rights of the defendant were disregarded and violated in the most prejudicial manner and in such a way as to have inevitably deprived him of a fair trial and produced a miscarriage of justice are so numerous that the mere statement of these particulars would involve considerable space, and their adequate discussion is bound to consume a great number of pages. The rights of the defendant, however, must be protected at all hazards, and it is our duty not to jeopardize any of these rights in any manner by an insufficient or an inadequate discussion, even though the thorough discussion of the question involve great labor both upon the writers of this brief and upon the Court. The reporter's transcript of testimony in this case consists of approximately eight thousand typewritten pages. After a careful reading of this record we are convinced that at least seven-eighths of the testimony produced at the trial was not only highly prejudicial to the rights of the defendant and improperly admitted and allowed by the Court, but that it was utterly irrelevant and immaterial to any issue involved in the case, that it had absolutely no bearing upon the question of the guilt or innocence of this defendant and that

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it should never even have been offered by the prosecution. Its introduction not only deprived the defendant of a fair trial but inflicted useless labor upon the Court and jury at an absurdly large and unnecessary expense to the public Treasury. We say in all fairness that in our opinion not one word of testimony relating to the so-called "Eastern Conspiracy" should ever have been offered by the prosecution or received by the Court. It is the admission of this testimony that renders it necessary for us to embark upon so extended a discussion of the issues involved. In this behalf we cannot forbear to quote the words used upon a similar occasion by Judge Cooper, former presiding justice of the District Court of Appeal of the First District and one of the most learned jurists of a State which has produced such judges as Field, Currey, Terry, Temple and McFarland. In the case of *People* vs. *Ruef,* 14 Cal. App., 576, Judge Cooper in commenting upon the vastness of the record in that case says:

> "It is somewhat of a reflection upon the mode of administering the laws that the trial of a simple question, as to whether or not the defendant offered a bribe to Furey, a supervisor, should take up the time of the Court and of the jury for months, and create a record of such amazing proportions. There were only two or three wit-

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nesses as to the main fact. Most of the testimony was as to matters and things that have no bearing upon the case."

It may be well at the present time to outline the principal points upon which we shall rely for a reversal in the present case. We shall show:

(1) That the grand jury which returned the indictment against the defendant was an illegally constituted grand jury under the law as it stood at the time of the finding of the indictment, for the reason that the members of the said grand jury, and each and every one of the said members, were biased and prejudiced against the defendant, some of the grand jurors being violent partisans of the prosecution, and that the trial Judge should have quashed and set aside the indictment upon that ground;

(2) That an unauthorized person, to wit, Earl Rogers, a private prosecutor employed by private interests, was allowed, contrary to the provisions of section 925 of the Penal Code, to be present in the grand jury room during the presentation of the evidence and the deliberations of the inquisitorial body, and by his acts, advice and demeanor influenced the grand jurors in the finding of the indictment against this defendant, and that upon that ground also

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the trial Judge should have granted the defendant's motion to quash and set aside the indictment;

(3) That the Court improperly denied challenges for cause interposed by counsel for the defendant to numerous talesmen who were summoned for the trial jury; that the defendant was compelled to use peremptory challenges on numerous talesmen to whom challenges for cause should have been allowed, and was thereby deprived of his lawful right to peremptory challenges, and was compelled to face a jury composed in part of those who had admitted bias and prejudice with reference to the issues in the case;

(4) That the Court was guilty of manifest and prejudicial error in admitting evidence of numerous crimes committed by persons other than the defendant in various portions of the United States, with which crimes the defendant had no connection, and in which it was not claimed by the prosecution that he had ever participated; that the Court permitted evidence to be received of a vast number of acts and declarations of other persons out of the presence of the defendant and which were in no way binding upon him. The evidence re-

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ferred to may generally be described as the so-called "Eastern Conspiracy" evidence;

(5) That the Court erred in admitting in evidence the package found at the house of F. J. Zeehandelaar, Secretary of the Merchants & Manufacturers' Association, upon the day following the destruction of the Times Building on the erroneous theory that it was part of the *res gestae,* to the manifest prejudice of the defendant;

(6) That the Court committed prejudicial error in permitting testimony to be given as to the finding of an explosive at the house of General Harrison Gray Otis upon the day following the destruction of the Times Building;

(7) That the trial Judge repeatedly by sustaining objections to proper questions asked of witnesses for the prosecution on cross-examination deprived the defendant in effect of his constitutional right to confront, and be confronted, by the witnesses against him;

(8) That the trial Judge upon numerous occasions during the progress of the trial and during the arguments of counsel commented in the presence of the jury upon the facts of the case and improperly and in violation of the rights of the defendant and the constitutional

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provision which inhibits judges from commenting upon the facts or expressing, in the presence of the jury, his opinion as to the weight and sufficiency of the testimony;

(9) That the trial Judge upon more than one hundred separate occasions improperly sustained or overruled objections to questions;

(10) That the District Attorney and his deputy, Mr. Keyes, and the special prosecutor imported from Indiana to assist in the trial of the case, were guilty of the grossest misconduct in making statements in the presence of the jury during the course of the trial and in their arguments to the jury;

(11) That the trial Judge wrongfully refused to charge the jury as to the presumption of innocence in criminal cases;

(12) That the trial Judge improperly and erroneously charged the jury as to the weight and sufficiency of circumstantial evidence;

(13) That the trial Judge erroneously and prejudicially instructed the jury that the defendant might be cross-examined as to matters on which he had testified in chief;

(14) That the trial Judge gave prejudicially erroneous instructions on the subject of conspiracy;

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(15) That the trial Judge gave a prejudicially erroneous instruction upon the subject of flight.

In the ensuing pages of this brief we shall follow approximately the order hereinabove indicated in our discussion of the points involved. It would seem the better order to commence with the discussion of the proceedings before the grand jury which culminated in the presentment of the defendant and of the questions which were passed upon by the learned trial Judge when he denied the defendant's motion to quash and set aside the indictment.

THE TRIAL COURT SHOULD HAVE GRANTED THE DEFENDANT'S MOTION TO QUASH AND SET ASIDE THE INDICTMENT BECAUSE

(a) THE EVIDENCE PRODUCED UPON THE HEARING OF THE MOTION SHOWS WITHOUT CONFLICT THAT GRAND JURORS DISQUALIFIED BY REASON OF BIAS AND PREJUDICE PARTICIPATED IN THE INVESTIGATION AND IN THE FINDING OF THE INDICTMENT.

(b) BECAUSE OF THE PRESENCE OF AN UNAUTHORIZED PERSON IN THE GRAND JURY ROOM.

The defendant prior to his plea interposed a motion to set aside and quash the indictment. The written motion which will be found in

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Volume I of the Clerk's Transcript, pages 7 to 19, specifies thirty-five grounds for the motion. After a careful examination of the evidence introduced upon the hearing of the motion and the law applicable thereto, we have reached the conclusion that all of the questions involved can be discussed under the two heads hereinabove set forth, namely, the disqualification of certain grand jurors, and second, the presence of Earl Rogers in the grand jury room during the deliberations of the inquisitorial body.

THE DISQUALIFICATION OF THE GRAND JURORS BY REASON OF ACTUAL BIAS.

The indictment in this case was presented and filed on the 5th day of May, 1911. The grand jury which returned the indictment had been formed in the preceding October. In considering the question of the disqualification of the individual grand jurors we must be governed not by the law as it stands to-day, but by the law as it stood at the time of the formation of the grand jury and the finding of the indictment. There can be no conviction, or punishment for a crime without a formal and sufficient accusation. In the absence thereof a Court acquires no jurisdiction whatever, and

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if it assumes jurisdiction a trial and conviction are a nullity.

> *Terrill* vs. *Superior Court of Santa Clara County,* 60 Pacific, 38.

The defendant had a right to be brought to trial upon a valid indictment, that is, an indictment valid under the law as it existed at the time it was presented and filed; he had a right to be tried only under an indictment found and presented by persons who were properly qualified as the law then stood to find and present the same. At the time of the formation of the grand jury and the finding of the indictment in this case, section 896 of the Penal Code read as follows:

> "A challenge to an individual grand juror may be interposed for one or more of the following causes only:
> 1. That he is a minor;
> 2. That he is an alien;
> 3. That he is insane;
> 4. That he is a prosecutor upon a charge against the defendant;
> 5. That a state of mind exists on his part in reference to the case, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging,"

and section 995 of the Penal Code in sub-division 4 thereof provided that an indictment must

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be set aside by the Court in which the defendant was arraigned, upon his motion "when "the defendant had not been held to answer "before the finding of the indictment, on any "ground which would have been good ground "for challenge either to the panel or to any "individual grand juror." The amendment of 1911 which repealed sub-division 4 of section 995 had not been passed at the time of the formation of the grand jury in this case and had not gone into effect at the time when the indictment was found and presented. Accordingly at the time when the indictment against him was filed, the defendant under the provisions of the sections above quoted clearly possessed the right (it being admitted that he had not been held to answer prior to the finding of the indictment) to have the indictment against him quashed if any individual grand juror was possessed of such a state of mind as to the case which would prevent him from acting impartially and without prejudice to the substantial rights of the party challenging. In the case of *People* vs. *Landis,* 139 Cal., 426, decided by the Supreme Court of this State in 1903, this question is thoroughly discussed and it is held that grand jurors actually biased against a defendant are disqualified from finding an indictment against him, and that where

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the defendant was not held to answer before the finding of the indictment, and the disqualification of grand jurors is made to appear, his motion to set aside the indictment for such disqualification should be granted. In that case Justice Van Dyke, who delivered the opinion of the Court, says:

> "Among the errors assigned by the appellant, he contends that the court below erred in overruling his motion to set aside the indictment. The motion to set aside the indictment was based upon the ground of the disqualification of two of the grand jurors, Dawson and Sweetser, on account of actual bias. The alleged forgery consisted of a note purporting to have been made by A. Fuller to the defendant for the sum of fifteen thousand dollars, one year after date, and dated at Chico, Cal., June 25, 1897. Fuller died on October 18, 1897, in Chico, Butte County, and thereafter, on March 26, 1898, the defendant presented to the public administrator, who had charge of the estate of said Fuller, a claim upon the said estate, based upon the note in question. The claim was rejected, and the defendant commenced an action thereon. The court below sustained a demurrer to the complaint in said action, and from the judgment entered thereon an appeal was taken to this court and said judgment reversed (*Landis* vs. *Woodman,* 126 Cal., 454). Thereafter, in December, 1900, the action on the claim involved in the said fifteen thousand-dollar note was tried in the superior court of Butte County. During the

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pendency of that trial Sweetser and Dawson, who were subsequently members of the grand jury who found the indictment against the defendant, were in and about the court-room, and heard the testimony given on such trial in the civil action upon the promissory note in question. On the motion to set aside the indictment Mr. Sweetser was examined, and after stating that he was in the court-house a part of the time during the progress of the trial in the civil action, and heard some of the testimony and argument of the attorneys, was asked: 'Did you form an opinion. A. I did. Q. And you formed an opinion from the testimony of the witness in the note case, and from the arguments of the attorneys in that case as to the merits of the case? A. I think I did; yes, sir. Q. You had that opinion at the time you were sworn as a grand juror in this case, did you? A. Well, I hadn't heard anything to change it. Q. Was that opinion favorable or unfavorable to this defendant? A. Well, I suppose I will answer the same as the other witness—it was unfavorable.' Again he was asked about the opinion he had formed from being present in the court-room during the trial of the note case and the argument of attorneys. 'Did you form an opinion that the signature to that note was a forgery? A. I think I did.' Again: 'In other words, you had the opinion that Dr. Landis had attempted to collect money from the estate of Alfred Fuller on a note that was bogus? A. I could not very well help it from the evidence I heard.' R. H. Dawson, another member of the grand jury that indicted the defendant, on being exam-

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ined before the court on the motion to set aside the indictment, testified as follows: 'I, at the time I was sworn in as a grand juror, had an opinion as to the defendant's guilt or innocence, but this opinion was not fixed, and this opinion was founded, not on what I had heard or what I had read, but on my acquaintance with Alfred Fuller in his lifetime. I was acquainted with Alfred Fuller in his lifetime and from my acquaintance with Alfred Fuller and my knowledge of him I had formed the opinion of the defendant's guilt or innocence, and it would require evidence to remove that opinion. Q. Was that opinion favorable or unfavorable to Dr. Landis? A. Unfavorable.' The challenge to these jurymen was denied, and motion to set aside the indictment was refused, for the reason that on cross-examination on behalf of the people, and on questions propounded by the court, they severally stated that, notwithstanding they had formed an opinion as to the guilt of the defendant in the manner stated, they went into the jury-room and acted impartially and fairly upon the matters submitted to them. The provisions of the Penal Code in reference to the qualifications of jurors and the grounds of challenge are the same with respect both to grand jurors and trial jurors. Sub-division 6 of section 896, provides that a grand juror may be challenged on the ground of a state of mind existing on his part in reference to the case or party which would prevent him from acting impartially and without prejudice to the substantial rights of the party challenging him; but this further provision is added: 'But no person shall be disquali-

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fied as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such juror, founded upon public rumor, statements in public journals, or common notoriety, provided it satisfactorily appear to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such opinion, act impartially and fairly upon the matters to be submitted to him.' Section 1076 contains similar language in reference to a challenge to a trial juror as that already quoted from section 896 in reference to a grand juror. At common law a juror who entered the juryroom or box with an opinion as to the guilt or innocence of the accused was, *ipso facto,* disqualified from acting in the case; but to obviate the inconvenience resulting from disqualifying jurors in case their opinion was based upon public rumor, or statements in public journals, or common notoriety, the rule in that respect was changed so as to render the juror competent if it should appear satisfactorily to the court, upon his declaration under oath, that, notwithstanding the opinion so formed, he could fairly and impartially act upon the matter submitted to him; but this being in derogation of the common law rule, it cannot be extended beyond the case stated —to wit, where the opinion was founded upon public rumor, statements in public journals, or common notoriety.' As said in *Lombardi* vs. *California-Street Ry. Co.,* 124 Cal., 318, 'This is the only important statutory exception to the common-law rule excluding jurors upon the ground of actual bias, and was enacted because of the apparent necessity' (see, also, *People* vs. *Wells,*

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100 Cal., 227; *People* vs. *Flannelly,* 128 Cal., 83). In this case Dawson and Sweetser, members of the grand jury who found the indictment against the defendant, did not form their opinion upon public rumor, or statements in public journals, or common notoriety, but upon knowledge obtained otherwise, and they were disqualified on the ground of actual bias, and could not qualify themselves so as to become competent by any answers on cross-examination, or in response to the question by the Court, as provided in the Code in case of an opinion founded upon public rumor, or statements in public journals, or common notoriety. By section 995 of the Penal Code it is provided that the indictment must be set aside by the Court in which the defendant is arraigned when he had not been held to answer before the finding of the indictment, upon his motion upon any ground which would have been good ground for challenge either to the panel or to an individual grand juror. In this case the defendant had not been held to answer before the finding of the indictment, and two of the members of the grand jury being disqualified, as shown, his motion to set aside the indictment should have been granted."

In *People* vs. *Hanstead,* 135 Cal., 149, in discussing the question of disqualification of grand jurors Justice McFarland in delivering the opinion of the Court says:

"The present indictment on which appellant was tried was presented to the court, and filed as a record thereof, on October

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16, 1900. But prior to that date, and on July 23, 1900, the same grand jury had presented to said court an indictment charging appellant with the identical crime with which he was charged in the second indictment, on which he was tried. The first indictment was filed as a record of the court; the appellant was arraigned to plead to said indictment, and his plea of not guilty was entered. That indictment, with appellant's plea, was pending when the second indictment was presented and filed; but afterwards the court on motion of the prosecution, and against the appellant's objection and exception, made an order dismissing the first indictment, to which order appellant excepted. Both indictments are in the record, and it is beyond question that they both charged appellant with the same offense; neither is it questioned that they were both found by the same grand jury. At the proper time appellant moved to set aside the second indictment, upon the ground that it was found by the same grand jury who found the first indictment, and that, therefore, they were disqualified from again acting on the case or finding the second indictment. The court denied the motion and appellant excepted.

"It is clear that grand jurors who have examined the charge against one accused of a crime, and found and presented an indictment against him for such crime, thus officially declaring their conviction upon the eivdence before them that he is probably guilty, are disqualified from again passing upon a second charge against him for the same offense. In such a case, if the accused had the opportunity of challenging

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the grand jurors, a challenge by him to each of the jurors, under subdivision 6 of section 896 of the Penal Code, on the ground 'that a state of mind exists on his part in reference to the case,' etc., would undoubtedly have been good; but in the absence of such opportunity, it is provided by section 995 of the Penal Code that the indictment 'must be set aside' on several grounds, and, among others, 'on any ground which would have been good ground for challenge either to the panel or to any individual grand juror.' In *Terrill* vs. *Superior Court* (Cal. 1899), 60 Pac. Rep., 38,—the opinion having been concurred in by all the justices in bank—the trial court, after it had sustained a demurrer to the first indictment, had ordered the case resubmitted to the same grand jury who had found that indictment, and the grand jury had found a second indictment under which the questions before the appellate court arose. This Court held that there could not be a resubmission to the same grand jury—at least, where the resubmission was not 'merely formal.' The Court, discussing the want of qualification of grand jurors to find the second indictment, say: 'If the resubmission was not merely formal, the grand jury which found the first indictmnet was disqualified. The grounds upon which an individual grand juror may be challenged are stated in section 896 of the Penal Code. Subdivision 6 states one ground of disqualification.' After stating the substance of sub-division 6, the Court say: 'This clearly implies, and it has alwyas been so held, that a fixed opinion upon full knowledge will disqualify. If a defendant has been held to answer, he is brought into

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Court and allowed to challenge the grand jury before the charge is considered by them. If he is not in custody, he may interpose the challenge upon his arraignment. This defendant, presumptively, had that privilege before the first indictment. But since then the grand jury had considered the case, and had examined witnesses in regard to the charge, and had, under oath, expressed an opinion to the effect that he was probably guilty. The code provides no further opportunity for challenging the grand jury, but the jurors are plainly disqualified, and if the resubmission is anything more than a mere formal matter, the charge cannot be resubmitted to the same grand jury.'

Of course, in *Terrill* vs. *Superior Court* (Cal. 1899), 60 Pac. Rep., 38, the point as to the disqualification of grand jurors to find a second indictment did not arise in precisely the same way in which it is presented in the case at bar; but the principle announced there applies here. There it was held that the Court could not legally order a case resubmitted to the same grand jury, while here no such order for resubmission has been made; but surely the absence of such order did not change the nature of the question involved. It is claimed, also, that what was said in *Terrill* vs. *Superior Court* (Cal. 1899), 60 Pac. Rep., 38, about the disqualification of grand jurors was *dictum;* but the discussion of that subject seemed to be necessary for the disposition of the points raised. However, we need not inquire whether it was absolutely necessary to the determination of that case, because, in our opinion, it was a correct statement of

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the law on the subject, and is directly applicable to the case at bar.

"It is not necessary to determine whether, upon a presentation of an indictment, and before any action has been taken upon it, the court could legally resubmit it to the grand jury for correction. In such case it might possibly be held that there was really only one transaction and one indictment, and that the resubmission was, as intimated in *Terrill* vs. *Superior Court* (Cal. 1899), 60 Pac. Rep., 38, 'merely formal': although we do not wish to be understood as expressing any opinion upon that subject. But in the case at bar the first indictment had been found and filed several months before the second one; it had been for a long time a permanent record of the court; the appellant had been brought into court under it and had pleaded to it; and the case had a permanent place among the cases at issue and ready to be set for trial. The second indictment, therefore, had no legal connection with the first one, but was the result of a new proceeding; and, under the above views, the grand jury were as much disqualified as trial jurors who had once found a defendant guilty would be disqualified to sit again as trial jurors on the second trial of the same defendant for the same offense."

Under the plain provisions of the Statute as it stood at the time of the finding of the indictment and under the decisions of the Supreme Court in the two last quoted cases it will be conceded, we believe, that the defendant in this case would have had the right

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to have had the indictment quashed on the ground that certain of the grand jurors were disqualified. That certain of the grand jurors were biased and prejudiced was not seriously denied by the prosecution. The affidavit of the defendant, Schmidt, sets forth among other things, the following facts in regard to certain of the grand jurors:

> "That the said J. L. Matthews prior to the beginning of the said investigation by the grand jury, and subsequent to the destruction of the Times Building, and the death of ———— set out in this indictment, had viewed the premises where the Times Building had stood prior to the explosion, and the ruins thereof, and made an investigation of said premises and the ruins of said building, and talked with persons who were present at the time of the explosion, to others who arrived upon the scene immediately, thereafter, and to many who pretended to know the nature of the explosion, the agency and the cause thereof, and of the facts that led up thereto, and the said grand juror prior to the said investigation by the said grand jury into the cause of the destruction of the Times Building and the death of the said Charles Hagerty talked with many persons who pretended to be skilled in the knowledge of explosives and the nature, effects and results thereof, and who claimed to be experts thereon, and to be able to tell from the condition of the premises and of the ruins of the Times Building what explosives had

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caused the destruction thereof, and the death of the said Charles Hagerty, which persons the said juror believed to be skilled in the knowledge of explosives and the nature, effects and results thereof, and to be experts therein, and to be able to tell from the condition of the premises and the ruins of the Times Building what explosive substance had caused the destruction of the said building and the death of said Hagerty; and from the investigation the said juror made of the said premises and ruins, and from the information he gained from his talks with persons as aforesaid, the juror, before the grand jury began its investigation into the cause of the destruction of the said building and the death of said Hagerty and fully and unalterably determined in his own mind that the destruction of the said building and the death of said Hagerty was caused by the explosion of dynamite, and that the said dynamite was wilfully, unlawfully, and maliciously placed upon said premises, and after being so placed was wilfully, unlawfully and maliciously exploded by Trades Unions and the members of Organized Labor; that at the time the said grand jury began its investigations of the matters aforesaid, the said juror was still of the same state of mind and fixed opinions as to the nature of the explosion and the agency that brought it about, and continued so to be throughout the whole of the investigation of the grand jury. That the opinion which the said juror had at the beginning of the said grand jury's investigation on the 27th day of October, 1910, with reference to the nature of the explosion which wrecked the said building and

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caused the death of ——— and the cause thereof was a fixed and unalterable opinion.

"Affiant further says that for several years immediately prior to and during all of the time of the said investigation of the said grand jury, the said juror was the enemy of Organized Labor and Trades Unions and the members thereof, and that during the whole of the said time his mind was so prejudiced and biased against Organized Labor and Trades Unions and the members thereof that it was impossible for him to act fairly or impartially or without prejudice to the substantial rights of any member of Organized Labor or of Trades Unions when such a member should be or was accused or suspected of crime. And affiant says that because of the juror's investigations of the premises and ruins as aforesaid, and because of the juror's talk with persons aforesaid, and because of the aforesaid prejudice and bias of the juror's mind toward Organized Labor, Trades Unions and the members thereof, the juror did not, at the time of the grand jury's investigation into the charge against this defendant set out in this indictment, act fairly or impartially and without prejudice to the substantial rights of this defendant, and it was impossible for the said juror so to act, but that, on the contrary, the said juror, in finding, endorsing and presenting this indictment against this affiant, was actuated and induced thereto by his aforesaid bias and prejudice, and by his investigation and talks made and had before the 27th day of October, 1910, as aforesaid.

"Affiant further says that the explosion which wrecked the Times Building and

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caused the death of Chas. Hagerty occurred on the 1st day of October, 1910; that the grand jury began its investigation into the causes of said explosion and the death of the said Hagerty on the 27th day of October, 1910, and continued such investigation throughout many days and months, and finally found and presented this indictment on the 5th day of May, 1911. That Harrison Gray Otis is, and has been for many years, the principal owner of the Times Building that was destroyed at the time of the death of the aforesaid.

"That the said Harrison Gray Otis is and has been for many years, a vindictive hater of Organized Labor, Trades Unions and the members thereof; that for many years he has been, by every means known to him, both fair and unfair, attempting to destroy and disrupt Organized Labor and Trades Unions, and that he is and has been for many years biased and prejudiced against all people who believe in or advocate the right of laboring men to organize for the purpose of promoting and furthering their rights.

"That the above mentioned juror, J. L. Matthews, has been for a number of years a paid correspondent of the Times newspaper; that about two years ago the said J. L. Matthews visited Imperial Valley and wrote a series of articles for said Los Angeles Times; that about six years ago the said J. L. Matthews wrote and sent a series of articles for said Los Angeles Times; that about six years ago the said J. L. Matthews wrote and sent a series of articles to the Los Angeles Times in regard to the industrial conditions concerning the fruit industry at

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Covina, California; that in these articles, the said J. L. Matthews bitterly and unjustly attacked Trades Unions and Organized Labor; that the said articles were published in the Times newspaper; that a citizen of Covina who read the said articles and realized the untruthfulness and injustice of them, took offense at the same, and attempted to reason with the said J. L. Matthews with reference to the said articles, and convince him out of the unjustness and falsity of the accusations therein set out; that said conversation resulted in the said citizen whipping the said J. L. Matthews soundly, since which time the bitterness, hatred, and prejudice of the said J. L. Matthews against Organized Labor and Trades Unions has been greatly increased, so that at the time of the destruction of the Times Building and ever since, the said J. L. Matthews has been an active and uncompromising enemy and bitter hater and denouncer of Organized Labor, Trades Unions, and members thereof.

"Affiant further says that said J. L. Matthews, was and has been at all times herein set out an ardent admirer and friend of the said H. G. Otis.

"That on or about the....day of....., 1911, the said J. L. Matthews, together with J. E. Carr and J. H. Cavanah, two other members of the grand jury that found this indictment, visited the C. & M. Rancho, of which ranch said H. G. Otis is the principal owner, and were the guests of one Bowker, manager of said Ranch. That the said J. L. Matthews took with him a letter of introduction from said H. G. Otis and Harry Andrews, the managing editor of the

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Times and agent of said Otis, to the said Bowker; that the conduct of the said J. L. Matthews, J. E. Carr and J. H. Cavanah in visiting said ranch and being the guests of the Manager thereof, under the circumstances of their being grand jurors, was reprehensible, and clearly indicates the state of feelings on the part of each of them toward the said H. G. Otis and the intimate relations between them, and toward this case.

"Affiant further says that J. L. Matthews is and has been for a long time President of the Chamber of Commerce of Covina, California; that on October 10th, 1910, subsequent to the time of the destruction of the Times Building and the death of
at a mass meeting called of all citizens of the East End of Los Angeles County, and held in Covina, California, the said Matthews was elected Chairman of said meeting, and after taking the chair he called Mr. Nichols of Pomona to the chair, and offered and introduced the following resolution, to wit:

" 'Being in receipt of the news to the effect that a dastardly crime has been committed in the city of Los Angeles, a crime against the commonwealth, which threatens the structure of American free government and liberty, in which the lives of employees of the Times-Mirror Company, a company issuing a daily newspaper known as the Los Angeles Times, have been sacrificed by assassins, and property wantonly destroyed, and in as much as this convention's Chairman has been advised by telephone communication by Mayor George Alexander and Chief of Police Galloway, that this crime has every evidence of having been

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perpetrated by dynamiters who are enemies of industrial freedom.

"'Be it Resolved, That this Convention wishes to record its feelings of horror because of the tragedy; that this Convention wishes to extend its heartfelt sympathy and support to the Times-Mirror Company and its condolences to the families and relatives of those who have been sacrificed through this act of assassins; and

"'Be it Further Resolved, That this Convention will heartily support any movement to bring the murderers to justice, and commends the Los Angeles Times for its long championship of industrial freedom in Southern California.'

"Affiant says that this resolution was written by a Mr. Henry Marshall, a former employee of the Los Angeles Times, and the Assistant Editor of the Covina Argus, of which paper the said J. L. Matthews now is and has been for many years the owner and editor.

"Affiant further says that at the time that this resolution was introduced by the said J. L. Matthews he, the said Matthews, had not received any communication from the said George Alexander, or any one else, to the effect that the blowing up of the Times had every evidence of having been perpetrated by dynamiters or persons who were the enemies of industrial freedom, and says that at that time it was impossible for any one to have made any intelligent investigation as to the cause of the destruction of the said Times Building, and that the intimation conveyed in said resolution that the said Times had been destroyed by the enemies of industrial freedom, or any enemy

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of industrial freedom, or that any employee of the Times-Mirror Company had been assassinated by enemies of industrial freedom, or any enemy of industrial freedom, was unjust, uncalled for, and could have emanated only from a heart and mind filled with hatred, bias, and prejudice toward Organized Labor, Trades Unions, and the members thereof.

"Affiant says that again on October 3rd, 1910, at a regular meeting of the Covina Chamber of Commerce at the High School Auditorium in said city of Covina, California, when many people were present, said J. L. Matthews called the meeting to order and asked Mr. Anderson to preside while he introduced a resolution. That thereupon said J. L. Matthews introduced and moved the following resolution:

"'Resolved, That we hereby extend our sincere sympathy to the Times-Mirror Company because of the foul attack made upon the lives of its employees and the destruction of its property;

"'Resolved, That the events of to-day have proven the far-sighted wisdom of the Times, and amply justify the struggle for industrial freedom;

"'Resolved, That we heartily endorse the Times in its fight for the "open shop," and pledge our support to this foremost champion of industrial liberty, calling on every loyal citizen to do the same, to the end that incendiarism and anarchy may be driven forever from our midst;

"'Resolved, That our hearts are deeply stirred with sympathy for the relatives of

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those who lie dead, and for those who were injured by the assassins who perpetrated the

(Signed) 'J. L. MATTHEWS,
President.

(Signed) 'H. N. WELLS,
Secretary.'

"Affiant says that at the time that said J. L. Matthews introduced this resolution at the said meeting, he had no reason to believe that a foul attack, or that any attack, had been made upon the lives of the employees of the Times-Mirror Company, and that he had no right to believe that the destruction of the Times was the result of incendiarism, or anarchy, or of any wilful act of human agency, and that he had no right to believe that any person that was killed in the destruction of the said Times building was slain at the hands of assassins, or that any assassin had perpetrated the destruction of the Times building.

"Affiant says that the innuendoes and insinuations and statements in said resolution to that effect emanated from the heart and mind of a man who was so biased and prejudiced against Organized Labor and Trades Unions, and so filled with hatred of all men who sympathized with Organized Labor, that he could not calmly and impartially seek out and investigate the cause of the destruction of said building, and that the person making such insinuations and statements could not, because of his bias and prejudice and hatred towards Labor Organizations, give to them, the members of said Organizations, the benefit of that humane provision of our law which says that every man is presumed to be innocent until he is proven guilty.

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"Affiant further says that on various occasions subsequent to the third of October, 1910, and prior to the time the grand jury began its investigations on October 27th, 1910, to divers persons the said J. L. Matthews has expressed his firm belief and opinion that the Times Building and the lives of its employees were, on the first day of October, 1910, wilfully and maliciously and unlawfully destroyed by the members of Organized Labor and Trades Unions. Affiant says that at the beginning of the said investigation by the Grand Jury, and during the whole of the said investigation the mind of the said juror, J. L. Matthews, was filed with bitterness, bias, prejudice and hatred toward Organized Labor, Trades Unions, and the members thereof, and that all of his acts during said investigation and in the finding and presenting of said indictment against this defendant were induced by his said bitterness, hatred, prejudice and bias against Organized Labor, Trades Unions and the members thereof. That he has not been, at any time herein mentioned, fair, or impartial, or unprejudiced, or unbiased with reference to the matter which the Grand Jury was investigating, or with reference to the substantial rights of this defendant.

"Affiant says that the acts, words and conduct of the said Grand Juror during the progress of the investigation as shown by the evidence taken before the said Grand Jury to which reference is hereby made, disclose the fact that the said Grand Juror had that state of mind during the said investigation with reference to the case and this defendant, and toward all members of

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Organized Labor, which prevented him from acting impartially and without prejudice to the substantial rights of this defendant.

"Affiant further says that it was not shown at the time of the impanelment of the said Grand Jury, or at any other time, and that it has not been made to satisfactorily appear, or otherwise appear, to the Court or to any one else upon a declaration of the said Juror under oath or otherwise, or at all, that the said Grand Juror could or would, notwithstanding such a state of mind, act impartially and fairly upon the matters which were to be and were submitted to him.

"Affiant further says that before the beginning of the investigation by the Grand Jury of the charges against this defendant and his connection therewith, and during the whole of said investigation thereof, a state of mind existed on the part of Charles Wier, one of the Grand Jurors who was present and took part in the said investigation and in the finding of said indictment in reference to the case and to this defendant, which prevented said Charles Wier from acting impartially and without prejudice to the substantial rights of this defendant.

"That the said Charles Wier prior to the beginning of the said investigation by the Grand Jury, and subsequent to the destruction of the Times building, and the death of set out in this indictment, had viewed the premises where the Times building had stood prior to the explosion, and the ruins thereof, and made an investigation of said premises and the ruins of said building, and talked with persons who

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were present at the time of the explosion, to others who arrived upon the scene immediately thereafter, and to many who pretended to know the nature of the explosion, the agency and the cause thereof, and of the facts that led up thereto, and the said Grand Juror prior to the said investigation by the said Grand Jury into the cause of the destruction of the Times building and the death of the said Hagerty talked with many persons who pretended to be skilled in the knowledge of explosives and the nature, effects, and results thereof, and who claimed to be experts thereon, and to be able to tell from the condition of the premises and of the ruins of the Times building what explosives had caused the destruction thereof, and the death of the said Hagerty, which persons the said Juror believed to be skilled in the knowledge of explosives and the nature, effects and results thereof, and to be experts therein, and to be able to tell from the condition of the premises and the ruins of the Times building what explosive substance had caused the destruction of the said building and the death of said Hagerty; and from the investigation the said Juror made of the said premises and ruins, and from the information he gained from his talks with persons as aforesaid, the Juror, before the Grand Jury began its investigation into the cause of the destruction of the said building and the death of said Hagerty had fully and unalterably determined in his own mind that the destruction of the said building and the death of said Hagerty was caused by the explosion of dynamite, and that the said dynamite was wilfully, unlawfully and maliciously placed upon said premises, and, after

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being so placed, was wilfully, unlawfully and maliciously exploded by Trades Unions and the members of Organized Labor; that at the time the said Grand Jury began its investigations of the matters aforesaid the said Juror was still of the same state of mind and fixed opinion as to the nature of the explosion and the agency that brought it about, an opinion which the said Juror had at the beginning of the said Grand Jury's investigation and continued so to be throughout the whole of the investigation of the Grand Jury. That the 27th day of October, 1910, with reference to the nature of the explosion which wrecked the said building and caused the death of and the cause thereof was a fixed and unalterable opinion.

"Affiant further says that for several years immediately prior to and during all of the time of the said investigation of the said Grand Jury, the said Juror was the enemy of Organized Labor and Trades Unions and the members thereof, and that during the whole of the said time his mind was so prejudiced and biased against Organized Labor and Trades Unions and the members thereof that it was impossible for him to act fairly or impartially or without prejudice to the substantial rights of any member of Organized Labor, or of Trades Unions when such a member should be or was accused or suspected of crime. And affiant says that because of the Juror's investigations of the premises and ruins as aforesaid, and because of the juror's talk with persons aforesaid, and because of the aforesaid prejudice and bias of the juror's mind toward Organized Labor, Trades Unions and the mem-

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bers thereof, the juror did not, at the time of the Grand Jury's investigation into the charge against this defendant set out in this indictment, act fairly or impartially and without prejudice to the substantial rights of this defendant, and it was impossible for the said juror so to act, but that, on the contrary, the said Juror, in finding, endorsing and presenting this indictment against this affiant, was actuated and induced thereto by his aforesaid bias and prejudice, and by his investigation and talks made and had before the 27th day of October, 1910, as aforesaid.

"Affiant further says that on various occasions subsequent to the third of October, 1910, and prior to the time the Grand Jury began its investigations on October 27th, 1910, to divers persons the said Charles Wier has expressed his firm belief and opinion that the Times building and the lives of its employees were, on the first day of October, 1910, wilfully and maliciously and unlawfully destroyed by the members of Organized Labor and Trades Unions. Affiant says that at the beginning of the said investigation by the Grand Jury and during the whole of the said investigation the mind of the said juror, Charles Wier, was filled with bitterness, bias, prejudice and hatred toward Organized Labor, Trades Unions and the members thereof, and that all of his acts during said investigation and in the finding and presenting of said indictment against this defendant was induced by his said bitterness, hatred, prejudice and bias against Organized Labor, Trades Unions and the members thereof. That he has not been, at any time herein mentioned, fair, or impartial, or unpreju-

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diced, or unbiased with reference to the matter which the Grand Jury was investigating, or with reference to the substantial rights of this defendant.

"Affiant says that the acts, words and conduct of the said Grand Juror during the progress of the investigation as shown by the evidence taken before the Grand Jury to which reference is hereby made, disclose the fact that the said Grand Juror had that state of mind during the said investigation with reference to the case and this defendant, and toward all members of Organized Labor, which prevented him from acting impartially and without prejudice to the substantial rights of this defendant.

"Affiant further says that it was not shown at the time of the impanelment of the said Grand Jury, or at any other time, and that it has not been made to satisfactorily appear, or otherwise appear, to the Court or to any one else upon a declaration of the said Juror under oath or otherwise, or at all, that the said Grand Juror could or would, notwithstanding such a state of mind, act impartially and fairly upon the matters which were to be and were submitted to him.

"Affiant further says that before the beginning of the investigation by the Grand Jury of the charges against this defendant and his connection therewith, and during the whole of said investigation thereof, a state of mind existed on the part of J. E. Carr, one of the Grand Jurors who was present and took part in the said investigation and in the finding of said indictment, in reference to the case and to this

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defendant, which prevented said J. E. Carr from acting impartially and without prejudice to the substantial rights of this defendant.

"That said J. E. Carr prior to the beginning of the said investigation by the Grand Jury, and subsequent to the destruction of the Times building and the death of set out in this indictment, had viewed the premises where the Times building had stood prior to the explosion, and the ruins thereof, and made an investigation of said premises and the ruins of said building, and talked with persons who were present at the time of the explosion, to others who arrived upon the scene immediately thereafter, and to many who pretended to know the nature of the explosion, the agency and the cause thereof, and of the facts that led up thereto, and the said Grand Juror prior to the said investigation by the said Grand Jury into the cause of the destruction of the Times building and the death of the said Hagerty talked with many persons who pretended to be skilled in the knowledge of explosives and the nature, effects and results thereof, and who claimed to be experts thereon, and to be able to tell from the condition of the premises and of the ruins of the Times building what explosives had caused the destruction thereof, and the death of the said Hagerty, which persons the said Juror believed to be skilled in the knowledge of explosives and the nature, effects and results thereof, and to be experts therein, and to be able to tell from the condition of the premises and the ruins of the Times building what explosive

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substance had caused the destruction of the said building and the death of said Hagerty, and from the investigation the said juror made of the said premises and ruins, and from the information he gained from his talks with persons as aforesaid, said Juror, before the Grand Jury began its investigation into the cause of the destruction of the said building and the death of said Hagerty, had fully and unalterably determined in his own mind that the destruction of the said building and the death of said Hagerty was caused by the explosion of dynamite, and that the said dynamite was wilfully, unlawfully and maliciously placed upon said premises, and after being so placed, was wilfully, unlawfully, and maliciously exploded by Trades Unions and the members of Organized Labor; that at the time the said Grand Jury began its investigations of the matters aforesaid, the said Juror was still of the same state of mind and fixed opinion as to the nature of the explosion and the agency that brought it about, and continued so to be throughout the whole of the investigation of the Grand Jury. That the opinion which the said juror had at the beginning of the said Grand Jury's investigation on the 27th day of October, 1910, with reference to the nature of the explosion which wrecked the said building and caused the death of Hagerty and the cause thereof was a fixed and unalterable opinion.

"Affiant further says that for several years immediately prior to and during all of the time of the said investigation of the said Grand Jury, the said Juror was the enemy of Organized Labor and Trades Unions

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and the members thereof, and that during the whole of the said time his mind was so prejudiced and biased against organized labor and Trades Unions and the members thereof that it was impossible for him to act fairly or impartially or without prejudice to the substantial rights of any member of Organized Labor, or of Trades Unions when such a member should be or was accused or suspected of crime. And affiant says that because of Juror's investigations of the premises and ruins as aforesaid, and because of the juror's talk with persons aforesaid, and because of the aforesaid prejudice and bias of the juror's mind toward Organized Labor, Trades Unions and the members thereof, the Juror did not, at the time of the Grand Jury's investigation into the charge against this defendant set out in this indictment, act fairly or impartially, and without prejudice to the substantial rights of this defendant, and it was impossible for the said Juror so to act, but that, on the contrary, the said Juror, in finding, endorsing and presenting this indictment against this affiant, was actuated and induced thereto by his aforesaid bias and prejudice, and by his investigation and talks made and had before the 27th day of October, 1910, as aforesaid. And prior to the time the Grand Jury began its investigations on October 27th, 1910, to divers persons the said J. E. Carr had expressed his firm belief and opinion that the Times building and the lives of its employees were, on the first day of October, 1910, wilfully, and maliciously and unlawfully destroyed by the members of Organized Labor and Trades Unions. Affiant

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says that at the beginning of the said investigation by the Grand Jury, and during the whole of the said investigation, the mind of the said Juror, J. E. Carr, was filled with bitterness, bias, prejudice and hatred toward Organized Labor, Trades Unions and the members thereof, and that all of his acts during said investigations and in the finding and presenting of said indictment against this defendant were induced by his said bitterness, hatred, prejudice and bias against Organized Labor, Trades Unions and the members thereof. That he has not been, at any time herein mentioned, fair, or impartial, or unprejudiced or unbiased with reference to the matter which the Grand Jury was investigating, or with reference to the substantial rights of this defendant.

"Affiant says that the acts, words and conduct of the said grand juror during the progress of the investigation, as shown by the evidence taken before the said Grand Jury to which reference is hereby made, disclose the fact that the said Grand Juror had that state of mind during the said investigation with reference to the case and this defendant, and toward all members of Organized Labor, which prevented him from acting impartially and without prejudice to the substantial rights of this defendant.

"Affiant further says that it was not shown at the time, of the impanelment of the said Grand Jury, or at any other time, and that it has not been made to satisfactorily appear, or otherwise appear, to the Court or to anyone else upon a declaration of the said Juror under oath or otherwise,

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or at all, that the said Grand Juror could or would, notwithstanding such a state of mind, act impartially and fairly upon the matters which were to be and were submitted to him.

"Affiant further says that before the beginning of the investigation by the Grand Jury of the charges against this defendant and his connection therewith, and during the whole of said investigation thereof, a state of mind existed on the part of A. R. Fraser, one of the Grand Jurors who was present and took part in said investigation and in the finding of said indictment, in reference to the case and to this defendant, which prevented said A. R. Fraser from acting impartially and without prejudice to the substantial rights of this defendant.

"That the said A. R. Fraser, prior to the beginning of the said investigation by the Grand Jury, and subsequent to the destruction of the Times building, and the death of set out in this indictment, had viewed the premises where the Times building had stood prior to the explosion, and the ruins thereof, and made an investigation of said premises and the ruins of said building, and talked with persons who were present at the time of the explosion, to others who arrived upon the scene immediately thereafter, and to many who pretended to know the nature of the explosion, the agency and the cause thereof, and of the facts that led up thereto, and the said Grand Juror prior to the said investigation by the said Grand Jury into the cause of the destruction of the Times building and the death of the said Hagerty talked with many persons who pretended

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to be skilled in the knowledge of explosives and the nature, effects, and results thereof, and who claimed to be experts thereon, and to be able to tell from the condition of the premises and of the ruins of the Times building what explosives had caused the destruction thereof, and the death of the said Hagerty, which persons the said Juror believed to be skilled in the knowledge of explosives and the nature, effects and results thereof, and to be experts therein, and to be able to tell from the condition of the premises and the ruins of the Times building what explosive substance had caused the destruction of the said building and the death of said Hagerty; and from the investigation of the said Juror made of the said premises and ruins, and from the information he gained from his talks with persons as aforesaid, the Juror, before the Grand Jury began its investigation into the cause of the destruction of the said building and the death of said
had fully and unalterably determined, in his own mind that the destruction of the said building and the death of said Hagerty were caused by the explosion of dynamite, and that the said dynamite was wilfully, unlawfully and maliciously placed upon said premises, and after being so placed, was wilfully, unlawfully, and maliciously exploded by Trades Unions and the members of Organized Labor; that at the time the said Grand Jury began its investigations of the matters aforesaid, the said juror was still of the same state of mind and fixed opinion as to the nature of the explosion and the agency that brought it about, and continued so to be throughout the whole of the inves-

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tigation of the Grand Jury. That the opinion which the said Juror had at the beginning of the said Grand Jury's investigation on the 27th day of October, 1910, with reference to the nature of the explosion which wrecked the said building and caused the death of Hagerty and the cause thereof, was a fixed and unalterable opinion.

"Affiant further says that for several years immediately prior to and during all of the time of the said investigation of the said Grand Jury, the said juror was the enemy of Organized Labor and Trades Unions and the members thereof, and that during the whole of the said time his mind was so prejudiced and biased against Organized Labor and Trades Unions and the members thereof that it was impossible for him to act fairly or impartially or without prejudice to the substantial rights of any member of Organized Labor, or of Trades Unions when such a member should be or was accused or suspected of crime. And affiant says that because of the juror's investigation of the premises and ruins as aforesaid, and because of the Juror's talk with persons aforesaid, and because of the aforesaid prejudice and bias of the Juror's mind toward Organized Labor, Trades Unions and the members thereof, the Juror did not, at the time of the Grand Jury's investigation into the charge against this defendant set out in this indictment, act fairly or impartially or without prejudice to the substantial rights of this defendant, and it was impossible for the said juror so to act, but that on the contrary, the said juror, in finding, endorsing and presenting this

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indictment against this affiant was actuated and induced thereto by his aforesaid bias and prejudice, and by his investigation and talks made and had before the 27th day of October, 1910, as aforesaid.

"Affiant further says that on various occasions subsequent to the 3rd day of October, 1910, and prior to the time the Grand Jury began its investigations on October 27th, 1910, to divers persons the said A. R. Fraser had expressed his firm belief and opinion that the Times building and the lives of its employees were, on the first day of October, 1910, wilfully and maliciously and unlawfully destroyed by the members of Organized Labor and Trades Unions. Affiant says that at the beginning of the said investigation by the Grand Jury, and during the whole of the said investigation the mind of the said Juror, A. R. Fraser, was filled with bitterness, bias, prejudice and hatred toward Organized Labor, Trades Unions and the members thereof, and that all of his acts during said investigation and in the finding and presenting of said indictment against this defendant were induced by his said bitterness, hatred, prejudice, and bias against Organized Labor, Trades Unions and the members thereof. That he has not been, at any time herein mentioned, fair, or impartial, or unprejudiced, or unbiased with reference to the matter which the Grand Jury was investigating, or with reference to the substantial rights of this defendant.

"Affiant says that the acts, words and conduct of the said Grand Juror during the progress of the investigation, as shown by the evidence taken before the said Grand

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Jury to which reference is hereby made, disclose the fact that the said Grand Juror had that state of mind during the said investigation, with reference to the case and this defendant, and toward all members of Organized Labor, which prevented him from acting impartially and without prejudice to the substantial rights of this defendant.

"Affiant further says that it was not shown at the time of the impanelment of the said Grand Jury, or at any other time, and that it has not been made to satisfactorily appear, or otherwise appear, to the Court or to any one else upon a declaration of the said Juror under oath or otherwise, or at all, that the said Grand Juror could or would, notwithstanding such a state of mind, act impartially and fairly upon the matters which were to be and were submitted to him.

"Affiant further says that before the beginning of the investigation by the Grand Jury of the charges against this defendant and his connection therewith, and during the whole of said investigation thereof, a state of mind, existed on the part of each and every one of said Grand Jurors who was present and took part in said investigation and in the findings of said indictment, in reference to the case and to this defendant, which prevented each and every one of said Grand Jurors from acting impartially and without prejudice to the substantial rights of this defendant.

"That each and every one of said Grand Jurors prior to the beginning of the said investigation by the Grand Jury, and subsequent to the destruction of the Times build-

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ing, and the death of Hagerty, set out in this indictment, had viewed the premises where the Times building had stood prior to the explosion, and the ruins thereof; and made an investigation of said premises and the ruins of said building, and talked with persons who were present at the time of the explosion, to others who arrived upon the scene immediately thereafter, and to many who pretended to know the nature of the explosion, the agency and the cause thereof, and of the facts that led up thereto, and that each and every one of said Grand Jurors prior to the said investigation by the said Grand Jury into the cause of the destruction of the Times building and the death of the said Hagerty talked with many persons who pretended to be skilled in the knowledge of explosives, and the nature, effects and results thereof, and who claimed to be experts thereon, and to be able to tell from the condition of the premises and of the ruins of the Times building what explosives had caused the destruction thereof, and the death of the said Hagerty, which said persons, each and every one of said Grand Jurors believed to be skilled in the knowledge of explosives and the nature, effects and results thereof, and to be experts therein, and to be able to tell from the condition of the premises and the ruins of the Times Building what explosive substance had caused the destruction of said building and the death of said Hagerty; and from the investigation each and every one of said Grand Jurors made of the said premises and ruins, and from the information he gained from his talks with persons as aforesaid, each and every one of said

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Grand Jurors, before the Grand Jury began its investigation into the cause of the destruction of the said building and the death of said Hagerty, had fully and unalterably determined in his own mind that the destruction of the said building and the death of said Hagerty was caused by the explosion of dynamite, and that the said dynamite was wilfully, unlawfully, and maliciously, placed upon said premises, and after being so placed, was wilfully, unlawfully and maliciously exploded by Trades Unions and the members of Organized Labor; that at the time the said Grand Jury began its investigations of the matters aforesaid, each and every one of said Grand Jurors was still of the same state of mind and fixed opinion as to the nature of the explosion and the agency that brought it about, and continued so to be throughout the whole of the investigation of the Grand Jury. That the opinion which each and every one of said Grand Jurors had at the beginning of the said Grand Jury's investigation on the 27th day of October, 1910, with reference to the nature of the explosion which wrecked the said building and caused the death of Hagerty and the cause thereof was a fixed and unalterable opinion.

"Affiant further says that for several years immediately prior to and during all of the time of said investigation of the said Grand Jury, each and every one of said Grand Jurors was the enemy of Organized Labor and Trades Unions and the members thereof, and that during the whole of the said time his mind was so prejudiced and biased against Organized Labor

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and the Trades Unions and the members thereof that it was impossible for him to act fairly or impartially or without prejudice to the substantial rights of any member of Organized Labor or of Trades Unions when such a member should be or was accused or suspected of crime. And affiant says that because of each and every one of said Grand Jurors investigations of the premises and ruins as aforesaid, and because of each and every one of said Grand Juror's talk with persons aforesaid and because of the aforesaid prejudice and bias of each and every one of said Grand Juror's mind toward Organized Labor, Trades Unions and the members thereof, no one of the said Grand Jurors did, at the time of the Grand Jury's investigation into the charges against this defendant set out in this indictment, act fairly or impartially or without prejudice to the substantial rights of this defendant, and it was impossible for any one of the said Grand Jurors so to act, but that, on the contrary, each and every one of said Jurors, in finding, endorsing and presenting this indictment against this affiant, was actuated and induced thereto by his aforesaid bias and prejudice, and by his investigation and talks made and had before the 27th day of October, 1910, as aforesaid.

"Affiant further says that on various occasions subsequent to the third day of October, 1910, and prior to the time the Grand Jury began its investigations on October 27th, 1910, to divers persons each and every one of said Grand Jurors has expressed his firm belief and opinion that the Times building and the lives of its employees

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were, on the first day of October, 1910, wilfully and maliciously and unlawfully destroyed by the members of Organized Labor and Trades Unions. Affiant says that at the beginning of the said investigation by the Grand Jury, and during the whole of the said investigation the mind of each and every one of said Grand Jurors was filled with bitterness, bias, prejudice and hatred towards Organized Labor, Trades Unions and the members thereof, and that all of his acts during said investigation and in the finding and presenting of said indictment against this defendant were induced by his said bitterness, hatred, prejudice and bias against Organized Labor, Trades Unions and the members thereof. That he has not been, at any time herein mentioned, fair, or impartial, or unprejudiced, or unbiased with reference to the matter which the Grand Jury was investigating, or with reference to the substantial rights of this defendant.

"Affiant further says that the acts, words and conduct of each and every one of said Grand Jurors during the progress of the investigation as shown by the evidence taken before the said Grand Jury, to which reference is hereby made, disclose the fact that each and every one of said Grand Jurors had that state of mind during the said investigation, with reference to the case and this defendant, and toward all members of Organized Labor, which prevented him from acting impartially and without prejudice to the substantial rights of this defendant.

"Affiant further says that it was not shown at the time of the impanelment of

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the said Grand Jury, or at any other time, and that it has not been made to satisfactorily appear, or otherwise appear, to the Court or to anyone else upon a declaration of any of the said Grand Jurors under oath or otherwise, or at all, that the said Grand Jurors, or any one of them could or would, notwithstanding such a state of mind, act impartially and fairly upon the matters which were to be and were submitted to said Grand Jury."

(Clerk's Trans., Vol. 1., p. 23, line 17, to p. 51, line 24).

The affidavit in opposition to the Motion to Quash the indictment filed by the District Attorney, which will be found in Vol. 1 of the Clerk's transcript, pages seventy-nine to eighty-six, does not controvert or deny any of the specific charges or allegations of actual bias made against any member of the Grand Jury. The names of all of the Grand Jurors are subscribed to one affidavit which may best be characterized as a general denial of bias or prejudice. Such an affidavit, however, is insufficient to raise any conflict of evidence. In fact it does not state any legal evidence whatever. It merely states certain legal conclusions. There is no denial, for example, that Grand Juror J. L. Matthews participated in the meeting held at Covina on October 10th, 1910; there is no denial that he sub-

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scribed the resolutions adopted at another meeting held on October 3rd, 1910, which resolutions endorse the editorial policies of the Los Angeles Times, the destruction of whose property and the death of whose employees were the subjects under investigation by the Grand Jury. There is likewise no denial of the allegations that the various members of the Grand Jury had visited the ruins of the Times building prior to their selection as Grand Jurors, had made investigations of the same and had discussed the matter with persons who were, or who claimed to be, witnesses. None of these matters (which would, of course, establish actual bias) are specifically traversed by the affidavit of the Grand Jurors. There was therefore no legal conflict in the evidence as to the disqualification of each and every one of the Grand Jurors who participated in the voting and the presentment of the indictment, and the defendant's motion to quash and set aside the indictment on that ground should have been granted unless the amendment of 1911, which repealed sub-division 4 of section 995 had the effect of depriving him of the right to set aside the indictment upon that ground. We believe that the amendment in question had no such effect. If the amendment had or was intended to have any effect or

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operation upon such a case as this, it was *ex post facto* and void. We do not wish to be understood as questioning the power of the Legislature to repeal the sub-division in question. Whatever one may think of the policy of a law which makes Grand Jurors the sole judges of their own fairness and impartiality, whatever may be thought of the policy of a law which places the good name, reputation and temporary liberty of the citizen at the mercy of the whim and caprice of a secret Star Chamber session composed of persons who may be his life-long enemies actuated solely by malice and ill-will,—these are questions not for the Court but for the Legislators of this State and for the people who in their wisdom or ignorance elect them to office. Especially would it be futile to question the existence of such power in the Legislature in these days when popular sentiment seems to view all of the safeguards with which our law from immemorial times sheltered those accused of crime from injustice and oppression as mere technicalities emanating from the ingenuity of judges and lawyers who desire the enforcement of the letter rather than the spirit of the law. But even in this age of radicalism, no Court has held and it has not been seriously contended that an accused person can

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be deprived by the Legislature of any substantial right which he possessed before the passage of the Legislative enactment. It must be borne in mind that in this particular case the defendant at the time that he was indicted possessed the right of challenging the Grand Jurors for actual bias and of moving to quash the indictment against him upon that ground. This right the Legislature can not take away. A law which deprives an accused person of some substantial right or immunity possessed by him before its passage is *ex post facto* as to prior offenses. Thus it has been held that laws which make conviction easier by changing the rules of evidence so that less or different evidence is required to convict are *ex post facto* as to offenses committed prior to the enactment of such laws. In *Hart* vs. *State,* 40 Ala., 32, 88 Am. Decisions, 752, a law was held *ex post facto* as to previous offenses which abolished the requirement of a previous law that the testimony of an accomplice must be corroborated. So also a law allowing marriage to be proved by indirect evidence in prosecutions for polygamy.

> *State* vs. *Johnson,* 12 Minn., 476; 93 Am. Decs., 241.

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A law providing that nine jurors out of twelve may give a verdict has been held *ex post facto* as to prior offenses.

State vs. *Ardoin,* 51 La. Ann., 169, 24 Southern, 802.

So also is a law reducing the number of jurors from twelve to eight.

Thompson vs. *Utah,* 170 U. S., 343.

A law changing the effect of a plea of guilty.

Garvey vs. *People,* 6 Colo., 559, 45 Am. Rep., 531.
Kring vs. *Missouri,* 107 U. S., 221.

It has been held that a law authorizing a conviction of an offense included in that charged is *ex post facto* as to a prior offense.

Lovell vs. *State,* 33 Fla., 389, 14 So., 837;
State vs. *Johnson,* 81 Missouri, 60.

A law punishing offenses that have been pardoned or making void convictions valid, is *ex post facto.*

State vs. *Keith,* 63 N. Car., 140.

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A law repealing a statute of limitation which protected the offender from punishment is *ex post facto* and void as to a prior offense.

> *Moore* vs. *State,* 43 N. J. L., 203, 39 Am. Rep., 558.

In the case of *People* vs. *McNulty,* decided by the Supreme Court of California on December 12, 1891, and reported in 28 Pac., 816, the Supreme Court held that a change in the place of imprisonment prior to execution in a capital case, or solitary confinement, keeping the prisoner ignorant of the time of his execution, or any other change calculated to add terror to the death penalty makes the law *ex post facto* as to past offenses.

Chief Justice Beatty in delivering the opinion of the Court in that case said:

> "By reference to section 1217 of the Penal Code above quoted, and the proposed amendment, it will be seen that the effect of the amendment, if valid, would be to change the period within which the execution must take place from not less than thirty nor more than sixty days to not less than sixty nor more than ninety days after judgment, the result of which is that under the amendment a convict might be kept alive and in dread and apprehension of a painful and ignominious death for thirty days longer than he could have been so kept under the old law. This

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change, also, it is strenuously argued, and apparently not without authority to sustain the contention, makes the law *ex post facto*. For, in the first place, it is said that, although by a vast majority of persons condemned to die on the scaffold any postponement of the date of execution would be eagerly welcomed as a boon, there may be some men to whom it would be an aggravation of their suffering. And, in the next place, it is contended that even if this were not so, the principle that Courts and Legislatures may be allowed to change the punishment of crimes *ex post facto* in such manner as in their opinion renders the penalty lighter cannot be admitted without destroying the value of the constitutional guaranty, because there could be no certainty that the legislative or judicial discretion would always be wisely and mercifully exercised; and neither the Legislator nor the judge is to be allowed to measure the feelings of the culprit by his own. In short, the cases have gone to the extent of holding that a law which changes the punishment of past offenses in any manner whatever except by remitting a separable portion of the penalty previously prescribed, i. e., by reducing the amount of the fine, the number of stripes, the term of imprisonment, etc., is necessarily void as to all such offenses. It is unnecessary, however, to cite or to criticize the cases in which this matter has been considered by courts whose decisions do not bind us as authority, when we have a decision of the Supreme Court of the United States which is clearly in point.

"We have seen that under the amend-

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ments of 1891 a person convicted of murder in the first degree and sentenced to death must within ten days thereafter be delivered to the warden of the state-prison, and be confined by him for from fifty to eighty days in said prison. If it is in the power of the Legislature to add to the penalty of death by hanging a previous imprisonment in the penitentiary for eighty days, the term might, under the same power, be extended to years. And even with respect to a short detention in the state-prison this is what is said in the Medley Case by the Supreme Court of the United States, (134 U. S., 168, 169, 10 Sup. Ct. Rep., 386, 387): 'Instead of confinement in the ordinary county prison of the place where he and his friends reside, where they may, under the control of the sheriff, see him and visit him, where the sheriff and his attendants must see him, where his religious adviser and his legal counsel may often visit him without any hindrance of law on the subject, the convict is transferred to a place where imprisonment always implies disgrace, and which, as this Court has judicially decided in *Ex parte Wilson,* 114 U. S., 417, 5 Sup. Ct. Rep., 935; *Mackin* vs. *U. S.,* 117 U. S., 348, 6 Sup. Ct. Rep., 777; *Parkinson* vs. *U. S.,* 121 U. S., 281, 7 Sup. Ct. Rep., 896; and *U. S.* vs. *De Walt,* 128 U. S., 393, 9 Sup. Ct. Rep., 111,—is itself an infamous punishment, and is there to be kept in "solitary confinement," the primary meaning of which phrase we have already explained.'

"Various other grounds are insisted upon by counsel as being each in itself sufficient

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to render the amendments of 1891 unconstitutional; as, that a convict confined in the state-prison awaiting execution would, under the general law, as construed in the *Arras Case,* 78 Cal., 304, 20 Pac. Rep., 683, be compelled to do hard labor during his confinement; and that he would, under the operation of sections 673, 674, of the Penal Code, become civilly dead, and be deprived of all civil rights, etc. We do not think there is anything in these points. There is nothing in the doctrine of the Arras case to sustain the conclusion that a prisoner confined in the penitentiary while awaiting execution could be compelled to labor, and sections 673, 674, could not be held applicable to such a case. But upon the other grounds above mentioned, and in conformity to the decision in the Medley Case, to the authority of which we are compelled to yield obedience, we feel constrained to hold that neither this appellant nor any other person in his situation can be punished under the amendments of 1891, because as to him and all such persons such amendments are *ex post facto* and void."

We have quoted the foregoing decision at considerable length, not because it is directly decisive of the question here involved, but because its reasoning is highly applicable to the subject under discussion. The McNulty case in brief holds that a convicted murderer cannot be punished under the provisions of an act passed after the commission of the crime

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charged, which, even in respect to the length of time that he may be imprisoned prior to execution, changes the prescribed punishment. If a convicted murderer cannot be deprived by a legislative enactment of a right which existed prior thereto, how much less can a person who has never been convicted of any offense, who has merely been indicted by a Grand Jury and to whom the presumption of innocence still attaches, be deprived of a right which existed at the time of his indictment, to have such an indictment quashed and set aside upon the ground that the members of the Grand Jury who returned the indictment were disqualified under the law as it then stood by reason of bias and prejudice against him? We are well aware of the fact that the Legislature has a right to change procedure in criminal cases and that laws that merely change procedure are not *ex post facto* as to prior offenses. It has been held, for instance, that a law reducing the number of peremptory challenges allowed to an accused is not *ex post facto*.

> *South* vs. *State,* 86 Ala., 617;
> *Mathis* vs. *State,* 31 Fla., 291;

But the amendment of 1911 to which we have referred is not a mere change in pro-

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cedure. It is a deprivation of a very substantial and a very important right. The Grand Jury is endowed by law with great and in some respects with almost arbitrary power. In this State the acts of a Grand Jury cannot be reviewed or its indictment set aside because of the insufficiency of the evidence upon which it acts. If a magistrate holds an accused to answer without reasonable or probable cause, the prisoner may be discharged upon habeas corpus either before or after the filing of the information against him by the District Attorney, but no such right attaches to an accused who has been indicted by a Grand Jury. Prior to the amendment of 1911, however, the law of California contained the humane and wise provision that a person accused of crime should not be indicted by a Grand Jury, the members of which were his personal enemies or whose members were biased or prejudiced against him by reason of having a fixed belief as to his guilt or innocence. In other words the law contemplated that the members of a Grand Jury should bring with them to their deliberations the same degree of judicial fairness and impartiality as the trial jurors who pass ultimately upon the question of the guilt or innocence of the accused. A defendant held to answer

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for a public offense had the right to challenge members of the Grand Jury for actual bias, and a defendant indicted for a public offense, who had not been previously held to answer for the same, had the right under the provisions of sub-division 4 of section 995 to have the indictment returned against him by a prejudiced jury quashed and set aside. For reasons good and sufficient unto itself the Legislature of this State has seen fit to repeal these provisions and to strike them from the Statute. With the policy of these amendments we have no present concern, as that is a question for the Legislature and not for the Courts. But the repeal of these provisions of the code, after this defendant had been indicted for the crime of murder, certainly deprived him of a substantial right. It must therefore be held that the amendments of 1911 are *ex post facto* as to this defendant, and that his motion to quash the indictment upon that ground should have been granted. The trial Court clearly took the position that the defendant by reason of the amendments of 1911 had lost his right to challenge the members of the Grand Jury for bias.

(Reporter's Trans., p. 7881, lines 16 to 26)

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And the Court denied the request of counsel for the defendant that the Grand Jurors should be called for the purpose of examination to determine the question of bias.

Reporter's Trans., p. 7883.

In view of the fact that the affidavit of the defendant himself and the other proffered testimony clearly established the actual bias of the Grand Jurors, and since the amendments of 1911, are clearly *ex post facto* as to an indictment returned prior to their enactment, it is respectfully submitted that the defendant's motion should have been granted upon that ground, and that the learned trial Judge committed manifest and highly prejudicial error in denying the same.

But even if this Court should take the position that the amendment of 1911, which repealed sub-division 4 of section 995 of the Penal Code, was merely a change in procedure which could be made applicable to a prior *offense* without violating the Constitutional prohibition of the passage of *ex post facto* laws —nevertheless, the defendant had the right upon his trial to the benefit of the law as it stood at the time of the indictment. Call the amendment a mere change in procedure if you will. Say that the amendment did not de-

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prive prior offenders of any right. Concede that the said amendment is not *ex post facto* as to prior offenses. Even then the defendant still possessed the right to have the indictment quashed upon the ground of actual bias of the grand jurors,—because the Courts of this State have held many times that changes in procedure passed by the Legislature do not affect proceedings that have been instituted prior to the time that the change in the law became effective. In other words, we contend that the amendment of 1911 is not retroactive, and does not have any application to a prosecution by indictment commenced prior to the time that the said amendment went into effect. Section 3 of the Penal Code is identical with section 3 of the Code of Civil Procedure. That section reads "no part of it (the Code) is retroactive, unless expressly so declared." It has always been the law of this State that amendments to the Code which do not expressly declare they shall be retroactive, can not be so construed.

> *Bank of Ukiah* vs. *Moore,* 106 Cal., 673;
> *Cook* vs. *Cockins,* 117 Cal., 140;

The same was true of the Practice Act. It did not affect past transactions. To give the

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Code a retrospective effect would be in violation of all settled rules of construction.

> *People ex rel. Thorne* vs. *Hays,* 4 Cal., 127;
> *Seale* vs. *Mitchell,* 5 Cal., 401.

It has been universally held by the Supreme Court of this State in civil proceedings that an amendment to the Code changing the procedure does not affect proceedings which have been taken at the time the amendment takes effect. In the case of *Pignaz* vs. *Burnett,* 119 Cal., 157, judgment was entered August 22, 1896. At the time of the entry of that judgment, section 939 of the Code of Civil Procedure fixed the time within which an appeal from a judgment might be taken at one year. On March 3, 1897, an amendment to that section was approved which reduced the time allowed for an appeal to six months. On July 31, 1897, the appeal in question was taken. The Supreme Court held that the amendment was limited in operation to judgments thereafter entered and had no operation upon judgments entered before its passage. Justice Temple who delivered the opinion of the Court says in part:

> "At the time the judgment was entered an appeal could be taken from a final

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judgment of any time within one year after its entry. March 3, 1897, section 939 of the Code of Civil Procedure was so amended as to give only six months after the entry of judgment within which an Appeal can be taken. At the time of the amendment the period of six months had already elapsed since the entry of the judgment; there remained, however, five months of the time allowed for taking an appeal under the code before the amendment. The act took effect sixty days after its passage, at which time nine months had elapsed since the entry of judgment. The appeal was taken after that time, but within the period of twelve months from the entry of judgment. If the amendment operated retrospectively, it cut off the right of appeal immediately upon the taking effect of the act, affording no opportunity whatever thereafter for the exercise of this privilege, and depriving this Court, so far as the legislature can, of its jurisdiction in the cases upon which it would so operate.

"To make this Statute applicable to judgments entered before it went into effect is to give it a retroactive effect. That it is no objection to the validity of a Statute to say that it is retrospective in its operation. The question is, Is the amendment an *ex post facto* law, or does it impair the obligation of contract? And also, perhaps, whether it deprives anyone of vested rights. If it does none of these things it is no objection to it, that it applies to pending cases or past transactions.

"Laws which create new obligations, or impose new duties, or exact new penalties because of past transactions have been uni-

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versally reprobated by civil and common law writers, and it is to be presumed that no statute is intended to have such effect unless the contrary clearly appears. This is especially so where to give the statute retrospective effect would work manifest injustice. Existing laws, it is said, enter into and become part and parcel of contracts to which they are applicable. How obvious it is therefore, that all should be able to contract obligations with knowledge of the laws which thus enter into them.

"It is quite obvious that great hardship is likely to result if a retroactive effect is given to the statute. One may be presumed to know the laws of the land, but the very instant this amendment took effect, if it be retroactive, the right of appeal was cut off at once. No time whatever was given to appeal in those cases in which judgments had been entered six months or more previously. Unless it is absolutely necessary, we should not impute such an intention to the Legislature. In view of the construction which has almost invariably been given to statutes of this character, I feel sure that the Legislature intended that its operation should be limited to judgments thereafter entered."

This decision was cited and approved only the other day by the Supreme Court in the case of *San Francisco & Oakland Terminal Railways* vs. *The Superior Court of Alameda County* (S. F. No. 7795, May 4th, 1916, 51 Cal. Dec., 549), which holds that the pro-

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vision of section 660 of the Code of Civil Procedure as amended in 1915, which limits the power of a trial Court to grant a new trial to a time within three months after the verdict of the jury or service on the moving party of notice of the decision of the Court, is not applicable to proceedings on motion for a new trial initiated prior to the amendment and pending at the time it became operative.

Following the reasoning in these cases we inevitably reach the following result: That the repeal of sub-division 4 of Section 995 of the Penal Code did not have a retrospective effect and did not deprive a person who was indicted prior to the time that the amendment went into effect of his right which existed at the time of the indictment to have the same quashed and set aside upon the ground that the grand jurors who presented him were biased and prejudiced against him.

THE PRESENCE OF AN UNAUTHORIZED PERSON DURING THE SESSION OF THE GRAND JURY.

As previously stated in the introductory portion of this brief the examination of the witnesses who testified before the Grand Jury was chiefly conducted by Mr. Earl Rogers, who was acting as counsel for the Merchants & Manufacturers' Association in Los Angeles

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and for the Los Angeles Times. It was contended by the defendant that the presence of Rogers in the Grand Jury room during the proceedings was unauthorized by law and the motion to quash the indictment was based in part upon that ground. It was contended by the prosecution, on the other hand, that Rogers was a duly appointed, qualified and acting Deputy District Attorney of the County of Los Angeles, and as such had a right to be present at the hearings before the Grand Jury and to take part in the proceedings. Section 995, sub-division 3 of the Penal Code provides that the indictment must be set aside by the Court upon motion of the defendant when a person is permitted to be present during the session of the grand jury and when the charge embraced in the indictment is under consideration except as provided in section 925. Section 925 of the Penal Code reads as follows:

> "The grand jury may, at all times, ask the advice of the Court, or the judge thereof, or of the district attorney; but unless such advice is asked, the judge of the court must not be present during the sessions of the grand jury. The district attorney of the county may at all times appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable by them, and may interrogate witnesses before them whenever he thinks it necessary; the grand jury on the demand

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of the district attorney, whenever criminal causes are being investigated before them must appoint a competent stenographic reporter to be sworn and to report the testimony that may be given in such causes in shorthand, and to transcribe the same in all cases where an indictment is returned. If an indictment has been found against a defendant, a copy of the testimony given in his case before the Grand Jury, shall be served upon him within five days after the discharge of the Grand Jury, or if the Grand Jury has not been discharged, at least five days before the cause is set for trial. The services of such stenographic reporter constitute a charge against the county. No person other than those specified in this and the succeeding section is permitted to be present during the session of the Grand Jury, except the members and witnesses actually under examination, and no person must be permitted to be present during the expression of their opinions, or giving their votes upon any matter before them. The Grand Jury or district attorney may require by subpoena the attendance of any person before the Grand Jury as interpreter, and such interpreter may, while his services are necessary, be present at the examination of witnesses before the Grand Jury. The services of such interpreter constitute a charge against the county."

Under the provisions of the sections herein above quoted it is very plain that the indictment should have been quashed because of the presence of Rogers during the deliberations of

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the Grand Jury, unless Rogers was a duly appointed, qualified and acting deputy District Attorney. In this behalf the affidavit of the defendant Schmidt reads as follows:

> "That on October 1st, 1910, after the destruction of said building, the Times-Mirror Company, H. G. Otis and Harry Chandler proclaimed and published to the world that the said building had been destroyed by human agency and particularly by the enemies of industrial freedom and by the members of Organized Labor and Trades Unions; that the said Times-Mirror Company, H. G. Otis and Harry Chandler began immediately to try to convince the people that such was the fact and began immediately to try to fix the blowing up of the said building and the destruction of the lives in the said building upon members of Organized Labor and Trades Unions, and ever since have continued to direct their every effort and endeavor to fix the perpetration of the destruction of said building and the lives therein upon members of Organized Labor and Trade Unions, and that they have spent a vast amount of money in endeavoring so to do; that on October 1st, 1910, immediately after the destruction of said building and the lives of the people therein, the said Times-Mirror Company, H. G. Otis and Harry Chandler hired and employed Earl Rogers, a prominent lawyer of Los Angeles, to assist the various detectives in bringing about the arrest of parties whom they, the said Times-Mirror Company, H. G. Otis and Harry Chandler, believed or pretended to believe were guilty of the

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destruction of said property and lives; that the said Earl Rogers entered immediately into employment and continued to be so employed until a few days before the presentation of the indictment herein; that the said Earl Rogers appeared before the said Grand Jury on the 2nd day of November, 1910, and was sworn as a witness and gave testimony upon the investigation then pending before the said Grand Jury concerning the destruction of the Times building and the lives of the individuals therein and concerning the charge embraced in this indictment against this defendant.

"That during the time that the said Earl Rogers was so testifying before the said Grand Jury he gave illegal, hearsay, opinion and secondary evidence as to facts concerning which he was testifying, and did not give the evidence that was the best evidence in degree concerning the facts to which he was testifying; and thereafter, after he had given his testimony as a witness before the said Grand Jury, and on many other occasions thereafter and subsequent thereto during the course of said examination, the Grand Jury permitted the said Earl Rogers to be present before it when it was examining into the said charge and while witnesses were on the stand giving testimony concerning said charge, and permitted the said Earl Rogers, at said times, to question the witnesses who were giving their testimony before the Grand Jury with reference to the said charge and with reference to the charge embraced in this indictment against this defendant, and permitted the said Earl Rogers to dispute and wrangle with said witnesses, and abuse and intimi-

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date said witnesses and to accuse said witnesses of lying when their testimony did not satisfy Mr. Rogers; and permitted the said Earl Rogers, during the sessions of said Grand Jury, when they were investigating the said charge, to express his opinion on questions of fact and as to the weight and sufficiency of evidence; and affiant says that the said Earl Rogers did attempt to influence, and did influence, the said Grand Jury in the finding of this indictment by himself giving illegal, hearsay, opinion and secondary evidence concerning the matters under investigation and by his questioning and producing from witnesses before the said Grand Jury upon said investigation illegal, hearsay, opinion and secondary evidence; and said Earl Rogers did, by his presence, acts and conduct, induce said Grand Jury to receive and consider evidence, both from himself and many other witnesses upon said investigation, that was not legal and that was not the best evidence in degree, but that was illegal, hearsay and secondary evidence.

"And affiant says that in the investigation of the charge against this defendant set out in this indictment the Grand Jury did, on many occasions, both when the said Earl Rogers was present and when he was absent, receive evidence from witnesses that was not legal and evidence that was not the best evidence in degree, and did receive illegal evidence and hearsay evidence and secondary evidence as to the charge and matters concerning which they were investigating. For particular details of said testimony and conduct of said Rogers, affiant hereby refers to the copy of said testimony

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taken before the Grand Jury and filed with the Clerk of this Court, and which by reference is made a part of this affidavit."

The affidavit of the Grand Jurors which we have previously referred to, does not contain any specific denial of the matters alleged in the affidavit of Schmidt. It merely contains the statement "that Earl Rogers was regularly and "duly authorized to be present during the ses-"sions of the said Grand Jury by reason of "the fact that he was at all of said times a "duly appointed, qualified and acting deputy "district attorney in and for the said County "of Los Angeles, State of California."

This affidavit, of course, is a mere statement of the legal conclusion of the person who drafted it. As a traverse of the facts set forth in the affidavit of the defendant, it is utterly worthless. It will be necessary therefore to refer to the further proof that was taken upon this subject in order to determine the precise status of Earl Rogers in the investigations of the Grand Jury. On the 6th of April, 1915, during the progress of the hearing upon the motion to quash the indictment, John D. Fredericks who was District Attorney of Los Angeles County at the time of the Grand Jury investigations and the return of the indictment, was called as a witness by counsel for the de-

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fendant. During his testimony the following proceedings were had:

"MR. APPEL—Mr. Fredericks, you were the district attorney of the County of Los Angeles during the years 1910 and '11?

"A. Yes, sir.

"Q. And referring back, for the purpose of having a starting point, you remember about the time of the explosion of the Times Building occurred?

"A. Yes. Sometime in September—A. October the 1st, I think it was, 1910.

"Q. And shortly after the explosion, there was a grand jury convened and commenced its investigations of that accident.

"A. I am not sure what the record is, whether there was one already in session or one called for that particular purpose.

"Q. Anyway, a grand jury commenced about October——

"A. There was one in session shortly after that, whether it was called then or not, I don't know.

"Q. Now, prior to the bringing of any indictments with reference to that matter you were here in the county?

"A. Yes.

"Q. And you were then in your office in attendance upon your duties as district attorney?

"A. Yes. Of course, I was away occasionally, but I was here generally.

"Q. Well, you had—at that time you had a full force of deputies, did you not?

"MR. KEYES—That is objected to as immaterial and irrelevant and incompetent;

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calling for a conclusion or opinion of the witness.

"THE COURT—Objection sustained.

"MR. APPEL—Except. And will you be kind enough to state whether or not you, at that time, had any vacancies in your office to which you desired the appointment of any expert or assistant prosecuting attorney or district attorney?

"MR. KEYES—The same objection to that question.

"MR. DAVIS—What was that objection, Mr. Keyes?

"MR. KEYES—Incompetent, irrelevant and immaterial.

"THE COURT—Objection sustained.

"MR. APPEL—Except. Your Honor, the reason why these objections are sustained—now, we understand a little about what the authorities hold with reference to having a person before a grand jury who has not been a regular district attorney or regular deputy. The point we want to illustrate to your Honor is that at that time there was no vacancy and that Mr. Rogers was appointed under certain conditions, and that the law does not permit an appointment of an assistant district attorney or private prosecutor under those conditions. Now, these facts which I am trying to get from Mr. Fredericks is with reference to how the appointment of Mr. Rogers came and how he came before the grand jury as an assistant district or whatever his title may have been, and as to whether or not they generally prove anything or not, that is purely a question of law, but as to the facts as to how he came to get in there, we ought to be allowed to bring

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out for the purpose of claiming afterwards that the law is and what it should be. Now, I don't say that every time I ask a question here, that it is irrelevant; it may be irrelevant or may be not. It is relevant to determine the proposition whether he had any business before the grand jury or not. Now, he may have been properly before the grand jury in the capacity of a deputy district attorney, but the moment that he acted before the grand jury in any other capacity, or the moment that he transcended his duty as deputy district attorney and made speeches there and insinuations before the grand jurors and gave a lot of hearsay statements and incited them to prejudice, then we contend that he had no business to be there, and that his advice to them to find an indictment was not a proper advice, and if there is any question at all about our objection, your Honor, we might as well say that we are ready to show the decisions under which we are proceeding. We are not here proceeding simply for delay, but we are here in good faith to make a record here to show that this man Rogers had no business there before the grand jury, and as we have already introduced in evidence his statements and his speeches and his testimony which gave expression down there before this grand jury, it is proper to establish that he was not placed there in a regular way; that he was brought there under certain circumstances of which Mr. Fredericks has knowledge of, and his testimony is very short in reference to that; that is what I am trying to do. As to whether it is immaterial or not to the issues is a question which

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your Honor can best decide when we discuss the law.

"MR. KEYES—We have no objection.

"(Discussion.)

"THE COURT—Well, you may proceed with the examination of the witness.

"MR. APPEL—As to how the appointment came about?

"THE COURT—How this appointment was made.

"MR. APPEL—That is all that I was proceeding to do.

"Q. Now, after the investigation commenced before the grand jury, Mr. Fredericks, do you remember of having made a written appointment with Mr. Rogers as—an appointment——

"A. I am trying to follow the question now.

"Q. Do you remember having signed an appointment or a statement appointing Mr. Rogers as a deputy district attorney?

"A. I have a memory of that, yes.

"Q. Do you remember how that appointment came about?

"A. Well, now, that is a very general question. I don't know how fully you want me to go into the answer.

"Q. I want you—I want to know whether you proposed it yourself of your own seeking, or whether someone—if any one demanded it.

"A. I don't remember that. If there is a record of it, as there seems to be—I notice you have been quoting a record there—why, of course. I didn't know what I was subpoenaed for or I might have refreshed my memory.

"Q. Do you remember whether or not

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a communication was sent to you purporting to be from the grand jury requesting that you should appoint Earl Rogers as one of the assistants during the time of the investigation?

"MR. KEYES—Now, we object to that on the grounds heretofore offered; it is irrelevant and immaterial to any issue here in view of what the witness has already answered, that he did make the appointment. The reasons for it, it strikes me, would be immaterial.

"THE COURT—Well, he may answer the question, but I will want to see authorities on the materiality of it on the argument.

"MR. APPEL—All this evidence that we seek to bring out here, you know, your Honor, is to be considered under the law and under authorities, and if it doesn't bear out our point, and if the law is against it, it won't injure anyone, when we are trying to put the facts before you to raise an issue here, a question of law, that is all there is to it.

"THE COURT—I have already ruled.

"A. If you have a copy of such letter, Mr. Appel, that I could see, it might refresh my mind.

"MR. APPEL—With the permission of the Court, to refresh your memory, I am going to attract your attention to what purports to be the minutes of the grand jury of November 2nd, 1910, so as to refresh your memory. I haven't got the original here, but we want to get at what you remember about it; if I be permitted to refresh your memory that way.

"A. Well, now, what was the question?

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"THE COURT—He wants to see whether you received a communication from the grand jury requesting you to appoint Mr. Rogers, in substance?

"A. I suppose I must rely on my memory, and I can't bring up at this time whether I did receive such or not. Now, I will answer your question on what I believe to be undoubtedly the fact, but if I am asked from memory, it doesn't come to my mind just now whether I received such a request or not, from the grand jury. Of course, there is—if those are the minutes—I assume they are—there is evidence that would satisfy my mind that I had received such a request.

"MR. APPEL—Now, have you any recollection at all about having made the appointment upon any other way than appears from the minutes here?

"A. Oh, I know, in a general way, the reasons why I appointed him.

"MR. APPEL—If I am permitted, I will put it very shortly. Isn't it a fact that Mr. Rogers, as we all concede here, appeared as a witness before the grand jury, and after he had testified there in the presence of Mr. McComas, that a request came to you from—either directly from some member of the grand jury, or from some other official requesting that you should appoint him as an attorney there to carry on the investigation?

"A. I think they consulted with Judge Bordwell in regard to it, as those minutes show; I think in regard to the appointment—I will say this, if I did receive a request from any one to appoint him, it was from the grand jury. If I received

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any such request it was from the grand jury.

"Q. What is your recollection as to whether you appointed him, either from—of your own choosing, your own selection?

"A. There were two reasons for my appointment; one of them would be the reason you suggested there, if what was brought to my mind, probably had its influence. There was another reason, to-wit, his intimate knowledge of the intricate facts in the case which would make it advantageous that he should place them before the jury himself, and that we should get before that jury everything that he knew. Now, just which one of the reasons weighed heaviest with me, I don't know. I wanted to get before that jury everything that Rogers knew. I thought probably that was the best way to get it.

"Q. Did you receive any request from any one through the office of the Merchants and Manufacturers' Association in respect to that?

"A. I don't think so. No, I don't think so. I am quite sure I didn't.

"Q. Well, now——

"A. That is, direct, you understand.

"Q. Now I understand. And he did appear before the grand jury as a witness?

"A. He appeared there as deputy, and I assume from what you have read of the record there, which has gone out of my mind, also, he appeared as a witness.

"Q. How was he paid?

"MR. KEYES—Wait a minute. We object to that as incompetent, irrelevant and immaterial.

"THE COURT—Objection sustained.

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"MR. APPEL—Have you any knowledge whether or not the County of Los Angeles or the State of California paid him for his services?

"MR. KEYES—Same objection to that question.

"THE COURT—Sustained.

"MR. APPEL—Now, wasn't he at the time you appointed him, and did you not know, that he had been hired as attorney or a hired detective of the Merchants and Manufacturers' Association for the purpose of prosecuting union men here—fixing the crime upon organized union labor, didn't you know that?

"MR. KEYES—We object to that as irrelevant and immaterial and calling for a conclusion.

"THE COURT—Answer the question.

"A. Let me have it now. (Last question read.) That question is so long and incompasses so many things, I will have to say no.

"MR. APPEL—To any portion of it would you answer yes?

"A. Well, now, when I say I know, you understand, I must give hearsay, because I have no knowledge of any contracts or anything of that kind. I assume that he was employed by the Merchants and Manufacturers' Association for the purpose of ascertaining who had blown up the Times Building, and who had put the dynamite in front of Mr. Zeehandelaar's place, and who had put the other one in front of Mr. Otis' place. I assume that he was employed for that purpose. I didn't know and don't know now whether or not he was employed by them prior to that or in any other

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capacity or in any controversy they may have had with union labor, I don't know that.

"Q. Now, did you attend the meeting of November 2nd, 1910, a meeting of delegates from the Chamber of Commerce, the Merchants and Manufacturers' Association, the Times-Mirror Publishing Company and the Founders and Employers' Association held in this city where Mr. Rogers appeared also, to your recollection?

"A. No. Where was it? Do you know where such meeting occurred?

"Q. In the Chamber of Commerce.

"A. No. I was never present at any such meeting.

"Q. Well, Mr. Brown was then your chief detective, wasn't he?

"A. Well, I don't know what you mean by 'then,' but Mr. Brown was my detective or the detective in the employ of the district attorney's office for a considerable length of time before the Times explosion and until a year or so ago.

"Q. When I say at that time, I mean immediately after the explosion and before November 2nd?

"A. Yes, he was.

"Q. Well, he went out of your office with Mr. Rogers up North before Mr. Rogers appeared before the grand jury; they were both investigating the matter.

"MR. KEYES—Objected to upon the ground that it is irrelevant, incompetent and immaterial.

"THE COURT—Yes, objection sustained.

"MR. APPEL—I offer to show now that Mr. Rogers is a hired detective for the

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people I have already mentioned here, the Chamber of Commerce, the Merchants and Manufacturers' Association, the Times-Mirror Publishing Company and the Founders and Employers' Association, who were then prosecuting union labor men in this city, and had a number of them in jail; was working together with Mr. Brown, a detective in the district attorney's office, and was paid—was then in the employ of these private institutions, and for the purpose of obtaining evidence and fixing the alleged crime here upon union labor people, and Mr. Fredericks was kept informed of the movements by reports from Mr. Brown.

"THE COURT—The offer is refused.

"MR. APPEL—We except.

"Q. You had all the deputies—at the time you appointed Mr. Rogers you then had all the deputies which was provided by law—the number of deputies that were provided by law or may appoint, you then had them all appointed and were——

"MR. KEYES—Wait a minute.

"A. I think the record would have to show that.

"MR. KEYES—We object upon the ground it calls for a conclusion or opinion, and not the best evidence, a legal conclusion.

"(Discussion.)

"THE COURT—The objection will be sustained.

"MR. APPEL—Well, then, we offer to show by the witness that he understood, and he knew at that time—at the time of the appointment of Mr. Rogers, that he was entitled, under the law, to appoint a certain stated number of deputies authorized by law; that he might make, and that he

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had prior to the appointment of Mr. Rogers, that he had appointed all of these deputies which were allowed by law for his appointment; at that time he had no vacanices and that the appointment of Mr. Rogers was in excess of the number allowed to be appointed by law.

"MR. KEYES—We make the same objection to the offer that was made to the question.

"THE COURT—Objection sustained.

"MR. APPEL—Take an exception. Whatever Mr. Rogers did before the grand jury, was it under your direction?

"A. Oh, yes—now, you understand, inasmuch as a deputy is under the direction of the head. It is more or less nominal.

"Q. Under your employ and direction?

"A. Yes, sir; it is more or less nominal.

"Q. Did he make any reports to you?

"A. I used to talk to him every day about it; he would discuss the witnesses and——

"Q. And whatever he said before the grand jury, whether they were facts or hearsay, or whatever opinions he gave, you approved of them?

"MR. KEYES—That is objected to as immaterial and irrelevant.

"THE COURT—Sustained.

"MR. APPEL—Mr. Fredericks, were you advised or informed of the facts that Mr. Rogers testified to before the grand jury before you appointed him?

"MR. KEYES—That is objected to as immaterial, irrelevant and incompetent to any issue here. Goes to the motives of the appointment.

"THE COURT—Objection sustained.

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"MR. APPEL—We except.

"MR. DAVIS—One question we would like to ask of the captain. Capt. Fredericks, was the appointment of Mr. Rogers in this instance the result of your desire and of your initiative to have him appear before the grand jury, or did it result from the desire of other people expressed to you?

"MR. KEYES—The same objection to that question, immaterial, irrelevant and incompetent.

"THE COURT—Overruled; answer the question.

"A. It was the result of my judgment. I don't know whether it was the result of my initiative or not. Rather inclined to think from these documents here that it was not.

"Q. It was the result of your desire to have him appear, and not the desire of other people?

"A. No, the result of my judgment; not the result necessarily of my initiative. I passed on it and I am responsible for it.

"MR. APPEL—Well, Mr. Fredericks, isn't it a fact that the jury insisted, the grand jury insisted upon his appointment?

"MR. KEYES—We submit that has been asked and answered. Object to it on that ground; it has been gone over.

"THE COURT—I think that has been covered. Sustained.

"MR. APPEL—We take an exception.

"Q. Were you not informed by your deputies that in a discussion before the grand jury that jurors made the statement or words to this effect?

"A. Made the statement or words?

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"Q. Right in the grand jury at the time—I would like to recite the facts 'that we insist on his appointment. That another juror said we had to insist to get him.'

"MR. KEYES—The same objection to that question.

"MR. APPEL—Were you informed of that statement, that is all we want to know?

"A. Was I informed that the statement you have made there was made in the grand jury room?

"Q. Yes.

"A. Well, I would have nothing in the world to hinge that to.

"Q. You don't remember?

"A. I don't recollect whether I was so informed or not.

"Q. You had deputies that were perfectly competent to conduct the investigation before the grand jury?

"A. Yes, so far as competency was concerned. I don't think there is any doubt about that. Mr. Rogers had some particular information and had done some particular labor that may have made him valuable along that line to the people—to the investigation."

Reporter's Transcript, pages 7883-7896.

The facts surrounding the alleged appointment of Mr. Rogers as a deputy district attorney seem to be as follows:

That Rogers was summoned as a witness and gave testimony before the grand jury on the morning of November 2nd, 1910; that while

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he was giving his testimony one Charles A. Wier, a member of the grand jury made the suggestion in the grand jury room that Mr. Rogers be made a special deputy district attorney to present the evidence which he had claimed in his testimony to have discovered. Thereafter and during the noon hour of the same day, District Attorney Fredericks executed the following purported commission:

"STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES—SS.

I, J. D. Fredericks, District Attorney of said County do hereby appoint Earl Rogers a deputy district attorney.

Witness my hand this 2nd day of November, 1910.

(Signed) J. D. FREDERICKS."

"STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES—SS.

I do hereby solemnly swear that I will support the Constitution of the United States and the Constitution of the State of California, and that I will faithfully discharge the duties of deputy district attorney, according to the best of my ability.

(Signed) EARL ROGERS.

Subscribed and sworn to before me this 2nd day of November, 1910.

C. G. KEYES, Clerk."

Clerk's Transcript, Vol. I, page 134, line 15, to page 135, line 6.

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Following the execution of this alleged appointment Earl Rogers returned to the grand jury room, examined numerous witnesses, and was present during the deliberations of the grand jury which culminated in the indictment of this defendant. The defendant offered to prove, and no attempt was made by the prosecution to deny it, that Earl Rogers was in the employ of Merchants and Manufacturers' Association of Los Angeles and that on the 24th of October, 1910, he received from F. J. Zeehandelaar, the secretary of the said Association, a letter in regard to the standing of some of the grand jurymen. This letter is set forth in Vol. I of the clerk's transcript at page 132, line 1, to 133, line 7. Various persons summoned for the grand jury are described in this letter by such phrases as "personal friend of mine", "believe him to be on our side", "absolutely O. K.," and "one of our strongest admirers". In other words, it is shown by overwhelming evidence, which the prosecution made no attempt to contradict, that Rogers was acting in the matter to be investigated as the personal and private attorney for this Association. Under the provisions of section 925 which we have quoted above the only persons permitted to be present at a session of the grand jury are the district attorney, the stenographic

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reporter and, where the same is necessary, during the examination of a witness, an interpreter. The grand jury may also call upon a judge of the Court for advice, but unless his advice is asked the judge must not be present. It must be borne in mind that at common law the sessions of a grand jury, were, in theory at least, absolutely secret. The right of the district attorney to be present is of purely statutory origin. As the grand jury is in contemplation of the law a fair and impartial body whose decisions should not be influenced by the suggestions of counsel, it stands to reason that any invasion of the functions of that body or any influence brought to bear upon it by the presence of an unauthorized person must of necessity render any indictment returned by such a grand jury subject to attack upon a motion to quash. While misconduct of the district attorney is not a ground for setting aside an indictment, it has been said by our courts that the district attorney should refrain from expressing an opinion to the grand jury as to the effect of evidence or the sufficiency thereof.

People vs. *Hatch,* 13 Cal. App., 521.

At common law the practice of allowing counsel for the Crown to be present at the sessions of the grand jury was frequently con-

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demned by some of the most eminent of the English judges. "I know not," said Sir John Hawles, "how long the practice in that matter "of admitting counsel to a grand jury hath "been. I am sure it is a very unjustifiable and "unsufferable one. If the grand jury have a "doubt in point of law they ought to have "recourse to the Court, and that publicly and "not privately, and not rely on the private "opinion of counsel, especially the King's "counsel, who are, or at least behave them-"selves, as if they were parties."

5 How. St. Tr., 972.

While under the statute of this State the district attorney may be present, yet, considering the regard which the law has always had, not only for the secrecy but for the impartiality of the proceedings of the grand jury, this right should not be extended to a mere private counsel even though he be especially deputized for the occasion. It is not necessary, however, to indulge in any speculations as to this question. Section 995 of the Penal Code expressly gives the defendant in a criminal case the right to have the indictment against him quashed and set aside where an unauthorized person is permitted to be present in the grand jury room. This section was duly invoked by the defendant

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in his motion to set aside the indictment in this case and that motion was denied. His counsel offered to prove that at the time of the alleged appointment of Earl Rogers, there was no vacancy in the office of the district attorney of Los Angeles County. In this State the appointment of deputies is regulated by statute. The power of the district attorney of Los Angeles County to appoint deputies is derived from Section 4230, subdivision 7, of the Political Code which reads as follows:

> "The district attorney, six thousand dollars per annum; provided, that in counties of this class, there shall be and there is hereby allowed to the district attorney, the following deputies, employees and assistants who shall be appointed by the district attorney of said county and who shall be paid salaries as follows: One assistant district attorney at a salary of two hundred and seventy-five dollars per month; one chief deputy at a salary of two hundred and fifty dollars per month; four deputies at a salary of two hundred and twenty-five dollars per month each; seven deputies at a salary of two hundred dollars each per month; one clerk at a salary of one hundred and fifty dollars per month; two detectives at a salary of one hundred and thirty-five dollars each per month; two process servers at a salary of one hundred dollars each per month; five stenographers at a salary of one hundred dollars each per month; one messenger at a salary of sixty dollars per month; the auditor shall

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audit and allow and the treasurer shall pay to the district attorney the sum of fifty dollars per month on the first of each month, which shall be for a secret service fund, to be used in detection and prevention of crime by the district attorney; provided, however, that nothing contained in this sub-division shall be construed as limiting the provisions of section 4307; provided further, that nothing herein contained shall be construed to prevent the Board of Supervisors of said counties of this class from employing special counsel, when in the judgment of said Board, the interests of said county require it. The salaries of the assistants, deputies, clerks, stenographers, special counsel, detectives, and employees herein provided for shall be paid by the county in monthly installments at the same time, in the same manner and out of the same fund as the salary of the district attorney is paid."

It is not pretended by the prosecution that there was any vacancy in the office of district attorney at the time of the alleged appointment of Mr. Rogers. The defendant was not permitted by the trial judge to prove that there was no vacancy. When Captain Fredericks was called to the stand and interrogated upon this subject, the trial Court sustained objections to the questions. There is likewise no pretense, and there is nothing in the record to show, that the Board of Supervisors of the County ever employed Mr. Rogers as special counsel

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in this case. The uncontradicted evidence is that he was appointed at a time when there was no vacancy in the office of the district attorney, and when he was employed as a special prosecutor by private interests. Laying aside all discussion as to the fundamental fairness and justice of such proceeding, and giving the defendant merely the letter of the statute, he had a right to have his motion granted because of the presence of Mr. Rogers during the deliberations of the jury which indicted him.

We are well aware of the fundamental rule which has been pronounced so often by the courts of this and other States, that where one is a *de facto* public officer, his right to the office can not be questioned in a collateral proceeding. That the acts of a *de facto* officer can not be collaterally impeached is a fundamental rule of the common law of England and the United States.

Ex Parte Ward, 173 U. S., 452.

But this doctrine has no application to the case at bar. Mr. Rogers was not a *de facto* deputy district attorney. At the time of his appointment there was no vacancy in the office of the district attorney of Los Angeles County. Therefore, if he could be held to be a *de facto* deputy district attorney, we would have the

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impossible situation of two *de facto* incumbents of a position. This is a situation which the courts have repeatedly said cannot exist. In the case of *McKannay* vs. *Horton,* 151 Cal., 711, the Supreme Court of this State says:

> "There cannot be two *de facto* incumbents of one office at the same time, and where two are acting simultaneously, each under claim of right, that one alone will be recognized who appears to have the better legal title."

The rule is sometimes stated to be that the title to the office *de jure* draws to it the possession *de facto.*

> *Morton* vs. *Broderick,* 118 Cal., 486;
> *State* vs. *Atlantic City,* 42 N. J. L., 332;
> *Braidy* vs. *Theritt,* 17 Kans., 468;
> *Hamlin* vs. *Kassafer,* 15 Oregon, 456;
> *State* vs. *Draper,* 48 Mo., 213;
> *State* vs. *Johnson,* 35 Florida, 2.

It is unnecessary to further pursue the argument of this question. That Mr. Rogers was a private attorney and investigator, that he was never legally appointed to office, that he was never even a *de facto* deputy district attorney of Los Angeles County,—these facts are self-evident from the proceedings hereinabove set forth. He was therefore an unauthorized per-

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son within the meaning of subdivision 3 of section 995, and the motion of the defendant to quash the indictment should have been granted upon that ground.

THE TRIAL JURY.

The defendant in this case, like every person accused of crime, was entitled to be tried by a fair and impartial jury. A trial before a biased and prejudiced jury, the members of which have pre-judged the defendant's guilt, is no trial at all. The right of trial by jury, which is guaranteed to every defendant in a criminal case by the Constitution and the laws, means the right to a trial by an impartial and an unprejudiced jury. In other words, the defendant is entitled to have his rights guarded and protected by the calm, dispassionate judgment of an impartial tribunal. It is the contention of the defendant in this case that he was tried by a biased and prejudiced jury, that the trial judge repeatedly disallowed challenges for cause which should have been allowed, and that he was compelled to use peremptory challenges upon disqualified jurors, and ultimately to face a jury every member of which had formed an opinion as to the merits of the case, which it was not shown could be set aside.

Before proceeding to a detailed discussion of the individual jurors who were challenged

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by the defendant, it may be well to consider the present condition of the law of this State applicable to the case. Jurors to be competent must be indifferent, having no bias or prejudice for or against either party. The juror must be indifferent both as to the person and the cause to be tried and must be so at the time of the trial. This, we believe, to be an accurate statement of the common law rule. The common law required that the jurors one and all should, as between the Crown and the defendant, "stand indifferent as they stand unsworn". Standing indifferent was held to mean that the mind is in a state of neutrality as respects the person and the matter to be tried; that there exists no bias for or against either party in the mind of the juror calculated to operate upon him; that he goes to the trial uncommitted and prepared to weigh the evidence in impartial scales.

> *People* vs. *Vermilyea,* 7 Cow. (N. Y.), 108.

Bias in a juror has been defined as "being "under an influence which so sways his mind "to one side as to prevent his deciding the "cause according to the evidence."

> *Haugen* vs. *Chicago etc. Railroad Co.,* 53 N. W., 769.

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In *People* vs. *Reyes,* 5 Cal., 349, the Court says:

> "Wherever the right of trial by jury exists the law in all cases contemplates that each and every juror who sits in a cause should have a mind entirely free from all bias or prejudice of any kind whatsoever. In order to arrive at the condition of the person's mind, who is offered as a juror, a party is permitted to ask of the person himself, questions, answers to which may tend to show whether he is prejudiced or not in the cause which he is about to undertake to decide. If not satisfied with his answers, he can charge the person offered as a juror with actual bias. Prejudice is a state of mind which in the eyes of the law has no degrees. If the juror is prejudiced in any manner he is not a fit or proper person to sit in the box."

The common law rule as stated in the Reyes case has been modified in this State by section 1076 of the Penal Code, which provides that

> "No person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury founded upon public rumor, statements in public journals or common notoriety; provided it appear to the Court by his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him."

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The meaning of this provision is not at all ambiguous. The law of this State still gives the defendant in a criminal case the right, not only to trial by a fair and impartial jury but to trial by a jury composed of persons who have not formed or expressed any opinion as to the case, with the sole exception that an opinion formed merely from public rumor, statements in public journals or common notoriety does not disqualify a juror who makes it appear to the Court that he can set aside such opinion and act fairly and impartially. If his opinion is formed or derived from any source other than the three enumerated he is disqualified.

The reason for the exception to the common law rule contained in the above quoted section of the Code is doubtless the fact that the tremendous development of the modern press and the vast circulation of modern newspapers which print some of the details, at least, of every important case, make certain phases of the case matters of common notoriety. As is well said by Justice Cooper in *People* vs. *Ruef*, 14 Cal. App., 593:

> "In these days of modern journalism the newspapers publish everything, particularly in regard to criminal cases of great notoriety or involving some private scandal that will furnish food for the eager multitude.

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> To hold that the publication of the evidence of witnesses given before a grand jury or a committing magistrate by questions and answers by an enterprising public journal would disqualify a juror who had formed or expressed some kind of an opinion upon it, notwithstanding it was clearly made to appear that he could and would, notwithstanding such opinion act impartially and fairly, would in many cases make it almost impossible to procure a jury. All intelligent people read public journals, at least to some extent; and no intelligent man can read the statements concerning the commission of a crime of great notoriety, or even hear the general public talk about such crime, without forming, and in many cases also expressing an opinion about it. But in most cases jurors are honest in their intentions to do what is right; and if they are intelligent and fit to be jurors they will discard any opinion that they may have as to the merits of the case when such opinion is not based upon knowledge of some fact, or where their minds are not so biased by the facts as to disqualify them."

But, as we have previously stated, the exceptions set forth in section 1076 of the Penal Code are the only exceptions to the common law rule. The subject is discussed very elaborately and with great ability by Justice Henshaw in *People* vs. *Helm,* 152 Cal., 532. We shall quote at considerable length from that decision for the reason that some of the same questions which arose on the challenges to the

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trial jurors in this case also arose in the Helm case. Indeed, we believe, that the Helm case lays down principles which ought to be followed by every trial judge in passing upon the fitness and qualifications of veniremen. The learned Justice who wrote that opinion says in part as follows:

> "The modification of the common-law rule which has been worked by section 1076 of the Penal Code, has often been the subject of consideration. The common-law rule which demanded the strictest impartiality upon the part of each individual juror, which declared that, one and all, should, as between the crown and the defendant, 'stand indifferent as they stand unsworn,' has, by the section before adverted to, been subjected to an exceedingly narrow change. Jurors must still be indifferent and unbiased. Where, however, a juror has formed or expressed an opinion upon the matter to be submitted to him for consideration, and that opinion, it is established, was formed upon public rumor, statements in public journals, or common notoriety alone, such a man is not necessarily disqualified, provided that it is made to appear to the court, upon his declaration under oath, or otherwise, that he can and will, notwithstanding such opinion, act impartially and fairly in deciding the question to be submitted to him. It will be noted, therefore, that the right to unbiased and unprejudiced jurors is still an inseparable right to the trial by jury guaranteed b your constitution. (*Lombardi* vs. *California Street R. R.*, 124 Cal.,

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317 (57 Pac., 66.)) It is for the trial court in the first instance to determine, and it must be affirmatively made to appear when a juror is shown to have an opinion, that that opinion is founded upon public rumor, common notoriety, or statements in the public journals, and it must further be made to appear to the satisfaction in the first instance of the trial court, that such opinion can and will be absolutely laid aside by the juror, and that so laying it aside he can and will act with strict fairness and impartiality. If it is not made to appear that the juror's opinion is based entirely upon one or all of the three sources of information above named; if it is shown that his belief has its origin in any other source than one of the three enumerated, he is at once as thoroughly disqualified under our Code as he would have been at common law. This proposition is here emphasized because of its exceeding importance and consequence to a defendant. Thus, in *People* vs. *Miller*, 125 Cal., 44 (57 Pac. 770), a challenge was interposed upon the ground of actual bias. The juryman stated that he had read newspaper accounts of the killing, he had heard the matter discussed by persons, but did not know whether such persons assumed to know the facts or not. From what he had heard and read he had formed an opinion rather unfavorable to the defendant—that is, if what he had heard and read was true. He did not know who the witnesses were. It would take a little evidence to remove the opinion he had. The only impression he had about the case was a sort of impressionable opinion formed from

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others. If sworn as a juryman he would try to lay aside his opinion entirely and act solely upon the evidence. He would regard the statements he had heard as of little weight. He had some idea that they might be mistaken. He would take the instructions of the Court as to the law. This Court held that the challenge for actual bias, which was disallowed, should have been allowed, and said: 'Under the Penal Code of this State a single exception is found to the common-law rule, and that exception is declared in section 1076. This juror was clearly disqualified, unless he came within the provisions of the aforesaid section. The exception found in the law covers the single case where the opinion of the juror is founded upon public rumor, statements in public journals or common notoriety, and it further appears to the Court from the declarations of the party under oath that he could and will, notwithstanding his opinion, act impartially and fairly upon the matters submitted to him. The Court is not allowed to hold that a juror is qualified when he is impressed with an opinion as to the guilt or innocence of the defendant, unless that opinion is based alone upon one or more of the cases enumerated in the aforesaid section of the Code. . . . As far as this record discloses, any one of the parties with whom the juror conversed as to the circumstances of the killing may have been an eye witness to the tragedy and an important witness at the trial. The record must show affirmatively a contrary state of facts to this, or the exception of section 1076 to the common-law rule cannot

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be invoked. There is nothing in the evidence which would justify the conclusion that the opinion of the juror was founded alone upon public rumors, statements in the public journals or common notoriety.' So, also, in *People* vs. *Wells,* 100 Cal., 227 (34 Pac. 718), this Court said: 'Omitting from the statement of the juror that these things came to him from parties directly interested in the case, and allowing the examination to rest upon the sole fact that the juror entered the box with an opinion as to the guilt or innocence of the accused, that fact is of itself a disqualification even though the juror should declare to the court under oath that, notwithstanding his opinion, he would and could act fairly and impartially upon the matters submitted to him. The juror would not only be disqualified at common law, but disqualified under the Penal Code for he has not brought himself within the provisions of section 1076; as those provisions require an affirmative showing to the Court that his opinion is based upon public rumor, common notoriety, or statements in public journals. Such a showing is not made in this case.'

"It is thus the established law that it must be affirmatively shown that the opinion which the juror holds was based upon one or all of the matters enumerated in section 1076 or he is disqualified. Again, in *People* vs. *Wiel,* 40 Cal., 268, a juryman on *voir dire* stated that he had a fixed and settled opinion regarding the guilt or innocence of the defendant. He believed what he heard and it would require evidence to remove the opinion now existing in

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his mind. He further stated on cross examination that his opinion was not an unqualified one; that he could try the case and render a verdict according to the evidence, notwithstanding any opinion previously formed in regard to the case. The challenge was denied. This Court said: 'The ruling in disallowing the defendant's challenge to the proposed juror . . . was clearly erroneous. The statement of the juror on his examination-in-chief clearly shows that he had formed an unqualified opinion and belief as to the guilt or innocence of the defendant, notwithstanding his subsequent statement on cross examination,' and, proceeds the Court: 'It appears from the above recital of facts from the record that defendant was driven to a peremptory challenge to relieve himself from this, to him, obnoxious juror, and this contributed to swell the number of peremptory challenges exercised by him to the full extent allowed by law before the panel was full, and before the last man required to complete the jury was called to the box for examination as to qualifications, so that the defendant could not exercise a peremptory challenge upon this last juror, however obnoxious to him he may have been. Thus it plainly appears that the direct result of the disallowance by the Court of defendant's challenge for cause was to contract the number of peremptory challenges to which he was entitled, and that such an error may have been seriously prejudicial to the defendant.' In *People* vs. *Suesser,* 132 Cal., 632 (64 Pac., 1095), this Court said: 'No more now than formerly is the defendant

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compelled to submit his case to a juror who has such an opinion of his guilt as will require evidence to remove, and thus unjustly add to the burden of his defence. . . . Most of the twenty peremptory challenges allowed the defendant were exercised upon proposed jurors who stated upon *voir dire* that if sworn as jurors they would take their seats in the box with the strong opinion against the defendant which it would require evidence to remove. Some said strong evidence. Where such a state of things exists the defendant can not have a fair and impartial trial.'

"These lengthy quotations have been made not alone because they announce the well-settled law in this State, but because they are peculiarly apposite to the evidence touching the examination of jurors presented on this appeal.

"The juror Seklemin testified on *voir dire* that he had read about the case and talked with people a little about it, but with no one who claimed to know anything about the facts. He had heard other people discuss it in his presence. He had formed an opinion in reference to the case, and he had that opinion at the time he was being examined, and it would take evidence to remove it. The opinion went directly to the guilt or innocence of the defendant, and if selected as a juryman it would require evidence to remove it before he could be perfectly free with reference to the trial of the case. This opinion was of such a nature that it would require less evidence, or evidence of less positive nature, to produce a conviction in his mind than it

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would if he had never heard of the case. This juror was challenged for cause, and upon redirect examination and re-cross examination he was asked whether he could 'listen to the testimony from the mouths of the witnesses here and obey the rules that you will hear the judge tell you in the end. Can you do that?' and the witnesses answered, 'I think I can, and I will; yes.' Further he testifies that he thinks he could give the defendant a fair and impartial trial. He thinks he could set aside the opinion that he has, though that opinion is one that would require evidence to remove. 'It certainly would at this time, in my present frame of mind require evidence to remove that opinion from me. I could set that opinion aside very easy, but not until I had heard some evidence on the part of the defendant. That is a positive fact. These statements that I have heard spoken by people I do not know whether they are true or false. I never heard them denied. Have no reason now to think they were untrue and I would continue with that idea in view until the defendant place some evidence before me to the contrary'. Again interrogated by the district attorney as to whether he could not and would not set aside this opinion and obey the instructions of the judge, he answers, 'I think I can; yes'. To the next appeal of the district attorney 'won't you do that if the judge tells you that it is the law?' He answers, 'I think I can set aside my present opinion. I will obey the instructions of the Court, but I have a certain opinion. I think I can set that opinion aside.' The final question is then asked: 'Your conscientious opinion

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now is that you can and will do it, is that right?'

"'A. Yes.'

"The Court then interrogates the juror:

"'Q. And you can do that and will do it?

"'A. I think I can and will.

"'Q. You say you think you can. Do you know that you can?

"'A. I know that I can.'

"The challenge was denied.

"E. R. WINTERS testified that he discussed the case with his neighbors and read it in the papers. The people with whom he talked made statements in a general way about the case. They were people in whom he had confidence and had no reason to disbelieve them, and accepted their statements as true. From these statements and from what he had heard and read generally, he had formed an opinion touching the guilt or innocence of the defendant, and he had that opinion still. 'It is a fixed and settled opinion, at least to the extent that it would require some evidence to remove it. If selected as a juryman I would possibly require the prosecution to convince me beyond a reasonable doubt of the guilt of the defendant. In my present state of mind it would not require as much evidence to convince me of the guilt of this defendant in this case as it would where I had never heard anything about the facts and circumstances. It might require more evidence on the part of the defense to prove the young man innocent than it would in a case I had never heard anything about. Feeling as I do and taking everything into consideration, what I have heard and read,

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and the opinion I have, I do not see why I could not fairly and impartially try the case at this time. From these things I have formed an opinion in a certain way, and that opinion would require evidence to remove it. The mere direction or request on my part on my mind to lay aside that opinion would not be sufficient. I certainly would have to have evidence to lay aside that opinion that I now have.' Further, he testifies that the opinion is formed solely upon statements in the newspapers and public rumors. It is not an unqualified opinion. That he is in a state of mind which would not prevent him from acting with entire impartiality. The challenge for cause interposed by the defense being denied by the prosecution, the juror further testifies, 'By an unqualified opinion I mean that I have not such an opinion, if there was sufficient evidence that it could not be changed. I could change that opinion if there was evidence, but it would require, in my present frame of mind, evidence to change that opinion.'

"'Q. You read of the facts that the defendant had been accused of several different murders?'

"'A. Yes, sir. I don't know as that would tend to prejudice me against the defendant. It would take evidence to remove my opinion now. The opinion is based upon whether or not those things that I heard and read are true or not.'

"Upon this juror the defendant was required to exercise a peremptory challenge.

"E. NEELEY testified that he had read some of the accounts of the preliminary examination of the defendant and never dis-

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cussed the case, only just passing remarks with his neighbors. He had formed an opinion. 'The opinion is one that, until evidence is introduced to remove it I will take with me into the jury box. I would have to have evidence on the part of the defense to change my mind. If the evidence brought out here in this case is different from what I have read that came out at the preliminary examination, then I have no opinion. I don't believe I could act just as fairly and impartially in this case if selected as a juryman as I could in a case that I have never heard anything about. The little impression that I have would bob up until all the evidence was in. I think that opinion or impression that I have would crop up in my consideration of the case. I don't know that I could handle this case as a juryman with the same degree of fairness and impartiality that I could in a case that I knew nothing about. I think that is the way I feel.' This juror was challenged and upon examination by the district attorney he testified that his impression would go into the jury box with him; that he did not think it would prevent him from obeying the instructions of the Court, and he did not think it would prevent him from acting with entire impartiality. If taken as a juror he would give his verdict according to the evidence and the instructions of the Court. He would have to do it. He would do it to the best of his ability. Defendant's challenge for cause was disallowed.

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"GEORGE WELLS read of the case in the newspapers and talked it over with people. He did not know whether the people he talked with knew the facts or not. The people with whom he talked were people in whom he had confidence. He never heard any statements to the contrary from what he heard from them. He did not know whether they were witnesses in the case or not. From what he had heard he had formed an opinion with reference to the guilt or innocence of the defendant. The opinion was based on what he heard and read. 'Do not know whether or not the things I have heard were from people who were witnesses or not. It would require evidence upon the part of the defendant to change my opinion. I could disregard the opinion if I heard different evidence. It is not such an opinion that it would influence me in the rendition of my verdict.' He thinks that he feels that he could meet the qualifications of a juror. If he heard the same evidence he would have the same opinion. It is an opinion such that it would require less evidence to convict the defendant than if he never heard of the case. To that extent it would influence his mind as to the rendition of a verdict until the opinion was changed. The opinion is adverse to the defendant, and based not only upon what he had read but upon the statements of people with whom he had talked. The people were not witnesses that he knew of. He does not know whether they are or not. He could absolutely discard from his mind any opinion and listen to the evidence and nothing else, and upon that alone, under the instructions of the

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Court render his verdict and would not be influenced by the opinion that he then had; but still that opinion is so strong that it would require evidence to remove it from his mind. It is a fixed and settled opinion until it is changed. It is not absolutely changeless. Upon examination by the District Attorney, in answer to the question: 'Well, now, this is based upon newspaper reports and public rumor, is it not?' he said, 'Yes.'

"'Q. Solely based on that?

"'A. Yes.'

"The challenge was denied and the juror peremptorily excused by the defense.

"N. N. NORTON, upon *voir dire,* testified that he had read pretty much all about the case, and conversed in regard to it with his neighbors. He did not know whether the people he talked with knew anything about the facts in the case or not. 'I do not think they knew any more than I read in the papers, but I don't know.' He had an opinion in reference to the guilt or innocence of the defendant. He thought that opinion would go with him into the jury box. It was unfavorable to the defendant, and it would take evidence on the part of the defendant to remove it. Was pretty sure that unless some affirmative evidence was introduced to change his mind with reference to the matter, the opinion would influence him in the rendition of the verdict. On cross-examination he testifies that the opinion formed in his mind is from newspaper reports alone. Asked if he would obey the instructions of the Court and regard only the evidence introduced, he an-

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swers that he would try to do that. Asked whether he would find anybody guilty of a crime on newspaper report, he says he does not think he would. He does not think he would allow an unsworn newspaper report to influence his mind against testimony sworn to in court. Finally, asked by the Court if he could fairly and impartially try the case and make up his verdict solely from the evidence and from the instructions, he answers, 'I think so.' The challenge to this juror was disallowed, and the defendant exercised a peremptory challenge upon him.

"JOHN COBBEY had read and heard of the crime with which the defendant was charged, and attended the preliminary examination of this defendant charged with the murder of Mr. Jackson. He had discussed the case and heard it discussed. He did not know whether the people with whom he talked were witnesses in this case or not. He does not think he talked with any one who was a witness; he does not know that they were. 'Do not think I have talked with any of the officers in the case.' He had formed an opinion as to the guilt of the defendant. He recalled portions of what he heard and statements made in reference to the case. He heard people make statements in reference to this defendant being seen on the White's Bridge road on the afternoon the crime was committed. (Witnesses in the case did testify to seeing the defendant on the White's Bridge road on the afternoon of the day when the crime was committed.) Further, he testifies that the opinion could be removed by

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the same kind of evidence that it was formed with; that it was from public rumors. He rather thought he could try the case fairly and impartially; rather thought he could act with the same degree of fairness, if selected as a juror, as he could in a case where he had never read or heard anything about it. He would require just as much evidence on the part of the prosecution in this case as if he had never formed an opinion or impression. Further, he testifies that, feeling as he does now, it would require evidence of some kind or character to remove from his mind the opinion that he has touching the guilt of the defendant. Challenged, he testified that the opinion is made up of public opinion and newspaper reports. He thinks he could give the defendant the presumption of innocence. He thinks he could wholly discard the impression which he has, not act upon it, and not take it into consideration; but until he does receive some evidence—something of some kind—he would have this opinion, and it would require evidence—sworn or unsworn evidence—something, to remove it from his mind. The challenge for cause to this juror was disallowed and a peremptory challenge exercised upon him.

"J. J. WALSH, examined after the defendant had exercised all of his peremptory challenges, had read of the case, heard it discussed and discussed it with others. He had an opinion, and believed that it would require evidence on the part of the defense to remove the opinion. It was adverse to the defendant. If the evidence was strong enough he could lay aside the opinion. The

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opinion was created from rumors and newspaper reports. 'I could lay aside the opinion provided there was sufficient evidence produced to convince me that it was a mistake I am laboring under. Until that evidence was introduced I would have the opinion. But not necessarily a fixed or settled opinion. It would require evidence on the part of the defendant to remove the opinion, but until it was removed by evidence it would influence me to the extent of requiring evidence to remove it.' Challenge for cause interposed by the defense being denied, the juror further testified that if sworn as a juror he could and would depend upon the testimony as he heard it from the lips of the witnesses and the instructions of the Court.

"With these extracts from the examination of the jurors before us we think little need of comment is required. The jurors were doubtless conscientious in their answers, but as to some it certainly cannot be said that they gave evidence of the impartiality of mind which alone would qualify them. In other instances, while in answer to leading questions from the District Attorney they stated that their opinions were founded upon common notoriety or the public journals, it is made equally apparent that their opinions were not so founded. One had attended the preliminary examination of the defendant, which preliminary examination he thinks was for the murder of Jackson. He talked with a man who saw the defendant at White's Bridge on the afternoon of the homicide. Witnesses did testify to seeing this defendant at White's Bridge at that time. Other jurors testi-

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fied that they did not know whether or not the persons with whom they talked were witnesses, or purported to know the facts. In each and all of these cases there is a failure to establish affirmatively that the opinion of the juror was based wholly upon public rumor or statements in the public journals, or common notoriety. It is not sufficient to qualify a juror that he should be led to say that his opinion is based upon common rumor, when from his own lips the evidence discloses that it is not so founded. As to some of the jurors, it is apparent that they were biased, within the meaning of the code. As to others, it is not made apparent that their opinions were founded exclusively upon matters enumerated in Section 1076 of the Penal Code. 'In criminal cases,' says Judge Cooley (*People* vs. *Holt,* 13 Mich., 224), 'wherein, after full examination, the testimony given upon the challenge leaves a reasonable doubt of the impartiality of the jury the defendant should be given the benefit of that doubt.' "

We have set forth, in the foregoing quotations, Justice Henshaw's entire summary of the evidence that was produced upon the examination of the jurors in the Helm case before setting forth the evidence taken on the examination of the talesmen in the case at bar, so that this Court may contrast the rules laid down in the Helm case with the proceedings followed in the selection of the Schmidt jury. There is even later authority to the same effect; namely,

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that before a juror who has formed an opinion can qualify for service it must be shown that his opinion is within the exceptions provided by section 1076. In *People* vs. *Loper,* 159 Cal., 6,—a great decision which condemns and denounces the infamous third degree,—Justice Melvin, in considering some of the challenges interposed in the Court below, says:

> "Where it appears that a man called into the jury box has an opinion respecting the defendant's guilt, based in part upon statements of purported facts relating to the alleged crime made to him by individuals, it must be shown, in order that Section 1076 of the Penal Code may apply, that the persons who stated these supposed facts, or expressed strong belief in the defendant's guilt, were not witnesses nor interested persons, or that they were not so understood to be by the man under examination."

The exposition of the law given by the learned Justices who wrote the decisions in the Helm case and in the Loper case has never been questioned or overruled.

In *People* vs. *Edwards,* 163 Cal., 752, a certain phase of the decision in the Helm case is questioned; namely, the statement therein contained that the defendant is entitled to examine the jurors for the purpose of eliciting information that might be of assistance to him

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in exercising his peremptory challenges. In the Edwards case the Court holds that the rights of the defendant are sufficiently safeguarded, if he is allowed to examine the jurors by asking questions relevant to a possible challenge for cause. In that respect only is the doctrine in the Helm case questioned. In so far as the question of actual bias, the test of qualification, and the means of ascertaining the same are concerned, the Helm case remains, and ought to remain, the law of this State. We also wish at this time to particularly call the attention of the Court to the doctrine enunciated in the Helm case that a prospective juror who has admitted having formed an opinion as to the cause which he is to try, cannot be qualified merely by categorical answers given in response to leading questions asked by the District Attorney. We mention this matter now, because we shall have occasion to frequently refer to it in our discussion of the challenges to the jury.

The defendant in this case exhausted his peremptory challenges. He is therefore entitled to complain of and to assign as error, each and every ruling of the Court which erroneously denied a challenge to a prospective juror for cause. To use the words of the opinion in the Loper case, "all of the per-

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"emptory challenges allowed by law were "exercised by defendant, and that fact makes "the errors of the Court, if any were com-"mitted in ruling upon his challenges for "cause, vitally material to defendant and prej-"udicial to his rights."

In this case the examination of the talesmen on their *voir dire* occupies approximately twenty-five hundred pages of the reporter's transcript, and more than one hundred talesmen were examined touching their qualifications. The examination of the jurors began on the 4th of October and was not completed until the 10th of November. Owing to the great publicity given to the destruction of the Times building and to the subsequent plea of guilty entered by J. B. McNamara, who was charged jointly with this defendant, and owing to the prejudice aroused by the alleged crime, it would have been almost impossible, in any circumstances, to have secured an impartial jury. The impossibility became absolute by reason of the rulings of the trial Judge, who denied challenge after challenge interposed by counsel for the defendant to jurors who admitted bias and prejudice and the formation of opinions which it would take evidence to remove.

It must be borne in mind in this connection

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that section 1076 cannot be here invoked as it might be in an ordinary case. Here the situation was entirely different. The deceased met his death in a catastrophe that caused the destruction of the building and plant owned by the largest newspaper in Los Angeles and the death of twenty-one of the employees of that newspaper. An opinion thereafter formed by the reading of statements made in the newspaper or editorial columns of the Los Angeles Times would not come within the same category as ordinary "statements in public journals." The Los Angeles Times was in reality the complaining witness in the case. It was the Los Angeles Times that was most greatly injured in the disaster in which the deceased lost his life. The Los Angeles Times was printed and published in part by men who actually appeared as witnesses in the case. Several of the members of the editorial staff of the paper were present in the building on the night of the disaster and appeared as witnesses at the trial of the case. These men therefore, and this newspaper, were not in the same position as ordinary journalists and journals who print reports of crime. Ordinarily the statements made in public journals are purely hearsay,—they are the repetitions of statements made to the reporter or editor of the paper by other

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persons, who may themselves have only second-hand knowledge of the event. Every intelligent person recognizes this fact; indeed, the impression seems to be somewhat prevalent that the newspapers commonly contain many grossly inaccurate statements. The law presumes therefore that a fair-minded person will not accord to statements in public journals the same weight or the same authenticity that he would accord to statements made to him by a person who knew or claimed to know the facts of the case of his own knowledge. But here, as we have said before, the situation is radically different. Every statement made in the Los Angeles Times with respect to the destruction of its plant, the death of its employees, and the criminal agency which was alleged to have produced the same, were statements made by persons interested in and claiming to have knowledge of the facts of the case. In other words every one in the community of Los Angeles who read the Los Angeles Times knew that the Times was greatly injured by the alleged crime, was interested in the outcome of the prosecution of the persons charged in the indictment and that the newspaper was written, to a considerable extent at least, by persons possessing knowledge of the facts, some of whom were actually witnesses at the

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trial. Accordingly, an opinion formed from statements made in the Los Angeles Times was a far different thing from an opinion formed from "statements in public journals," and such an opinion should be held to disqualify a juror, just as much as an opinion formed from talking personally with a person who was a witness or interested in the case.

> "If he talked with persons understood by him to be possessed only of such information as he himself obtained from his reading, their conversation would naturally amount to public rumor so far as he was concerned. If on the other hand some one whom he believed did say 'I saw the crime committed and know whereof I speak,' the discussion by that person of the manner of the commission of the offense would almost certainly make a deep impression upon the talesman's mind and conduce to the formation of a strong opinion, even if, as a matter of fact, the narration were pure fiction."

People vs. *Loper* (*Supra.*)

Having thus discussed the principles of law applicable to the qualifications of jurors and to the question of actual bias in such a case as this, we may proceed to an examination of the several challenges interposed for cause by the defendant's counsel. In so doing we again desire to call the attention of the Court to the

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striking similarity between the practice followed by the trial Judge in this case and the proceedings so strongly reprobated by the Supreme Court in *People* vs. *Helm*.

(1) When the first twelve jurors whose names were drawn had taken their place in the box the defense challenged each and every one of the said jurors under sub-division 2 of section 1073 of the Penal Code for the existence of a state of mind on the part of the jurors and each of them with reference to the case and to the defendant which would prevent them from acting with entire impartiality and without prejudice to the substantial rights of the defendant. Counsel for defendant in support of this challenge requested that the District Attorney be called to the stand. (Reporter's Trans., p. 18.) In the discussion that followed it became apparent that counsel for the defendant believed that the District Attorney's office had conducted an investigation of the panel, and was aware of the state of mind of the several jurors. Counsel for the defendant offered to prove (Rep. Trans., p. 26) that one Malcolm McLeran, a detective in the office of the District Attorney, had been for weeks and months interviewing those jurors and had sent his employees and his agents to

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find out their condition of mind, and to approach them and learn what their verdict would be in case they were sworn as jurors, and that there were, in the possession of the District Attorney's office, reports which showed these facts, and that the District Attorney had before him a venire made up of men who had been carefully sifted, whose names had been examined, whose interests had been consulted, and who had been carefully inquired of as to their attitude in the case for the purpose of making jurors that would bring about a conviction regardless of evidence, and that the District Attorney had those reports in his possession. The Court denied the offer and refused to allow the District Attorney to be called as a witness. This ruling was clearly erroneous. The disqualification of a juror can always be shown by testimony other than that of the juror himself. The cause of challenge may be established by other competent testimony, and the parties have a right to contradict the testimony of the juror by that of other winesses. Section 1082 of the Penal Code provides that "other witnesses may also "be examined on either side, and the rules of "evidence applicable to the trial of other is-"sues govern the admission or exclusion of "evidence on the trial of the challenge." Of

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course, it was competent for the defendant to produce evidence of the disqualification of such jurors from the lips of the District Attorney, in like manner as from those of any other witness.

(2) GEORGE ALEXANDER, the first juror examined (Rep.'s. Tr., pp. 30-79), testified in substance as follows:

> "I have heard of this case but I think I have not discussed it in the last three or four years. Previously to that time I had heard of the case and the discussion that was made; talked with my friends and neighbors and formed an opinion. I discarded that opinion. I have spoken about the case two or three times in the last week to some of the other jurors to the effect that I supposed that we would be on this panel at the time of the Schmidt trial. I didn't believe that the defendants were guilty. In the first place I had an opinion that some one had dynamited that building; I still think so. I believe as a matter of fact that the building was dynamited. It would take evidence to remove that opinion from my mind. *I would require the defendant to prove that it wasn't dynamite.* I believe I could give anybody a square deal. I did start out with the opinion that it had been dynamited; as I said before I believe that the building was dynamited. *I believe that the building was destroyed maliciously by some one.* I believe it was done with malice. I do believe it was done by some one wilfully and maliciously.

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"Q. Now, all that will be necessary to convict this defendant in your mind, which remains to be proved, is connecting him with this offense?

"A. To prove that he did it.

"Q. And to prove that he exploded that or he was interested in it in some way, that would be all that would be necessary?

"A. No, that wouldn't be all that would be necessary.

"Q. You believe it was maliciously done?

"A. I believe it was maliciously done.

. . . . . .

"A. The newspapers confirmed your opinion in a certain way, did they not?

"A. I won't say that it would, no.

"Q. Well, did they confirm?

"A. You see I take all the papers.

"Q. Yes, they were all one way, weren't they?

"A. No.

"Q. Practically. They attributed it to Organized Labor, didn't they?

"A. Not all of them.

"Q. Well, most of them?

"A. One of them did, I believe.

"Q. Then your opinion *was not founded upon newspaper notoriety?*

"A. *No.*"

Without the production of any evidence by the prosecution, and without any showing that this juror could and would set his opinion aside, and in the face of the juror's own declaration that his opinion was not founded upon newspaper notoriety, the trial Judge denied a challenge to the juror for cause and thus

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forced the defendant to use one of his peremptory challenges to eliminate Mr. Alexander from the jury.

(3) W. IMBLER on his *voir dire* testified in part as follows:

"Q. Do you not believe that the Los Angeles Times building was destroyed by some explosive fired by some one wilfully?
"A. I do.
"Q. You don't think, of course, that was an accident, do you?
"A. No sir.
"Q. You believe, do you not, that the defendants in this indictment, the two McNamara brothers, were instrumental or were guilty of dynamiting that building?

. . . . . .

"Q. Well, you believe they pleaded guilty, do you not?
"A. I think they did, yes sir.
"Q. And you believe they were guilty of this offense, do you not?
"A. That is what they say.
"Q. Well, don't you believe it?
"MR. KEYES—We object to that as immaterial as to what he believes in reference to the McNamaras.
"THE COURT—Sustained.
"MR. FAIRALL—What was the objection?
"THE COURT—Immaterial what he believes in regard to the McNamaras.
"MR. FAIRALL—Q. Well, you be-

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lieve some of the men indicted under this indictment were guilty, do you not?

"A. I do.

"Q. What ones do you think were guilty?

"A. Well, I think the ones that—the McNamaras; they plead, they must have been guilty."

(Reps. Tr., pp. 114-115.)

. . . . . .

"Q. Now, this case involves the trial of a man for his life; several elements enter into and make up this charge, among other elements is the element of the means by which the purpose was accomplished, the killing was accomplished and the intent with which it was accomplished; both of these are very material elements in the case, especially intent. Now you have an opinion at this time as to the intent with which that explosion was made, haven't you?

"A. Yes sir."

(Reps. Tr., p. 124.)

"Q. You believe that lives were taken by an explosion of some kind by some one for the purpose of committing murder, don't you, do you or do you not?

"A. I do not sir.

"Q. You don't know, well what do you mean by that, please state in your own words what you mean?

"A. Well, for the simple reason that I don't know what their opinion was, what their intentions were in their minds.

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"Q. But you have already said that you believed the intention was to murder?
"A. Yes."

(Reps. Tr., p. 125.)

"MR. FAIRALL—Q. Are you satisfied that this explosion was the result of the act of the human mind?
"A. May I have that question?
"(Question read.) A. Yes sir.
"Q. And you believe some one did it for the purpose of taking human life?
"A. I think so, yes sir.
"Q. You believe that, don't you, isn't that true or not?
"A. Yes sir.
"Q. Now, believing those two facts, that some one did this act to kill and murder, you have already, as you understand, do you not, determined one or two of the elements in this case, haven't you?
"A. Yes sir.
"Q. Then, do you say now that you believe that so far as the crime itself was concerned or the act itself was concerned, it was a crime?
"A. Yes sir.
"Q. The only question the prosecution will have to prove in your case to satisfy you is, did the defendant have any connection with it? Is that right?
"A. Yes sir."

(Reps. Tr., p. 126.)

Counsel for the defendant thereupon challenged the juror for cause under sub-division

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2 of section 1073 of the Penal Code on the ground of actual bias. The Court in the face of the foregoing testimony, and without any further examination, disallowed the challenge.

(Reps. Tr., p. 127.)

It must be borne in mind that the two McNamaras were jointly charged in the indictment with the defendant on trial. The juror had formed an opinion that a crime had been committed and his state of mind was such that he would not require the prosecution to prove any element of the *corpus delicti*. He would merely require them to prove the connection of the defendant with the commission of the offense. Later, on examination by the Deputy District Attorney, the same juror gave the following testimony as to the source of his opinions.

> "MR. KEYES—Q. Mr. Imbler, you know nothing of this case, do you, except what you read in the newspaper?
>
> "A. That is all, I wasn't here at the present time.
>
> "Q. You haven't formed any opinion about this matter one way or the other, except what you heard, have you, through the newspapers?
>
> "A. No sir.
>
> "Q. You never talked with anyone about the merits of this case, did you?
>
> "A. No sir.

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"Q. And your mind at the present time is open to conviction in this matter; in other words, if you were chosen as a juror here, could you act fairly and act according to the evidence in this case and be convinced one way or the other as to the guilt of this defendant?

"A. Yes sir.

"Q. Well, would you take the evidence from the stand here as your sole standard and sole guide in arriving at a verdict in this case, on the question of fact?

"A. Yes sir.

"Q. And if you have any personal view on the matter or opinions concerning the destruction of the Times Building which you gathered from these newspaper accounts, would you lay that aside in your consideration of this case if you are chosen as a juror?

"A. Yes sir.

"Q. And do you feel that you can do so?

"A. Yes sir.

"Q. You feel that your mind at the present time is entirely free from bias and prejudice one way or the other in this matter?

"A. Yes sir."

(Reps. Tr., pp. 128-129.)

On re-direct examination the juror denied that his opinion was founded on newspaper statements. He further testified:

"MR. FAIRALL—Is it true, or not, that the opinion which you now have, which you say was founded on newspaper stories,

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which you have heard and read, of such a nature that it would take some evidence to remove?

"A. I haven't read any of the newspaper stories.

"Q. You haven't read the newspapers; then your opinion is not founded on newspaper stories, either?

"A. No sir.

"Q. Is that right?

"A. Yes sir."

(Reps. Tr., p. 135).

. . . . . .

"MR. FAIRALL—Do you think that you are a fair juror under these circumstances?

"A. Well, I don't know."

(Reps. Tr., p. 140.)

"Q. Until you get some evidence to overturn that opinion, which you already have, you will retain that opinion, won't you? Isn't that right?

"A. I want somebody else to judge of that question. I could not answer it myself, I don't know.

"Q. You would have to ask who to judge it for you. You wouldn't be prepared to pass on that yourself?

"A. I don't know.

"Q. If there were no evidence introduced at all in the matter—

"A. I will fill that position to the best of my ability.

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"Q. Well, until they introduce some evidence showing the contrary you have the opinion that you now have? You will still be of the same opinion, won't you? Isn't that true?

"A. Yes sir."

(Reps. Tr., pp. 140-141.)

In the face of all of these admissions the Court again denied the challenge. It will be observed that the only answers of the juror which tended to qualify him were answers to leading questions by the District Attorney. The case of *People* vs. *Helm* (*supra*) clearly holds that a juror cannot be qualified in that manner.

"It is not sufficient," says the Court in that case, "to qualify a juror that he should be led to say that his opinion is based upon common rumor, when from his own lips the evidence discloses that it is not so founded."

The examination of the juror Imbler, and particularly his testimony on re-direct examination, clearly discloses that the opinion that he had was not founded upon statements in public journals, because he said that he had not read about the case in the newspapers and was not in Los Angeles at the time. In other words, he did not derive the opinion that he had from

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any of the three sources that constituted the exceptions mentioned in section 1076. Imbler served on the jury.

(4) The juror JACOB SQUIRE testified that he believed that the Los Angeles Times was destroyed by dynamite (Reps. Tr., p. 434); that he had a fixed opinion to that effect based upon the plea of guilty made by the McNamara brothers (p. 445); that he would require the defendant to introduce evidence upon that question before he would be able to change that opinion (p. 449); that he would feel that there ought to be some explanation offered of the alleged flight of the defendant (p. 452). The juror did not state nor was he asked during his examination by the District Attorney if he could set aside the opinion which he had formed. The Court also denied a challenge to this juror and it became necessary for counsel for the defendant to exercise one of their peremptories upon him.

(5) Juror H. L. MCCABE testified that he read the Los Angeles Times and agreed with its editorial policy and that from his reading of the Times and from the plea of the McNamaras he had formed an opinion that the building was blown up with dynamite. He further testified that his mind was absolutely

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at rest on the fact that the building was blown up by dynamite. His opinion was fixed as far as the cause of the disaster was concerned and he would have to rely upon it (p. 565). The Court denied a challenge for cause and this juror was subsequently disposed of by a peremptory challenge.

(6) CHARLES HUGHES gave the following testimony on his *voir dire:*

> "My impression is that the Los Angeles Times openly charged that the explosion was produced by Organized Labor. I heard some people express the opinion that the explosion was caused by dynamite and I also heard the opinion expressed that it might have been gas. My opinion was about evenly balanced in the beginning, and it stood that way up to the time of the confession of the McNamaras.
>
> "Q. You know what this indictment charges that these defendants, including the defendant here on trial, wilfully, feloniously and with malace aforethought did kill and murder one Charles Hagerty, a human being?
>
> "A. Yes sir.
>
> "Q. Well, then, you know that if that indictment was confessed it was also confessed that they did it with intent to take human life?
>
> "A. Yes.
>
> "Q. So you had the opinion, didn't you?
>
> "A. I have the opinion after the confession.

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"Q. And you have that opinion now, haven't you?

"A. Yes sir.

"Q. That is, such an opinion as would require evidence to remove?

"A. Yes sir.

"Q. And the defendant would have, if he wanted to establish in your mind it was gas, he would have to prove it to you?

"A. I think he would, yes sir.

"Q. And you would start out in the trial with the firm positive conviction that this building was destroyed by dynamite with intent to take human life?

"A. Yes sir.

"Q. And you thus see, do you not, that about half the case against the defendant will be proven in your mind before any evidence is introduced?

"A. Well, the fact that the defendant was indicted did not positively—

"MR. FAIRALL—No, I know that.

"MR. WOOLWINE—Just a minute. Let the witness answer. I suggest counsel let the witness finish his answer.

"THE COURT—Let the witness finish.

"MR. FAIRALL—All right, I don't want to interrupt the witness.

"A. I said the fact that the defendant was indicted with the McNamaras did not positively identify him with the crime they confessed.

"Q. Now, while that is true, a certain element of that kind, which must be proven, namely, the manner and means of the killing, and the actual taking of human life, apply to one as well as the other, doesn't it? You understand that?

"A. A certain element of it, yes sir.

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"Q. Now, as to that element, you are as well satisfied upon the question of this defendant as you were upon the question of the McNamaras?

"A. Well, to a certain extent, yes.

"Q. Well, after he is connected with it, then he would be absolutely guilty in your mind, wouldn't he?

"A. If he was connected with, there would not be any question.

"Q. No. Then you would start out I say in this case on the trial of this defendant with the case half proven against him, by proving the death and the manner and means of it, wouldn't you? I don't care whether it is a half conclusion, so far as that was an element in the case you would start out with this opinion in your mind or established in your mind?

"A. Well, to a certain extent. I said that I did not positively connect the defendant with the confession of the McNamaras.

"THE COURT—You are talking about one thing and counsel is talking about another.

"MR. FAIRALL—Well, I will get it right now in a minute.

"THE COURT—Now, try and agree on the same proposition.

"MR. FAIRALL—Now, leaving out of the question entirely, for a moment, the defendant's connection with the offense, and considering only the elements of the offense themselves, you would say, would you not, that as to those elements they are proven in your mind now?

"A. Yes sir, certain of the elements.

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"Q. Yes, and if the defendant wanted to establish to your satisfaction that it was done with gas accidentally, he would have to introduce some proof, wouldn't he?

"A. If that is a necessary element in the case, he would have to do that.

"Q. That is, as you understand, a necessary element?

"A. Yes sir.

"Q. Then if the District Attorney, in the presentation of his case against the defendant, did not remove from your mind the belief, which is now there, that it was done by means of dynamite, you would not require any proof on that question, from the people, would you?

"A. I would be inclined to believe that the building was destroyed by dynamite.

"Q. Now, you understand that is the position of the District Attorney?

"A. Yes sir.

"Q. *And upon that point you would not require any proof from the District Attorney as to that point, would you?*

"A. *No.*

(Reps. Tr., pp. 754-759.)

. . . . . .

"THE COURT—The question is this, Mr. Hughes; the people, as I understand, claim that this explosion was caused by dynamite. Now, your answers to counsel appear to indicate that you have made up your mind to a certain extent, at least, on that subject. Now, the question is, would you require the people to prove that, that being one of the material elements, would

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you require the people to prove that it was destroyed by dynamite or would you accept the theory which you have at the present time as true, or could you and would you lay aside whatever opinion you have and require the people to prove that as an independent fact, before you would find the defendant guilty?

"A. The question of the cause of the explosion I consider practically settled, but the connection of the defendant with the crime I didn't consider settled. I would want positive proof from the prosecution that he had a part and took an act in that explosion.

"MR. FAIRALL—In other words, you believe a crime was committed to start with?

"A. Yes.

"Q. But you haven't—you are going to make them prove that the defendant had something to do with the crime or was connected with the crime?

"A. That is the idea.

"Q. Now you understand the position; here are three—just as plain as it can be, here are three bottles of ink. There are two; you are satisfied with two of them?

"A. Yes sir.

"Q. Now, there are the three. You are satisfied with them, all three are there, isn't that true?

"A. No, not positive on that first two, but that is my impression, might say an opinion, that the building was destroyed by dynamite.

"Q. Criminally destroyed?

"A. Possibly.

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"Q. Now you say those are two elements of the crime?

"A. Yes.

"Q. The other element is connecting the defendant with it. You start out with those together. The District Attorney adds the third, then you are ready to convict, aren't you? That right?

"A. I think that would be.

"Q. All that is necessary?

"A. All that is necessary."

(Reps. Tr., pp. 762-763.)

The defendant thereupon challenged the juror for actual bias. He was then further examined by the District Attorney and by counsel for the defendant as follows:

"MR. KEYES—Q. Mr. Hughes, you don't know anything about what caused the destruction of the Times Building except what you read, did you?

"A. That is all.

"Q. And you don't know anything about the confession of the McNamaras or their plea of guilty except what you read, do you?

"A. That is all.

"Q. You understand that only one of the McNamara men plead guilty to this charge?

"A. Yes sir.

"Q. And you gathered your information about that solely from the newspapers?

"A. That is all.

"Q. You never have talked with any one

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who claimed to know anything about the facts of the case?

"A. No more than I took from the newspapers.

"Q. Yes sir. Now, Mr. Hughes, you understand, do you not, if selected as a juror here, under the law you would require the prosecution to prove this defendant guilty of this crime before you would find him guilty?

"A. Yes sir.

"Q. And you understand it, do you not, it would be your duty as a juryman to require the prosecution to prove to your mind beyond a reasonable doubt every element of this crime before you would find this defendant guilty?

"A. Yes sir.

"Q. Well now, assuming you have some opinion based upon these newspaper reports as to what caused the Times explosion, if you were selected as a juror here, could you lay that opinion aside and decide this case from the evidence as you hear it from the stand and act fairly and impartially towards this defendant?

"A. I believe I would.

"Q. Well, I asked you if you could do that first?

"A. As near as it was possible for a human being to do it, I believe.

"Q. And you would lay it aside, would you, and require the prosecution to prove—?

"A. Yes sir.

"Q. —to you what blew up the Times, it being one of the elements in this case?

"A. Yes sir.

"Q. Suppose on the conclusion of the testimony of the case, the prosecution hav-

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ing put in their case as to their theory of the destruction of the Times Building, and the defense having put in his theory of the case, and you had a reasonable doubt in your mind, as to what had blown up the Times Building, would you find this defendant not guilty?

"A. I would find him not guilty.

"Q. Then that being the case, don't you think you could lay aside the opinion you have in this matter, gathered from what you read in the newspapers and try the case fairly and impartially and decide the case on the evidence that you hear both from the defendant and the people?

"A. I would take the evidence at the trial of the case.

"Q. And act fairly upon it, could you?

"A. Yes sir.

"Q. And impartially?

"A. Yes sir, I would try to.

"Q. Don't you think you could?

"A. I don't know any reason why I should not.

"MR. KEYES—Submit it.

"MR. FAIRALL—You don't know any reason why you should not, except you have an opinion as to a material element of the offense which will carry all through the trial?

"MR. KEYES—That is objected to upon the ground it has already been gone over, testified to.

"MR. FAIRALL—I know, he says he doesn't know any reason, but you do know that reason?

"A. That seems to be the situation at the time—at the present time.

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"Q. Well, you say you would give him a fair and impartial trial. That statement is also coupled with the mental reservation that you have this opinion which would affect your judgment?

"A. To a certain extent, yes sir.

"MR. FAIRALL—We insist on our challenge.

"MR. KEYES—Could you lay the opinion aside and act independently of it on the evidence here, knowing that the people must prove their case before you can find this defendant guilty under the law?

"A. I should not be satisfied to convict the defendant on what evidence I have at just the present time from what opinion gathered from newspaper reports.

"Q. You wouldn't be satisfied, would you, Mr. Hughes, to take that as a fact, that the Times Building was destroyed by dynamite, from what you read in the newspapers in regard to the guilt or innocence of this defendant?

"A. Well, connecting the defendant with it, if the prosecution did that, I should take that part of it as settled.

"Q. From what you read in the newspapers?

"A. And the confession of the McNamaras.

"Q. You only know that from what you read?

"A. That it all.

"MR. FAIRALL—There is no dispute as to that.

"MR. KEYES—Don't you believe you could lay that matter aside and try this case and act upon it and be governed by it in forming a conclusion as to the defendant's

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guilt, from the evidence you hear here and lay aside the newspaper reports altogether?

"A. I should be ready to start again.

"Q. Don't you think you could do that?

"A. Yes sir.

"Q. And will you do it?

"A. Yes sir.

"MR. KEYES—Submit it.

"MR. FAIRALL—Now, we submit, your Honor, that the juror is not found to be qualified, but on the contrary disqualified. While the juror sometimes has shown a certain misunderstanding as to terms that have been used, he makes it very clear that he would carry this opinion all through the trial, and if the defendant didn't introduce any evidence he would be entitled to convict him upon his opinion now entertained, and the further fact connecting the defendant with it, it would be of course something, something that the law would not tolerate. This is not either a question of a newspaper statement, statement in the public journals or anything of the kind, because it is a statement of fact, occurring in the Court of justice, which no one denies and which everybody concedes took place; namely, the confession of the McNamaras, who are at present undergoing sentence in the penitentiary. Now, there is no question about that, cannot be; it is a public record and he is satisfied on that, cannot remove that from his mind.

"THE COURT—Is there any public record of the fact that they destroyed this by dynamite? I have never seen any record of that myself.

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"MR. FAIRALL—Whether or not there is a public record, the witness has stated that—

"THE COURT—He pleaded guilty.

"MR. FAIRALL—Whether or not there is a public record, the witness has that opinion.

"THE COURT—As to the manner, I have never seen any statement, newspaper or otherwise, that they confessed that they blew it up with dynamite.

"MR. FAIRALL—Well, admitting that to be true he still has the opinion founded on nothing, which is more dangerous than an opinion founded on something. If a man can reach an opinion, a positive opinion, founded upon no evidence whatever, his frame of mind is much more dangerous to one whose views it affects or one whose interest it affects, than a man whose statement or whose opinion has been formed upon even the slightest evidence. Now, if a man can make up his mind without evidence, it is a bad situation for another man to be tried by him.

"MR. KEYES—He has testified that all he knows about it is what he read and he would set aside that knowledge gained from the newspapers and act on the evidence that he hears here on the stand.

"MR. FAIRALL—He said that, your Honor, in answer to the question, but he said and repeated it over and over again, so frequently I was afraid your Honor would stop from asking the question that he would have this opinion and had it all the time, ever since the time of the McNamaras' confession, that he would carry it to the trial and if the defendant did not

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prove that it was gas, he would still hold to that opinion and that the District Attorney would only have to prove the connection of the defendant, and he would be satisfied to act, and that he would convict on that, and all those things over and over again. Now, for the purpose of qualifying counsel says: Could you and would you set it aside? Certainly. Every man can do that—try to, of course.

"MR. KEYES—Well, the Supreme Court has said that qualifies him as a juror.

"MR. FAIRALL—No, the Supreme Court has not said that qualifies him as a juror. The Supreme Court says that notwithstanding that, if a man has a positive conviction and an opinion in a case, he is not a qualified juror, no matter where he got it or what he says, but if he has only an opinion which is slight, and which is gathered from mere newspapers, public journals and common notoriety, and so forth, and can set it aside, all right; but where he has that positive and unqualified opinion as to the guilt or innocence of a defendant upon any material element of the charge, or the proof of any material element of the charge, he is not qualified, no matter how he got his opinion—no matter how he entertains it or what he says about it, or what he says about setting it aside.

"THE COURT—You may pass this juror for the present and I will read the evidence when it is written up.

"MR. FAIRALL—Very well, your Honor.

"THE COURT—And pass on it this afternoon.

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"MR. FAIRALL—I hope you won't take counsel's statement as to the law about what the Supreme Court says.

"THE COURT—I know what the Supreme Court has said. I don't need the statement of either side in regard to that. I want to get his various answers together. The Supreme Court says it is for the Court to determine from all his answers. Proceed with the next juryman."

Later on the same day, the Court after some hesitation denied the challenge. It is apparent from the answers given by the juror even in response to questions by the District Attorney that he was disqualified. Again and again he reiterated the statement that he believed that the building was destroyed by dynamite; that that opinion was settled and that all he would require would be for the prosecution to connect the defendant with the commission of the offense. We cannot see any conceivable theory on which the trial Judge should have denied the challenge, especially in view of the well known rule that any doubt should be resolved against the juror and in favor of the challenge to the end that the defendant may have a fair and impartial trial.

People vs. *Ruef*, 14 Cal. App., 576.

The juror in question was undoubtedly honest and conscientious in his answers and even

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the District Attorney by leading questions failed to qualify him. We are well aware of the rule pronounced in *People* vs. *Edwards,* 163 Cal., 752; *People* vs. *Riggins,* 159 Cal., 117; *People* vs. *Ryan,* 152 Cal., 371; that inconsistent statements made by the juror in his examination raise a conflict of evidence which it is the duty of the trial Court to determine. But here there was no conflict in the evidence. There is nothing in the testimony of the juror to show that he could set aside the opinion which he had previously formed. Every element of the *corpus delicti* was firmly established in his mind without the introduction of any evidence. There was no affirmative showing that he could or would set aside the opinion and act fairly and impartially.

(6) L. E. STEINBERGER testified on his *voir dire* in part as follows:

> "MR. RYCKMAN—Have you ever had an opinion as to how that disaster happened?
>
> "A. Well, after the trial of the McNamaras, and they confessed they blew it up with dynamite, why, I certainly had an opinion that they must have done it or they wouldn't have plead guilty to a grave crime like that.
>
> "Q. And you have been satisfied in your own mind ever since, it was blown up by dynamite?
>
> "A. I took it for granted it was. I

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have given it no great thought, as far as that is concerned.

"Q. You have never had any occasion to believe to the contrary?

"A. No reason to have any other opinion.

"Q. And you have that opinion now?

"A. I say that I believe that it was blown up by dynamite from the fact that they plead guilty to the fact and they wouldn't plead guilty to a crime of that magnitude unless there was something to it.

"Q. I say, you have that opinion now?

"A. I believe I have.

"Q. And you would enter upon the trial of this case with that opinion in your mind, if you are chosen as a juror?

"A. I should, certainly.

"Q. And it would require evidence to remove that opinion?

"A. I think it would.

"Q. You heard about J. B. McNamara pleading guilty to the charge, you say, and you know he is now in the penitentiary serving a life sentence?

"A. I know it from reading the facts; that is all. I never attended the trial.

"Q. And you have never heard any contradiction of those statements you saw in the paper?

"A. I took it as a matter of news from the newspapers that such is the facts.

"Q. Have you ever expressed that opinion to anybody?

"A. I don't know that I have. You mean that he is guilty—

"Q. Have you ever expressed the opinion to anyone that you believe the Times Building was blown up by dynamite?

"A. No, I don't think I ever have.

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"Q. Although you have held that opinion for a long time, you don't know as you ever expressed it to anybody?

"A. I have that opinion from the fact that is the general belief, because they plead guilty to the fact. I have no knowledge of it except that read in the newspapers. I know none of the principles in the case.

"Q. I say you have not expressed that opinion, although you have held it for a long time?

"A. No, I don't think I have expressed it. I don't remember of having expressed it.

"Q. Well, broadly speaking, the crime charged against this defendant may be said to consist of two elements; first, that the Times disaster was caused by the explosion of dynamite placed there by some one with malicious intent, and, second, that this defendant aided or abetted or had some guilty knowledge of that fact. Now, upon the first of those two elements, if I correctly state the two elements in this case, you have an opinion that is fixed?

"A. Why, I have—since that confession I have believed the Times was blown up with dynamite.

"MR. KEYES—Wait. He hasn't finished his answer.

"MR. RYCKMAN—Beg your pardon. What further is the answer?

"MR. KEYES—I understand him to say the word "but"—pardon me.

"MR. RYCKMAN—In this case, it would be only necessary for the prosecution or people, to prove to your mind beyond a reasonable doubt that this defendant aided or abetted that offense, or that crime, in

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order to justify you in finding the defendant guilty. Does that correctly state the situation as to your mind?

"A. There has never been any proof or any argument placed before me that this man ever was connected with it in any way.

"Q. No, I am saying that it will be necessary for the people to prove that he had some guilty knowledge of it in order to ask you to convict him.

"A. Why, certainly would.

"Q. I am saying now that is the only thing that remains for the people to do, so far as your mind is concerned at the present time?

"A. They would certainly have to produce evidence he was connected with it.

"Q. But as to the other element it would not be necessary to convince you?

"A. I have reason to believe that the building was blown up by the McNamaras from the confession they made.

"Q. Yes. Well, as to that point it would not be necessary for the people to introduce any evidence; you would be satisfied to act upon that, if the people show that the defendant here, Mr. Schmidt, had guilty knowledge of it?

"A. If no evidence to the contrary is produced, why, it would not be necessary to bring evidence to make me believe it.

"Q. If there was no evidence to the contrary introduced it would not be necessary?

"A. No."

(Reps. Tr., p. 924, line 16, to p. 927, line 20.)

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that the Times Building was blown up by gas?

"A. No, I never have had any occasion to investigate that in any way or form any opinion about that.

"Q. You never had any occasion or reason to entertain that opinion?

"A. No sir.

"Q. And you never did entertain that opinion, your opinion such as you have had, has always been steadfastly to the one thing, it was blown up by dynamite?

"A. It was after the man confessed doing it.

"Q. Well, I mean since you formed an opinion?

"A. If I formed any opinion; I can't say that I really formed any opinion but I naturally supposed that it was blown up by *gas,* the man confessing to it, or by dynamite, the man confessing to it.

"Q. You said a little while ago that you had an opinion upon that element of the case.

"A. I certainly have an opinion that it was blown up by dynamite.

"Q. Yes. It would require evidence to remove that opinion?

"A. Yes sir.

"Q. If you were called as a juror to sit in this case?

"A. Yes sir; it would require evidence.

"MR. RYCKMAN—We challenge the juror for cause, if the Court please, under subdivision 2 of section 1073 of the Penal Code.

"MR. KEYES—We deny the sufficiency of the facts and resist the challenge.

"THE COURT—Examine the juror.

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"MR. KEYES—Q. Mr. Steinberger, if you were selected as a juror to sit in this case, you would require the people to prove every element of the case involving the defendant's guilt beyond a reasonable doubt, before you would find him guilty?

"A. I certainly would.

"Q. And if you were selected as a juror, you would try this case, would you not, from the evidence you hear on the stand here in the court room?

"A. Yes sir.

"Q. And couldn't you lay aside any opinion that you may have formed from reading the newspapers about this matter and try the case fairly and impartially from the evidence you hear in the court room?

"A. I could.

"Q. And would you do that?

"A. Yes sir, I would.

"THE COURT—Challenge disallowed."

(Reps. Tr., p. 932, line 25, down to 936, line 23.)

Here again the only testimony tending to qualify the juror in question consisted of his categorical answers to leading questions by the District Attorney. The Court ought to have required more of an affirmative showing before allowing a juror entertaining such an opinion to sit upon the jury. Once again we must reiterate what we said in our preliminary discussion of this topic, namely, that statements made in the Los Angeles Times do not

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belong to the same category as ordinary statements in public journals. We further call the attention of the Court particularly at this time to the testimony of the witness that he had never heard any contradiction of the statements that he saw in the paper. As a matter of fact, none of the jurors testified that any of the newspaper reports had ever been denied. In this behalf we call the attention of this Court to the vigorous words of Justice Temple in *People* vs. *Suesser,* 132 Cal., 635,—words which are highly applicable to the case at bar:

> "Most of the twenty peremptory challenges allowed the defendant were exercised upon proposed jurors, who stated upon *voir dire* that if sworn as jurors they would take their seats in the box with a strong opinion against the defendant which it would require evidence—some said strong evidence—to remove. Where such a state of things exist, the defendant cannot have a fair and impartial trial. * * * The Attorney General says the opinions formed by jurors were based upon rumor or newspaper reports; but there never was any real conflict about the occurrences at the time of the homicide. They were not denied. The opinions were therefore based on the facts as developed at the trial."

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(7) EDWARD A. EATON testified in part on his *voir dire* as follows:

"Q. When did you first hear of the disaster of the Times?

"A. I presume when the paper come to me.

"Q. What papers were you reading then?

"A. The Times.

"Q. Any other?

"A. No.

"Q. You have been reading the Times for some time before that?

"A. Yes sir.

"Q. A subscriber?

"A. Yes.

"Q. Familiar with the attitude of the Times towards questions of labor?

"A. Well, I presume I read it.

"Q. You read the Times for its news as well as its editorials?

"A. Certainly do.

"Q. You were then and are now familiar with its attitude towards organized labor?

"A. Yes sir.

"Q. You remember the attitude it took and the belief it expressed as to the cause of this disaster?

"A. I do.

"Q. That it was brought about by organized labor?

"A. Yes, sir.

"Q. You sympathize with that theory?

"MR. KEYES—That is objected to as immaterial and irrelevant.

"THE COURT—Sustained.

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"MR. RYCKMAN—Did you form an opinion from what you saw in the Times and read in the Times and heard others about that disaster as to what had caused it?

"A. No, sir.

"Q. Have you ever had any such opinion?

"A. Why, I gained what I have after the first issue of the Times after the destruction and continued.

"Q. That is to say, read the first issue of the Times after the disaster and formed the opinion as to how it happened?

"A. I read the other man's opinion and I had no occasion to form any of my own.

"Q. Then I understand you to say you never had an opinion?

"A. Founded on my own individual knowledge.

"Q. You have such an opinion?

"A. I say—I answered your question.

"Q. I didn't catch it.

"A. I have no opinion founded on my own individual knowledge.

"Q. That is to say you have no opinion that you didn't see the explosion?

"A. That is the idea.

"Q. But apart you have is what you saw and read caused you to form an opinion?

"A. I said I read the Times and listened to the opinion that they advanced and I never took any part in changing—changing that report.

"Q. Do you believe what you saw and read in the Times?

"A. Yes, sir.

"Q. And still believe?

"A. Yes, sir.

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"Q. Although you have no opinion as to whether it was true or not?

"A. No, sir.

"Q. Anything happen since that time to confirm the idea you got from the Times?

"A. No, only the continuation, that is all.

"Q. You formed an idea at that time, did you not, that the Times was blown up by dynamite?

"A. Well, if you call it an idea. I read the Times and read it every day.

"Q. What would you call it if it isn't an idea?

"A. It wasn't a question that I would pause upon to form an opinion about.

"Q. It was so conclusive in your mind that that was the way it was done that you never thought about it afterwards?

"A. It wasn't so conclusive. I would form no conviction that would interfere with anybody's liberty.

"Q. Did you ever express an opinion as to how the Times was—

"A. I presume I have.

"Q. Are you quite sure about that?

"A. I guess I probably made several statements.

"Q. All along that line, they declared that the Times was destroyed by dynamite? Is that right?

"A. Well, I might have talked about it, probably did.

"Q. You never suggested to anybody that it was destroyed by gas?

"A. I did not.

"Q. You never had any controversy with anybody who led you to think for a moment that it was destroyed by gas?

"A. I did not.

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"Q. And you never gave the gas theory any consideration, did you?

"A. No.

"Q. Did you ever hear that there was a theory prevalent about the town about the Times building being blown up by gas?

"A. Yes, sir.

"Q. But as to that theory you took no stock?

"A. No, sir.

"Q. And did not believe it?

"A. No, I didn't have anything to change the way that I read it.

"Q. To change the way that you read it?

"A. In the first place.

"Q. You wouldn't call that an opinion?

"A. No, I wouldn't call it an opinion.

"Q. And you won't admit that you ever did form an opinion?

"A. No, I won't feel that I had an opinion about it.

"Q. You heard about J. B. McNamara pleading guilty to this indictment?

"A. I did.

"Q. The same indictment that the defendant is to go to trial upon here?

"A. Yes, sir.

"Q. And that confirmed the idea or opinion, if I may call it so, that you formed the very day following the explosion?

"A. It did.

"Q. And made you more certain than ever that your original idea enunciated in the first place by the Times was correct?

"A. Yes, sir.

"Q. And you heard about J. B. McNamara having been sentenced to life imprisonment for what he admitted?

"A. I did.

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"Q. And you know that he is in the penitentiary now serving that sentence?

"A. Yes, sir.

"Q. Then, of course, after you heard that J. B. McNamara had pleaded guilty and had been sent to the penitentiary for life, you then believed that the Times building had been destroyed by dynamite?

"A. Yes, sir.

"Q. And you have that belief now?

"A. I have.

"Q. And if you were to enter upon the trial of this case here as one of the jurors in this case you would enter upon such trial with that belief firmly fixed in your mind, just as firmly—

"A. I could not change my—

"Q. You couldn't change your opinion?

"A. No, sir.

"MR. RYCKMAN—I challenge the juror for cause, if the Court please.

"MR. KEYES—We deny the sufficiency of the facts.

"MR. RYCKMAN—Under section 1073, subdivision 2, of the Penal Code.

"MR. KELES—We deny the sufficiency of the facts and resist the challenge.

"THE COURT—Examine the juror.

"MR. KEYES—Q. Mr. Eaton, if you were selected as a juror here to try this case, don't you think that you could be able to lay aside whatever belief or opinion you may have concerning the destruction of the Times and try the case from the evidence which you hear on the stand here?

"MR. RYCKMAN—We object to that question for the reason that it is wholly immaterial what the juror says as to his ability to lay aside such an opinion, when he once

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has said that he has it, under the ruling of the Supreme Court in the case of the People against Edwards in 43 California.

"THE COURT—Overruled, under the ruling of the People against Ruef and People against Overtaker, and a great many other cases.

"MR. RYCKMAN—Mistakenly.

"THE COURT—And People against Edwards in 163 California.

"THE WITNESS—I will vote the defendant was innocent until proven to my satisfaction that he was guilty.

"MR. KEYES—And you would require the people, would you not, to prove that guilt beyond a reasonable doubt before you would vote to find him guilty?

"A. I would.

"Q. You would require them to prove every element in the case to your satisfaction and beyond a reasonable doubt?

"A. I would.

"Q. And don't you think that if you were selected as a juror that you could fairly and impartially try this case?

"A. Yes, sir, I could.

"Q. And would you do so, if selected?

"A. Yes.

"Q. And lay aside from your mind whatever opinion or belief you may have about the destruction of the Times and try the case from the evidence that you hear from the stand? Could you do that?

"A. Solely from the evidence.

"MR. FAIRALL—We submit, your Honor, that the witness has said he couldn't do that very thing within three questions before the close of the examination.

"THE COURT—Yes, I heard it.

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"MR. KEYES—I submit it.

"MR. RYCKMAN—We ask leave to ask a further question or two.

"THE COURT—Additional questions or the same questions over again?

"MR. RYCKMAN—We don't need to ask the same question over again, your Honor.

"THE COURT—Very well.

"MR. RYCKMAN—Now, you say, notwithstanding the belief that you have you can enter upon the trial of this case and make a fair juror?

"A. I could hear the evidence and act in an impartial manner.

"MR. RYCKMAN—I would like to have the question answered. I think perhaps you did not get the question.

"(Question and answer read.)

"MR. KEYES—I submit that answers the question.

"THE COURT—Yes, a fair juror is one that acts impartially.

"MR. RYCKMAN—You understand, do you not, that this defendant is presumed to be innocent until his guilt is established by the people beyond a reasonable doubt by competent evidence?

"A. I do.

"Q. How can you give this defendant the presumption of innocence which the law entitles him to, if you already have a belief that the Times building was blown up by dynamite and to establish his guilt in this case the people must first prove that the building was blown up by dynamite maliciously placed there, and, second, that this defendant had some guilty knowledge of it? How can you reconcile his right to the pre-

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sumption of innocence with your conviction that one of the elements of his case is already established in your mind?

"A. I understand that the McNamaras plead guilty to the offense of blowing up the Times.

"MR. RYCKMAN—I submit he does not answer my question.

"MR. KEYES—I object to the question on the ground it is argumentative, calls for argument.

"THE COURT — Sustained on that ground.

"MR. RYCKMAN — Now, broadly speaking in this case you understand, do you not, that the people must prove two things: first, that the Times building was blown up by dynamite maliciously by J. B. McNamara; second, that this defendant aided and abetted J. B. McNamara in that regard. You already have a settled conviction as to the first of those elements.

"THE COURT—Wait a minute. Let him answer those two questions.

"A. Yes, sir.

"MR. RYCKMAN—You have already a settled conviction as to the first element of the crime of which this defendant is now charged, have you not?

"A. According to the man's own confession.

"Q. Then it would remain only for the people of this state to show you that the defendant aided and abetted that explosion in order to enable you to find a verdict of guilty. Is that true?

"A. I would like to have that question.

"(Question read.) It would not.

"Q. What further evidence would you re-

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quire the people to produce than that this defendant aided and abetted that explosion?

"A. That he was associated with them, did operate in the destruction of the Times.

"Q. Well, I am saying that is all you would require the people to prove, that he aided and assisted, is that not true?

"A. I should require him to prove that to my satisfaction.

"Q. Then you would be ready to bring in a verdict of guilty?

"A. I would.

"MR. FAIRALL—Is that an answer or a question?

"A. An answer.

"Q. An answer he says 'I would.'

"MR. RYCKMAN—Then you would not require any proof in your present state of mind that the building was blown up by dynamite?

"A. Oh yes, I would.

"Q. You would?

"A. Yes, sir.

"Q. You are already convinced of it, aren't you?

"A. I am convinced that the other man thinks it was blown up.

"Q. That is not the point. The point is that you are already convinced that the building was blown up by dynamite.

"MR. KEYES—Objected to upon the ground it has already been answered.

"THE COURT—Well, Mr. Ryckman, you have been over that.

"MR. RYCKMAN—We renew the challenge, if the Court please.

"THE COURT—Mr. Eaton, you seem to be agreed on certain things and you have answered counsel for the people in a cer-

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tain way and counsel for the defendant in a little different manner. Now, the Court wants to understand your frame of mind in this case. Now, you understand it is the duty of the people to prove every material element of this charge or else that it is your duty to acquit the defendant.

"A. Yes, sir.

"Q. You understand that? Now, it is the duty of the people to prove that the defendant himself or some person who he aided and assisted caused the explosion by which the deceased came to his death, do you understand that?

"A. Yes, sir.

"Q. Now, from some of your answers the Court would think that you had a fixed opinion that this building was exploded by dynamite and that you would not require proof. From others of your answers the Court is of the opinion that you have no fixed opinion but require the people to prove every material element, that is, you would require the people to start out now and prove that the building was destroyed by the explosion of dynamite, is that what you mean?

"A. That is what I mean.

"MR. FAIRALL—Which one does he mean, I would like to know. You stated them both.

"THE COURT—Now, whatever opinion or impression that you now have in regard to this explosion having been caused by the McNamaras placing dynamite there, or one of them placing dynamite there, could you and would you set it aside and try the case solely on the evidence that you hear from the witness stand here, without regard to any

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previous opinion or impression that you may have had in regard to the matter?

"A. Solely upon that.

"MR. RYCKMAN—If the Court please, we ask leave to ask him a few questions.

"MR. FAIRALL—Now, your Honor, those questions are just simply built up in this manner or means for this man evading this issue, and we submit that they are not a fair set of questions to test this juror's condition of mind and I ask to ask him some more questions.

"MR. KEYES—I would like to ask the juror, if the Court please, on what he founded this impression or opinion. I don't think that has been gone into, before the Court rules.

"THE COURT—Well, you may ask him.

"MR. FAIRALL—I would like to ask the juror some more questions.

"MR. KEYES—Mr. Eaton, all you know about the destruction of the Times building and any impression or idea or opinion, whichever they call it which you have about that you gathered from the public press?

"A. All together.

"Q. All together. You never talked with anyone who claimed to know anything about it?

"A. No.

"MR. FAIRALL—Now, notwithstanding you founded your opinion upon what you read in the public press you believed it, didn't you?

"A. It could be wrong.

"Q. But you believed it, didn't you?

"A. Inasmuch as—

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"Q. You believed it, didn't you? Will you answer my question?

"A. What I read in the public press I believed.

"Q. Yes, and you still believe it?

"A. Yes.

"Q. And you would go into the trial of this case believing it, wouldn't you?

"A. No, I think it has to be proven to my satisfaction.

"Q. What are you going to do with your present belief?

"A. I could be mistaken.

"Q. What are you going to do with your present belief?

"A. I would set aside what opinions that I might have in regard to how the destruction happened.

"Q. But you said—read back the other question, the last question.

"MR. KEYES—I object——

"MR. FAIRALL—I do object to this manner and means of examining jurors. We are entitled to know more than this.

"MR. KEYES—You are doing the examining.

"MR. FAIRALL—I have listened to this thing until it has gotten on my nerves. I can't stand for such work as that.

"MR. KEYES—I move to strike that from the record.

"THE COURT—Stricken out.

"MR. FAIRALL—I don't care whether it is stricken out or not. We are looking for a fair trial, and that is not the means of getting it, if we are here to exhaust our challenges upon men who are qualified under conditions like that I want to know.

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"MR. KEYES—I move to strike that from the record.

"THE COURT—Stricken out.

"MR. FAIRALL—What is the question?

"MR. KEYES—There is no question.

"MR. FAIRALL—There is a question, the last one.

"THE COURT—The reporter will read the answer; I may not state it correctly. (Last answer read.)

"MR. FAIRALL—Now, before that the first three questions I asked him. (All questions propounded by Mr. Fairall and answered by the juror was then read by the reporter.)

"MR. FAIRALL—You say you can be mistaken?

"A. Yes, sir.

"Q. But you don't believe you are mistaken, do you?

"MR. KEYES—That is objected to as already covered by the questions and answered by the witness.

"THE COURT—Those have been covered by the questions that have been asked.

"MR. FAIRALL—He has put it in again for the purposes of qualifying. He says he can be mistaken. Now, I said I would like to have an answer to that question, he doesn't believe he is mistaken.

"THE COURT—I think that is all the further examination I will allow. This is the third examination now I have allowed him on that point. The challenge will be denied.

"MR. FAIRALL—The effect of that kind of ruling is we have to exhaust our

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peremptory challenges and the people get theirs without exhausting them."

(Reps. Trans., p. 943, line 2, to 957, line 22.)

We have set forth the examination of this talesman almost in its entirety for the reason that it will illustrate the attitude of the trial Court and the District Attorney during the entire time that the jury was being procured. From the foregoing examination it appears that the juror disqualified himself several times by his answers given on examination by counsel for the defense. Every time that he did so the Court as well as the District Attorney, by the asking of palpably leading questions, endeavored to procure from him answers that would serve to qualify him. Throughout the entire examination of the prospective jurors, the trial judge seemed to have followed the invariable rule that if a juror in response to a leading question by the District Attorney said that he could act fairly, the challenge would be denied, it mattered not how frequently and with what detail he had previously disqualified himself. Common fairness should have dictated to the trial judge that such jurors should be excused. The doubt certainly should in every case have been resolved in favor of the challenge and against the juror.

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(8) GEORGE L. LOUDEN, on his *voir dire,* testified with reference to his opinions as follows:

"Q. On the morning of the first of October, 1910, did you examine the ruins?

"A. No, sir; I did not.

"Q. Well, did you go down there later?

"A. Oh, it was possibly inside of a week sometime; I just don't know when, but inside of a week I went past the ruins. Of course, there was a crowd there, and they had a rope stretched and the police kept me moving along. I didn't get to see very much. I was busy with my own work. I didn't take time to go down.

"Q. I suppose you saw the ruins to the extent to fix it to enable you to realize there had been some serious disaster there?

"A. No question about that.

"Q. And in the nature of an explosion of some kind?

"A. Yes, sir.

"Q. You think it was something more than simply a fire?

"A. I did what?

"Q. You thought it was something more than simply a fire?

"A. Oh, sure.

"Q. Did you see the bent steel pieces?

"A. I could see the girders were pretty badly twisted.

"Q. Did you see the glass scattered around the opposite side of the street?

"A. I don't think I noticed that. I think I noticed the broken windows on the north side, but I don't think I noticed on the opposite side of the street. I just hurried

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through, so I didn't get a chance to see very much of it.

"Q. I suppose at about the same time you talked with various people who told you what they heard and saw about the thing?

"A. Well, I suppose, in a general way. I haven't much recollection of the conversation. I think the most that I gained was from the papers.

"Q. But you had some conversations that are confused with what you read and what you read are confused with you heard?

"A. Yes, later.

"Q. It would be pretty hard to distinguish what you heard from what you read?

"A. That is very true.

"Q. But did you have any acquaintances or friends that were connected with the Times either in the capacity of employe or in the capacity of managers of departments?

"A. No, sir, I don't know any of them at all, neither employe or anything else.

"Q. You don't know any of the deceased—those that were killed in the disaster, nor none of their families?

"A. No, sir, nor none of their relatives.

"Q. I take it that at the time of the—subsequently you were either told about or read the report of the coroner's inquest, when that came out?

"A. I undoubtedly read it at the time, because I was reading the papers pretty closely at the time, but I have absolutely no recollection.

"Q. But you feel undoubtedly you did read it then along with the balance of the other matters?

"A. I think I did, yes.

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"Q. What paper were you taking at the time.

"A. Iwas taking the Times.

"Q. Subsequently, I take it that you read of the reports of the arrest of the two McNamara brothers?

"A. Yes sir.

"Q. And doubtless you followed the developments of that case from day to day as they were reported and as you heard it currently talked about among your friends?

"A. I guess I did.

"Q. And were you present at any time during the proceedings had in that case?

"A. No, sir, I was not here at the time of the trial. I spent about six weeks in the desert at that time, was the first I knew of the trial was when I got a letter from my son and got the Tribune. I was taking the Tribune at that time.

"Q. Do you know any of the members of the grand jury that returned the indictment?

"A. I did not.

"Q. When the plea of guilty came out in that case, I suppose you read and talked with people about that?

"A. Well, as I say, I was over on the desert at that time, and I got the reports from the papers that I got there. We were not getting the papers very regularly but I went to Blythe and found a letter and some papers there and when we got back to camp, we were in camp at the time, why, we did discuss the matter.

"Q. And later when you returned to Los Angeles you found that the newspaper reports that you had read, you confirmed those reports by talking with your friends

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and learning about what had developed here, I suppose?

"A. Well, I don't think I have done very much talking about it after I came back. The thing pretty well died down by that time.

"Q. At any rate you know that the plea of guilty was entered in that case?

"A. I do.

"Q. And the plea of guilty by J. B. McNamara to the explosion of the building by the use of dynamite?

"A. As far as I know it was.

"Q. And the facts as developed by the plea of guilty were confirmatory of the original opinion that you had formed by looking at the ruins, that there had been some form of violent explosion there?

"A. Yes, sir.

"Q. So that you found the newspaper reports, what you subsequently learned was entirely consistent with what you had originally seen yourself?

"A. Yes, sir.

"Q. So that I take it at the present time your opinion is a settled and fixed opinion that the building was blown up by J. B. McNamara by the use of dynamite?

"A. Yes, sir.

"Q. And very naturally that opinion will remain with you until such time as you get some new facts from some other source of equal credibility which would lead you to change the opinion which you have already formed in connection with it?

"A. Well, I could lay the opinion aside in the trial of these defendants and give him a fair trial.

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"Q. Well, I appreciate that undoubtedly you would make the effort, but nevertheless the opinion is existent now, which is an opinion which logically and naturally you couldn't change without acquiring some new facts, that is correct, isn't it?

"MR. KEYES—Objected to upon the ground he has already answered that. He said he could lay the opinion aside.

"MR. MOORE—That is not the question I am asking him. I am asking him another question.

"MR. KEYES—Well, the question is objectionable on the ground it is argumentative in view of the witness' answer that he has already given. We object to it on that ground.

"THE COURT—Read the question.

"MR. MOORE—The question as I am now framing it is entirely a different question from the former question.

"THE COURT—Read the question. (Last question read.)

"MR. KEYES—If the Court heard the other question—We object to this one.

"THE COURT—Yes, I remember the answer to the other question.

"MR. MOORE—This question, if the Court please, is simply a different question in that it is directing the juror's attention to a different phase of the same matter and in connection with his last answer; he should be allowed to answer it.

"THE COURT—It sounds to me like the same question. Do you understand the question, Mr. Louden?

"A. I do.

"Q. This last question?

"A. Yes, sir.

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"THE COURT—Well, you can answer it.

"Q. What is that?

"THE COURT—You may answer.

"Q. You say answer it?

"THE COURT—Yes.

"A. Why, I suppose that it would take some extra evidence to change that, take that out of my mind; but for all that, there is no reason in my mind why I could not lay that opinion aside and expect the prosecution to prove, without a reasonable doubt, the defendant was guilty, before I could expect the defendant to produce any evidence.

"MR. MOORE—Well, in other words, substantially your feeling is this, I take it, that while you believe and you will continue to believe until some new matter is secured, that the building was blown up by dynamite, nevertheless before you would convict this defendant of so doing, you would require the State to produce evidence, beyond a reasonable doubt, to the effect that the defendant was involved and was a party to the blowing up of the building by dynamite? Is that the idea?

"A. That is right.

"Q. But the fact would remain that independent of whether or not this defendant had anything to do with it or not, the fact would still remain at all times in your mind, that whether he had anything to do with it or not, somebody, namely, J. B. McNamara, blew the building up with dynamite?

"MR. KEYES—I object to that on the ground it assumes something not testified to by the witness and is directly contrary to what the witness has already testified to,

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that it will not remain in his mind, but he will set it aside.

"MR. MOORE—He said he would set aside the presumption against this defendant. You understand the question, do you?

"A. I do.

"THE COURT—Objection sustained.

"MR. MOORE—Q. Mr. Louden, assume that the defendant here has two defenses, one that the building was not blown up by dynamite, the other that he had no connection with the transaction; at the present, as I understand your prior answers, you are already convinced and your opinion upon that question could only be changed by the introduction of evidence that the building was blown up by dynamite?

"A. Well, I said before, that I had that opinion, but that I could lay that opinion aside.

"Q. Well, you could lay that opinion aside, but you could only lay it aside when you had secured evidence which would be just as credible as the evidence that you now have that it was blown up by dynamite? Isn't that correct?

"A. Well, as I said before, I should expect evidence to be first produced by the prosecution.

"Q. Yes, but——

"A. And then, if they satisfied me as to that evidence, then I should require the defendant to prove his side of the case.

"Q. Isn't it true, though, that you are already convinced and that all the State—if you are convinced upon that question, what are you going to do with the idea that is now already in your mind?

"MR. KEYES—That is objected to.

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"MR. MOORE—That the building was blown up by dynamite.

"MR. KEYES—Objected to on the ground that he has already testified to do what he was going to do with the opinion.

"THE COURT—I think the witness answered that question, he would lay any opinion or impression he now has, aside.

"MR. MOORE—I am asking him what he is going to do as a practical proposition.

"THE COURT—He has already answered what he would do. Sustained on the ground that it has already been answered.

"MR. MOORE—Isn't it a fact, though, that your mind, upon that question, having already been made up, that it would be far easier to convince you upon that question than it would be if your mind was not already made up?

"MR. KEYES—Objected to as argumentative.

"THE COURT—Objection sustained as argumentative.

"MR. MOORE—Q. Suppose that you were the defendant here, about to go to trial, and that every juror in the box, whose mind was already made up and fixed upon one of the elements of your defense when you knew that you had two defenses, but one of those defenses in the mind of the juror was already fixed upon, in all fairness would you want such a juror to remain in the box, or would you prefer to have a juror whose mind was free from any fixed opinions upon either one of the two defenses which you had?

"MR. KEYES—Well, that is objected to on the ground that it assumes something

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not in evidence, and is not a proper question, argumentative, immaterial, already answered. The question assumes that there is a fixed opinion in the juror's mind which cannot be changed. Now, he has already said he can lay that opinion aside, and, as I understand, this kind of a question is limited to the proposition as to whether or not the juror would want a man to sit as a juror in his case in the same frame of mind that he now is. He did not put that question to him.

"THE COURT—Sustained.

"MR. MOORE—If you know that you had two defenses, one of which was that the building was not blown up by dynamite, the other that you were not involved in the transaction, you knew that there was a juror in the box whose mind was already fixed upon the question that the building was blown up by dynamite, but which juror said that if taken as a juror, he could lay that opinion aside, would you want that juror to sit in your case, or would you prefer to have a juror who came into the case with no opinions at all upon either of your defenses?

"THE COURT—Answer the question.

"A. Why, I don't see why I would not. If a man was of the same mind that I am, I would be willing to be tried by eleven other men having the same mind that I have.

"Q. Will you answer the question as I gave it?

"MR. KEYES—Now, that question is objected on the ground it is a double question and on the ground it again uses that word fixed.

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"MR. MOORE—If you will listen to the question you will see that that question is so qualified——

"THE COURT—The witness has answered.

"MR. MOORE—Coming back to the question that I just asked you, you have said that you see no reason why you should not sit as a juror, but you did not answer which of the two types of jurors you would prefer to have sit in your case.

"MR. KEYES—That is objected to as incompetent, irrelevant and immaterial; already asked and answered.

"MR. MOORE—That question has not been answered; the last answer was not an answer to my question.

"MR. KEYES—I submit it is, if the Court please. What difference does it make what kind of a juror he would prefer? He has testified if there were eleven other men in the box, who were in the same frame of mind that he now has, he would be willing to be tried by them. The fact that he prefers this or that is immaterial.

"THE COURT—Yes, I think so.

"MR. MOORE—He has not answered the question I asked as to whether or not he would prefer to have a juror whose mind was not fixed upon one of the vital elements of this defense. I ask that that question shall be answered.

"THE COURT—It is not a question of a juror's preferment. I suppose a juror would prefer not to sit on a case at all. Unfortunately we have to have jurors and I think he has fairly indicated by his several answers his condition of mind. Objection sustained.

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"MR. MOORE—You do recognize, do you not, Mr. Louden, that it is far easier for the State to convince a man, whose mind is already convinced in the way that they want it to be convinced upon a given state of facts, than it is to convince a man whose mind is as yet unformulated upon that question.

"MR. KEYES—Objected to as argumentative, immaterial and irrelevant.

"THE COURT—Objection sustained.

"MR. MOORE—It goes to the very point that was raised yesterday, your Honor, in the matter of Mr. Horton. Mr. Horton had a fixed opinion in connection with gas. The case is in all senses analogous.

"THE COURT—I allowed Mr. Horton to answer.

"MR. MOORE—The question of the challenge was then permitted.

"THE COURT—The challenge was not denied; that is the ground he was discharged on.

"MR. MOORE—Then we will come back to the question of Mr. Hughes. Mr. Louden, have you talked with anybody in connection of the facts in this case?

"A. I have not.

"Q. Are you acquainted with any of the people connected with the District Attorney's office?

"A. No, sir, I am not. I only see them since I have been here. I have seen one of them in the other trial, of course, but personally I don't know them nor they don't know me.

"Q. Have you ever been interested in

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the prosecution of any criminal case of any kind or character?

"A. No, sir.

"Q. Have you served in criminal cases as a juror prior to this?

"A. No, sir.

"Q. This is the first time you have ever served as a juror?

"A. The first time. Well, I served in the Police Court here about ten years ago about one hour. That is all the service I have done since I have been in Los Angeles.

"Q. You haven't served on any previous juries since you were called on the 15th of September?

"A. No, not previous to that; no, sir.

"THE COURT—Let us understand that. Counsel asked you if you served on any juries between the 15th of September and now. The juror is evidently answering to this panel.

"A. As I understand, if I served on any jury previous to the 15th of September.

"MR. MOORE—No, since the 15th of September.

"A. I served on two in the other Court, not in a murder trial.

"Q. Were those civil or criminal cases?

"A. Criminal.

"Q. In what department was that?

"A. Seventeen.

"Q. You had at no time been acting in the capacity of a peace officer, have you?

"A. No, sir.

"Q. You probably read about the arrest of the defendant around the first of the year?

"A. Yes, sir.

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"Q. You have read pretty generally about the facts in this matter from the time of the—1910, along, haven't you, the general developments?

"A. Well, I don't think I have paid very much attention to it, excepting since the arrest, I, of course, kept up with the paper, noticed at different times that they have been in, that they have been looking for these men.

"Q. But you have read about it since the arrest?

"A. Yes, sir.

"Q. And you have followed it pretty closely, have you?

"A. Well, not very.

"Q. Well, what I mean is, you have read practically everything that has developed in the case that you have seen?

"A. I don't say I have read everything.

"Q. What paper do you take?

"A. I take the Times.

"Q. I take it you are in general sympathy with their editorial and news policies?

"MR. KEYES—That is objected to as irrelevant, incompetent and immaterial.

"THE COURT—Sustained.

"MR. MOORE—Upon their editorial and news policies on labor questions?

"MR. WOOLWINE—Objected to on the same grounds.

"THE COURT—Sustained.

"MR. MOORE—That goes to a very vital element of this defense.

"THE COURT—I am not going to try the editorial policies of a paper in this case.

"MR. MOORE—Well, you know, do you not, from what you have read in the Times,

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that the Times is an upholder of the doctrine of the open shop?

"A. I do.

"Q. You are fully advised as to that?

"A. I am.

"Q. And I take it you take the Times because the Times represents in a general way your views?

"MR. KEYES—That is objected to as immaterial, irrelevant and incompetent why he takes the Times.

"THE COURT—Overruled.

"A. I do not. There is a great deal of the Times that I don't approve of.

"MR. MOORE—Do you approve of that part of their policy on labor questions?

"A. I do not. I think they are too strong entirely.

"Q. At any rate, you followed the developments in this case at the time of the arrest of the defendant and read of the reported flight and discovery of the defendant?

"A. I think I have; I haven't taken the Times all the time. I quit the Times for a couple of years, was taking the Tribune.

"Q. You are taking it now, aren't you?

"A. I am taking it, yes. I went back to the Times because it has more news in it than the other papers, is the only reason that I do take it.

"Q. You read in the Times doubtless, that Mr. Burns had, after many reported captures, during the intervening years, had finally made the final capture of Mr. Schmidt?

"A. Yes, sir.

"Q. And that the result was that the

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reward that had been offered was being claimed by Mr. Burns?

"A. I seen that.

"Q. You knew all about the fact and the reward and——

"A. Yes, sir. I didn't know the amount of it until towards the latter part here, a month or two ago, I saw he was demanding, I think, $10,000.

"Q. And you subsequently have read in the Times that some kindly disposed person has seen to it that Mr. Noel has been sent out here to assist the prosecution?

"MR. KEYES—That is objected to as irrelevant and immaterial and object to the form of that question.

"THE COURT—Sustained.

"MR. NOEL—He don't know who it was, and I assume——

"MR. WOOLWINE—Well, I will tell you right now, I am the man and I take full responsibility of it.

"MR. MOORE—I am assuming the kindly disposition.

"MR. WOOLWINE—You might add the county is paying for it.

"THE COURT—The kindly disposition may be stricken out, if you desire.

"MR. MOORE—At any rate, you read that Mr. Noel had appeared upon the scene to render his assistance to the District Attorney of this county.

"A. I heard of that just lately. I don't think I noticed it in the papers until just of late.

"Q. Now, from all these accumulated facts of the purported flight and the purported discovery by Mr. Burns and this activity of someone that resulted in Mr.

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Noel's appearance and all the surrounding circumstances that surround this matter, is there not at this time or is there at this time, an opinion or a belief or a surmise or conjecture that the defendant is probably guilty?

"MR. WOOLWINE—Objected to upon the ground it is indefinite, unintelligible, argumentative and immaterial.

"MR. MOORE—Do you understand my question?

"A. Yes, sir.

"MR. WOOLWINE—Just a moment.

"THE COURT—Objection sustained.

"MR. MOORE—He says he understands, and the only objection is that it is unintelligible, and he says he understands it, notwithstanding the limitation of the counsel.

"THE COURT—There are very numerous other objections.

"MR. MOORE—Oh, but they are not framed and the only objection is that I know of, that the Court can act upon, is the objection framed.

"THE COURT—Read the objection. (Objection read.) Yes, on the ground it is immaterial.

"MR. MOORE—Do I understand that the Court rules that it is immaterial if this juror has an opinion that the defendant is guilty?

"THE COURT—Then why don't you ask him if he has an opinion?

"MR. MOORE—That is what I did ask him. He said he understood my question.

"THE COURT—No, you asked him if from all these things several things might not occur and among them he might have a surmise the defendant might be guilty.

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"MR. MOORE—He says he understands my question.

"THE COURT—I understand it also. If you want to ask him if he has an opinion as to the guilt or innocence of the defendant, ask him.

"MR. MOORE—Suppose he has something lesser than an opinion, suppose he has a surmise rather than an opinion, are we not entitled to know? Is it an immaterial matter that the defendant shall know he surmises or conjectures he is probably guilty?

"THE COURT—What he has must be raised at least to the dignity of an opinion in order to disqualify him or become material in this case, that is the reason I sustained it on the ground it was immaterial.

"MR. MOORE—Well, anyway that we may conform with the Court's opinion I will ask you the question whether or not you have an opinion from all of the facts I developed in my previous question that the defendant is probably guilty?

"A. Why, I couldn't say that he was guilty because I haven't heard any evidence proving his guilt.

"Q. Now, but I asked you if you had an opinion that he was probably guilty?

"A. No, I have not.

"Q. You have no opinion whatsoever upon that question at the present time?

"MR. KEYES—That is objected to upon the ground that he has already answered it.

"THE COURT—Overruled; answer the question.

"A. Please read the question. (Question read.) I have not.

"MR. MOORE—But you do have an

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opinion that the building was blown up by dynamite?

"MR. KEYES—That is objected to as already answered.

"THE COURT—Yes.

"MR. MOORE—But if the fact that the building was blown up by dynamite—was not blown up by dynamite should be one of the elements of the defendant's defense, then you have a fixed opinion upon that question, which, however—which fixed opinion, however, you say you could lay aside, is that correct?

"MR. KEYES—Objected to as already asked and answered, gone over the first part of the examination.

"THE COURT—Yes, he went over that. Sustained on the ground already answered.

"MR. MOORE—That opinion upon that question is one which I believe you have formed as you have heretofore stated from your going over—going around the ruins a few days after the explosion and seeing that it was an explosion and seeing that the windows on the opposite side of the street were broken, and seeing the steel girders bent, and forming at that time from all the facts you saw with your eyes the opinion that it was not a fire merely but an explosion, and which opinion was subsequently added to and confirmed, that is confirmed so far as it being a dynamite explosion, by your reading of the coroner's inquest report, the various developments up to the time when the plea of guilty was entered, the reading of the plea of guilty, the proceedings had in a court of law at that time, and which opinion so formed and so reported has up to this time never been contradicted.

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"MR. KEYES—We object upon the ground it assumes something not testified to by the juror.

"THE COURT—Yes, that assumes several things that the juror has not testified to.

"MR. MOORE—I don't know what they were, if the Court please. He has testified, I believe, to every one of those elements, with the possible exception—

"THE COURT—The first one was that he didn't testify that he saw any glass on the opposite side of the street.

"MR. MOORE—I didn't say so. I didn't put that in my question.

"THE COURT—Read the first part.

"THE JUROR—You put that in.

"MR. MOORE—Didn't you say you saw broken glass windows—

"MR. WOOLWINE—Just a moment. We object to counsel interrupting.

"THE COURT—Read the first part of that question. (Question read as indicated.) That is what I said you put in and the witness didn't testify to. You said you didn't put it in, that is one of the things, and there are a number of others in that question.

"MR. MOORE—Mr. Louden, did I understand you to say, that while you did not see the broken glass, you did see broken windows on the north side of the street; isn't that your testimony?

"A. I am not positive about that, but I guess I did, because—

"Q. You did testify to that?

"A. I said on the north side I saw—

"Q. Yes, you testified that you saw broken windows on the north side, didn't you?

"A. Yes, sir; not on the opposite side.

"Q. That is the state of your testimony—

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"THE COURT—You keep talking and the witness keeps talking and you don't hear what he says. Read it, if you can get both of them at the same time. (Last four or five questions and answers read by the reporter.)

"MR. MOORE—I would like to know what other facts I put in my question that are not testified to. If you will state them I will draw the matter out. If you will frame an objection here, if there are any other elements in that question that are not brought out by the evidence, I want to know what they are.

"MR. KEYES—Well, I can mention one; for instance, about the plea of guilty, that he saw it or heard it in a court of law, something of that kind.

"Q. I understand you to say that you had read the newspaper reports of the plea of guilty having been entered in one of the courts here?

"A. I don't think I said that.

"Q. Didn't you say that you read the plea of guilty while you were out on the desert?

"A. I did, but I didn't say that I saw it entered in the court.

"Q. Oh, no, I didn't say that you did.

"A. I understood you to say—

"Q. My question is, that you had read the newspaper reports of the plea of guilty having been entered in a court of law. Isn't that correct?

"MR. KEYES—That wasn't what was in the original question. That is my objection.

"MR. MOORE—That is exactly the phraseology that was in my original question.

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"THE COURT—I will sustain the objection. Now, you may frame another question.

"MR. MOORE—Q. I believe also that you stated that you not alone read about it in the newspapers, but you likewise had a letter from your son?

"A. Yes, sir.

"Q. To the effect that a plea of guilty had been entered?

"A. Yes, sir.

"Q. Now, the opinion that you have formed that the building was blown up by dynamite, as I understand, is formed from your going down and examining the ruins some few days after the explosion and seeing that there had been something more than simply a fire, namely, an explosion of some high explosive, which had resulted in the destruction of the building, the bending of steel girders, the breaking of glass and windows on the north side across the street.

"THE COURT—Now, I didn't hear him testify to across the street.

"MR. MOORE—All right, in the same building, is that correct? In the same building?

"A. It was where the Building and Contractor was in; it was just north of the Times across the alley.

"Q. Across the alley. I will continue the question: the breaking of the windows in a building across the alley from the Times building; from the subsequent reading of the developments surrounding the coroner's inquest; from the subsequent reading of the reports of the plea of guilty having been entered; from the receipt of a letter from your son to the effect that the plea of guilty had

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been entered; from the return to Los Angeles where you found that these reports in the papers and the report as contained in the letter from your son, were true, and all of which reports have remained uncontradicted at this time; now, as I understand, those are the various elements upon which you formed an opinion that the building was destroyed by dynamite.

"A. Well, I formed my opinion of it being blown up by dynamite, I should say, exclusively upon the testimony or the plea of the McNamaras pleading guilty. I would have to say that at first I had no definite opinion and I was rather under the impression for a while that it was blown up by gas, because I had labor union men working for me and they contended very strongly that it was, gas had blown it up, and I was undecided until the plea of the McNamaras, confirmed by the newspapers and by a letter from my son, and then I was very definitely satisfied in my mind that it had been blown up by dynamite, but it was not until that time.

"Q. But when you did examine the building on the 4th or 5th of October, 1910, you did know that some form of a high explosive had destroyed the building?

"MR. KEYES—That is objected to as already asked and answered, immaterial, irrelevant.

"MR. MOORE—That is a basic fact in this matter, which goes to destroy that constant objection of the imposition of this statute here.

"MR. KEYES—He has already stated that he had no definite opinion.

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"MR. MOORE—Well, he had an opinion on the fact it was a high explosive that had been used and it goes to the very basic thing of this introduction of the statute here.

"Q. Is that correct?

"THE COURT—Is what correct?

"MR. MOORE—The last question.

"MR. KEYES—We have objected to that.

"THE COURT—Do you know what the question is now?

"A. Whether it had been blown up by a high explosive.

"Q. BY MR. MOORE—Yes.

"A. Why, I answered that quite awhile ago.

"Q. You answered it before counsel objected, didn't you?

"MR. KEYES—He answered it, the first part of the examination; that was one of the grounds of my objection that it had already been answered.

"MR. MOORE—You did not get that in until just this minute.

"Q. Then when you read the reported plea of the McNamaras and read your son's letter, you found that the facts as developed in the newspaper report and as developed in your son's letter have since remained uncontradicted, were entirely consistent with the original opinion which you had formed, namely, that some high explosive had been used there? Is that right?

"A. Yes.

"Q. In other words, the opinion which you had is one, while it was confirmed by the plea of guilty and your son's letter and uncontradicted statements, while it was confirmed by those facts, it receives its real basis

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in the fact that it is entirely consistent and confirmatory of an original opinion based upon an examination of physical facts? Is that correct?

"MR. WOOLWINE—Objected to on the ground it is argumentative.

"MR. MOORE—No, it is not argumentative. It goes to the very basis of this thing.

"THE COURT—Answer the question.

"MR. MOORE—Is that correct?

"A. Yes, sir.

"Q. In other words, when you told me a few minutes ago that you could lay aside your opinion that the building was blown up by dynamite, that in addition to laying aside an abstract opinion out of the air, you have to lay aside knowledge of certain physical facts which you saw with your own eyes, namely, bent beams, broken windows and other signs of the use of some high explosive power? Is that correct?

"A Read back. (Question read.)

"A. Well, as to that, the high explosive might be gas.

"Q. The facts are though that you saw these physical facts and no matter what you might be able to do with an opinion that somebody told you, you cannot put outside of your mind what you saw with your own eyes, can you?

"A. No.

"Q. And if anybody came on to the stand and told you that a steel beam was not bent at all, you would know that that man who was so testifying was testifying for something other than facts, wouldn't you?

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"MR. KEYES—Objected to, argumentative and irrelevant, asking the juror to pass on the evidence before even its introduction, immaterial.

"THE COURT—Sustained.

"MR. MOORE—Q. In other words, any testimony here in connection with the facts of this matter as developed by your own personal physical examination, as you have indicated, would have to be facts consistent with what you saw with your own eyes, otherwise you couldn't change your opinion? Isn't that correct?

"A. I could not change my opinion as to the beams, of course not, because I seen those.

"Q. No. In other words, the opinion which you have in this matter is one that you get from a commingling and mingling up of what you saw with your eyes and what you have since read and what you have since been told, and which has never since been contradicted. Isn't that right?

"MR. KEYES—Objected to.

"MR. MOORE—He has answered.

"MR. KEYES—Well, I move to strike the answer out until I get a chance to object.

"THE COURT—What is the answer?

"THE REPORTER—I did not hear any answer.

"MR. KEYES—We object to it on the ground it is irrelevant and immaterial, assumes something not in evidence, namely, that the juror had an opinion, a fixed opinion on the matter, and he has testified that he had no opinion until the plea of the McNamaras.

"THE COURT—Sustained.

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"MR. MOORE—Why, if the Court please, he testified here as to the knowledge of certain physical facts which he examined, if your Honor will allow the reporter to read that last question.

"THE COURT—I heard the question. I remember what it said.

"MR. MOORE—Do I understand you still to sustain that objection?

"THE COURT—When I sustain an objection, why, I still sustain it. I don't want any argument afterward. I have given you great latitude in this matter, Mr. Moore. Where a question was uncertain I have allowed you to reframe it, have done that repeatedly, and I have listened very carefully to what this witness has said.

"MR. MOORE—We submit a challenge to Mr. Louden on the ground that his examination on *voir dire* shows the existence of a state of mind which comes within subdivision 2 of Section 1073 of the Penal Code.

"MR. KEYES—We deny the sufficiency of the facts and resist the challenge, and ask leave to examine.

"THE COURT—You may examine.

"MR. KEYES—Mr. Louden, I understood you to say that you did not see the ruins of the Times building until days after the explosion? Is that correct?

"A. Correct.

"Q. About how many days?

"A. Why, I don't know; it was, I think, three or four days, possibly a week.

"Q. At the time you went down there I also understood you to say the place was roped off and there were crowds of people around there?

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"A. The rope was stretched along the west side of the street and the police were keeping the crowd moving; we walked right up north along the street right up—I didn't get close to the building; I was across the street all the time, and on the move, so I did not get to see very much of it, or a very long length of time.

"Q. Then you were alone at that time, were you?

"A. Yes, sir.

"Q. And walked up there out of idle curiosity at that time, I suppose, to see the building?

"A. Yes, sir.

"Q. And did not stop to make any minute examination of it, I take it?

"A. They wouldn't let us stop.

"Q. Wouldn't let you stop and wouldn't let you get within 60 or 100 feet of it, I suppose?

"A. Across the street, I suppose 60, about 60 feet, possibly 70; about 80 feet to where I could see the beams in the center of the building.

"Q. You did not talk at any time, did you, with anyone who purported to know anything about the facts of the case?

"A. No, sir, that knew the facts.

"Q. All you have heard about it was the common gossip that was going around among your employes and probably your friends, family?

"A. That is all, and what I saw in the paper.

"Q. What you read in the paper, and I understood you to say that with all that talk you heard, what you read in the papers, you formed no definite opinion as to what had

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destroyed the Times up until the time you read the McNamaras' plea of guilty? Is that true?

"A. Correct.

"Q. And when you read that plea of guilty by the McNamaras, you probably read in the papers that they had confessed—one of them had confessed to having destroyed this building by dynamite?

"A. Yes, sir.

"Q. And the opinion that you got about the matter was formed, was it not, exclusively from what you read at that time about the McNamaras' confession?

"A. Well, that is the most of it; yes, sir.

"Q. You never after that talked with anyone who knew anything about the facts, did you, or claimed to know anything about the facts?

"A. I did not.

"Q. You never examined the Court records of the McNamaras' plea or confession, did you?

"A. I did not.

"Q. And all you know about it was what you gained by newspaper articles, common notoriety, public rumor?

"A. That is all.

"Q. Now, you say that——

"MR. MOORE—I object to that, I ask that the last—I object to that last question as not being a correct statement of the facts upon which the opinion was based and ask that the same be stricken. The counsel's question is that the opinion that he has formed is based upon public rumor, newspaper report and one other element.

"MR. KEYES—Common notoriety.

"MR. MOORE—The facts are that his

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opinion as developed is based upon newspaper reports, letters, entirely consistent with the physical facts which developed from what he saw. Your question is not inclusive of all the elements. I object to that question and ask the answer be stricken.

"THE COURT—From all the matters which counsel has asked, it is for the Court to determine from the examination of counsel on both sides and all the facts and circumstances.

"MR. MOORE—But your Honor objected to my framing a question on the ground that I was not including the elements to testified. Now, counsel has included elements to which he has not testified, taking his examination as a whole, and it is unfair to the juror and unfair to this defendant.

"MR. KEYES—Our objection to your question, Mr. Moore, was that you asked or assumed matters that the witness had not testified to.

"MR. MOORE—Yes, and so your question assumes elements that the witness has not testified to, exactly the same.

"MR. KEYES—I fail to see where they are.

"MR. MOORE—Well, your question includes only newspaper reports and public rumor, while the facts are that his opinion is based upon an examination of the physical facts, which were confirmed by what he read and saw.

"MR. KEYES—The trouble with your argument is, if I may, if the Court please—

"THE COURT—No, don't stop to argue this matter. Objection overruled.

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"MR. KEYES—The question is answered and I suppose the answer stands.

"THE COURT—The answer stands.

"MR. KEYES—Mr. Louden, if you were accepted as a juror here—you have already testified to this but I will ask it again—you could and would lay this opinion aside that you gathered, as I stated, and try this defendant fairly and impartially upon the evidence which you hear from the stand, would you?

"MR. MOORE—I object to the form as I have stated.

"THE COURT—Overruled.

"A. I would.

"MR. KEYES—You would?

"A. Yes.

"MR. KEYES—I submit the challenge.

"THE COURT—Challenge denied.

"MR. MOORE—Just one or two more questions on another line. Q. Mr. Louden, do you know any reason, whether I have asked it or not, which would prevent you from acting with entire impartiality as between the people and the defendant in this case?

"A. I do not.

"Q. Have you formed any prejudices or leanings as against any of the defendants or the defendants' counsel or any of the parties interested in this matter?

"A. No, sir.

"Q. So that if you were taken as a juror, would you be able to come into the case with a mind absolutely free from any prejudices whatsoever?

"A. I think I could.

"THE COURT—Could you and would you lay aside any opinion or impression that

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you have of any kind whatever in regard to this matter and require the people to prove every material element in this case before you would convict the defendant?

"A. I would.

"THE COURT—Challenge denied.

(997 line 19 down to 1031 line 2)

The important thing to be borne in mind in regard to the testimony of the last juror is the fact that he himself had visited the scene of the disaster and had made some examination of the ruins. Of course, testimony was given at the trial with reference to the condition of the building after the explosion and fire. Some of this testimony has been previously quoted in the introductory portion of this brief. The fact that he had made these observations of the building coupled with the opinion that he afterwards formed from the confession of the McNamaras should have been sufficient to have disqualified him.

(9) R. J. ARATA on his *voir dire* testified in part as follows:

"Q. Were you in the city on the 1st of October, 1910?

"A. Yes, sir.

"Q. Were you living close enough to the Times building at that time to hear the explosion?

"A. I might have been living close enough, but I didn't hear it.

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"Q. I suppose then, that early in the morning you went down and saw the ruins?

"A. The next day about 8 or 9 o'clock.

"Q. And the next morning about 9 o'clock you went down?

"A. Yes, sir.

"Q. You went as close to the building as you would be allowed to go, did you?

"A. Yes, sir.

"Q. And I suppose that you went on subsequent occasions later?

"A. Oh, I was there several times afterwards.

"Q. I suppose that among other things you saw broken windows in adjoining buildings?

"A. Yes, sir.

"Q. And you saw probably broken glass and other matter that had been thrown out by the explosion?

"A. Yes, sir.

"Q. And I take it you also saw either on that first day or on your subsequent visits, you saw the bent steel girders and other matter to indicate that there had been a serious explosion?

"A. Yes, sir.

"Q. So that you were fully advised from the beginning that the difficulty had been something more than simply a fire, but that there had been in addition to the fire a serious explosion of some kind, is that right?

"A. Yes, that is right.

"Q. Did you at that time form an opinion as to what the character of the explosion was.

"A. Why, I didn't form the opinion but I heard it had been gas, caused by gas.

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"Q. You heard of the gas theory, did did?

"A. Yes, sir.

"Q. You also heard I suppose of the dynamite or nitroglycerin theory?

"A. Yes.

"Q. Is that right?

"A. That was after, not at the time though, not the next day.

"Q. You heard both theories advocated by different people, did you?

"A. Not the next day.

"Q. I mean in successive days; I am not talking of the next day, but successive days after that you heard both theories talked about?

"A. I think I did.

"Q. Do you know any of the people who worked in the building?

"A. Not at the time, no.

"Q. Well, I mean did you meet those people later or have you met any of the people who worked in the building since that time?

"A. No, not since the time.

"Q. Well, at the time, before?

"A. Before.

"Q. Before the time?

"A. Before.

"Q. And they have talked I suppose and you have talked together about what caused the explosion, have you?

"A. Yes, sir.

"Q. And you probably have talked with people who claimed to have or who at least claim to have some knowledge of the fact?

"A. Yes, they claimed they had but previous to the explosion.

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"Q. I didn't get that.

"A. They had knowledge of the building there previous to the explosion but not afterwards.

"Q. What paper were you taking at the time?

"A. I was taking the Times, and the Examiner and I think I was taking the Tribune also.

"Q. I suppose that naturally the matter attracted a great deal of your attention and you read the papers pretty generally as to the developing daily news on the matter?

"A. Yes, sir.

"Q. Among other matters that you read along about that time was probably the report of the coroner's inquest when that came out?

"A. I don't remember about the coroner's inquest. I might have read it, I expect I did.

"Q. Do you remember reading the report of the citizens' committee appointed by the Mayor?

"A. Yes, sir, I read it.

"Q. You did read that?

"A. Yes, sir.

"Q. And did you happen to know any of the members of that citizens' committee, Mr. Mulholland and others?

"A. I met Mr. Mulholland but don't know him very well, just met him a few times.

"Q. You know him very well?

"A. Not very well.

"Q. But you read his report that was published, did you?

"A. I might have read it but I forget it.

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"Q. At any rate you followed the case at the time that the arrest of the McNamaras, did you, or up to that time?

"A. Yes, sir.

"Q. Then you read of the trial and of the plea of guilty having been entered?

"A. Yes, sir.

"Q. Were you present in Court during any of the proceedings in that case?

"A. No, sir.

"Q. Did you know any of the jurors or any of the people connected with the trial of the case?

"A. No, sir.

"Q. You were not acquainted with Mr. Fredericks or Mr. Ford or any of the people active in that case?

"A. I know Mr. Ford but not very well.

"Q. But you know him as a friend and possibly your lawyer?

"A. No, not a friend or a lawyer.

"Q. At any rate you followed the case up to the entry of the plea of guilty, you read the report of the proceedings had in Court at that time, did you?

"A. Yes, sir.

"Q. You then learned that the building had been blown up by dynamite from the plea of guilty?

"A. Yes, what the papers said, yes.

"Q. You never have heard that report contradicted since, have you?

"A. No."

(Reps. Trans., p. 1081, line 2, down to p. 1085, line 8.)

"Q. Then your opinion is at the present time that the building was, as a matter of

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fact, blown up by dynamite by J. B. McNamara?

"A. Yes, sir.

"Q. And that opinion which you have, very naturally you cannot change that opinion—would not change it except that you got new information, which was just as much entitled to credit as the information which you now have upon the subject and upon which you formed the opinion that you now have, would you?

"A. Yes, I would have to take evidence as it is submitted in Court.

"Q. What?

"A. I would have to take evidence as it is submitted in Court.

"Q. Well, that isn't what I am asking you. I say it would be impossible for you to change the opinion which you now have on this subject that the building was blown up by dynamite, except that you hear evidence on the same point and of such a character as would lead you naturally and logically to change your mind.

"A. Yes.

"Q. That is true, isn't it?

"A. That is right.

"Q. In other words, you opinion is a fixed opinion now and very naturally you would not change that opinion until you had some new facts on the subject? Isn't that right?

"A. That is right.

"Q. So that if the defendant here has two defenses, one that the building was not blown up by dynamite, upon that question which it is true that you could change your mind, if you heard evidence, at the same time it is equally true that until you

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do hear evidence, your mind is made up on that subject? Isn't that right?

"A. Yes sir, that is right.

"Q. So that if you were taken as a juror in this case, the defendant, if he wanted to combat the idea that this building was blown up by dynamite, would have to introduce evidence to change your mind upon that question? Isn't that right?

"A. Some one has to submit evidence to change my mind, yes."

(Reps. Trans., pp. 1090, line 1, down to p. 1091, line 8.)

A challenge to this juror for cause was also denied.

(10) JAMES B. HUNTER testified in part as follows:

"Q. Now do you know that one of the McNamara brothers pleaded guilty to blowing up the Times?

"A. I do know it.

"Q. Do you know they plead guilty to the same moral certainty that you know they were arrested?

"A. Yes.

"Q. The same certainty. Now you feel the same confidence and your mind rests as easy in that fact and belief as it does in the fact and belief that they were arrested?

"A. Yes.

"Q. And you believe that their plea of guilty was true, don't you?

"A. Yes.

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"Q. That one of them did blow up the Times Building with dynamite?

"A. Yes.

"Q. You believe that to a moral certainty?

"A. I do, yes sir."

(Reps. Trans., p. 1194, line 21, down to p. 1195, line 6.)

. . . . . .

"MR. HARRIMAN—Can you set that view or that opinion aside just as though you hadn't had it, and act as fairly concerning all the facts that caused that opinion to form if you were chosen as a juror and act as freely as if you had never had the opinion?

"A. *Well, I don't see how I could.*

"Q. *It would go out with you into the jury box because it is a part of your state of mind, wouldn't it?*

"A. *Yes.*

"Q. You couldn't help it?

"A. No."

(Reps. Trans., p. 1196, line 25, to p. 1197, line 6.)

. . . . . .

"Q. If then, you were accepted, the defense would have to produce before you, evidence that the building was not blown up by dynamite, would they?

"A. Yes.

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"Q. And if the defense did not produce that evidence you would feel that you could pronounce a verdict of guilty, would you?"

(Reps. Trans., p. 1198.)

The last question was objected to and the Court wrongfully sustained the objection. The question was an absolutely proper one and ought to have been allowed. The juror had already testified that he had formed an opinion that it would take evidence to remove, that he believed that the building was blown up by dynamite, and that the defense would have to produce evidence that it was not so destroyed. Counsel for the defendant had the undoubted right to ask the juror if he would bring in a verdict of guilty if the defense did not produce contrary evidence. An affirmative answer to the question would absolutely have disqualified the juror. It is inconceivable to us how or upon what theory the question should have been disallowed. Why should a defendant in a criminal case be compelled to stand trial before such a juror, and why should his counsel be arbitrarily and improperly curbed and restrained in the asking of a question so obviously proper and so obviously

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relevant to the subject of the state of mind of the juror? The same juror further tetsified:

> "Q. If the prosecution should not produce any evidence to show that the building was blown up by dynamite, and if the defendant should not produce any evidence, do you feel sufficiently convinced of that fact to act upon it, whatever other facts in the case there may be that might be proven, is your mind sufficiently at rest on that point?
>
> "A. Well, I think it is pretty evident that it was blown up or it wouldn't have been confessed to and they serving time for it.
>
> "Q. I understand, and you believe it?
>
> "A. Yes.
>
> "Q. And it would require evidence to remove it?
>
> "A. Yes sir.
>
> "Q. And you could not set it aside without evidence?
>
> "A. *Well, I don't see how I could.*"
>
> (Reps. Trans., p. 1198, line 25, to p. 1199, line 12.)

This juror thoroughly disqualified himself by the foregoing answers. The District Attorney did his best by leading questions to wring from the juror some contradictory or conflicting answers, but he did not succeed. Under

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examination by the District Attorney the juror testified:

"Q. Now if you are selected as a juror in this case, would you, notwithstanding that belief that you may have, wouldn't you be able to set that belief aside, in the background, as it were, and try this case and decide the defendant's guilt or innocence by what you hear from the witness stand by the testimony of the witnesses that are produced here?

"A. Well, it is hard for a man to set aside an opinion like that, when a man has confessed a crime, and knows that he has a life term before him.

"Q. I didn't ask you to set it aside, Mr. Hunter, in that way, that is, that you should forget it, or try to dislodge it, as it were, from your mind, but what I ask you to do is this: that notwithstanding you may have that opinion, or that belief in your mind, and may be convinced that McNamara did plead guilty and did blow up the Times building, wouldn't you require the people in this case to prove, before you would find this defendant guilty, that the defendant had something to do with the blowing up of that Times building?

"MR. HARRIMAN—We object upon the ground it has already been asked and answered.

"THE COURT—Overruled.

"MR. KEYES—Wouldn't you require them to prove that?

"A. Yes sir.

"Q. And if that connection with the defendant—that that matter involved the

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destruction of the Times building you would also require the people to prove that that building had actually been destroyed by dynamite before you would find him guilty, wouldn't you?

"A. Yes.

"Q. In other words, Mr. Hunter, suppose the defendant in this case should not prove that the building had been destroyed by dynamite; suppose they went into the proof of the case and simply tried to connect the defendant up with the destruction of that building and put in no evidence at all that the building had been destroyed by dynamite, don't you realize that you wouldn't be authorized, it wouldn't be right or lawful for you to render a verdict of guilty against the defendant, because as a man believed that McNamara had destroyed it by dynamite or that it had been destroyed by dynamite, you understand that?

"A. No, I don't know as I do.

"Q. In other words, if the people don't prove both elements of the case, you stated a moment ago that you would not convict the defendant. Now, suppose they only prove one element, that being that Schmidt was connected with the blowing up of the Times building in some way, but suppose the people failed to prove that it was blown up by dynamite, wouldn't you acquit the defendant?

"A. If they failed to prove it was blown up by dynamite?

"Q. Yes.

"A. Oh yes.

"Q. You would acquit the defendant and

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you would acquit him because they had not proved their cause, wouldn't you?

"A. Yes, because I wouldn't have sufficient evidence.

"Q. Notwithstanding the fact that you yourself as a man now may believe that the building was actually destroyed by dynamite, if the people don't prove that you would acquit the defendant, isn't that true?

"A. Yes, I expect it is.

"Q. In other words, if you are selected as a juror in determining the defendant's guilt in this case as a juror, you would not act upon your belief which you now have as a man?

"A. No, I couldn't, if the evidence was sufficient, if I was wrong——

"Q. No, without any evidence at all on that point, without any evidence at all on the question as to whether or not the building had been destroyed by dynamite, if the people don't put in any evidence on that question and there wasn't any by anybody in the case, don't you realize in arriving at a verdict you would not—you could not as a juror act upon your opinion that you now have as a man?

"A. Yes.

"Q. You realize that?

"A. Yes.

"Q. Then that being the case don't you believe that you could put this opinion aside and act fairly and impartially in this matter and try the case absolutely and solely upon the evidence which you hear on the stand?

"A. Yes, I will endeavor to.

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"Q. You think you can act fairly in the matter?

"A. Yes sir.

"Q. Render a verdict according to the evidence?

"A. Yes sir.

"Q. And the evidence alone?

"A. Yes.

"Q. You think you could act impartially in the matter, do you?

"A. I think I could.

"Q. And if selected as a juror, do you say that you would act fairly and impartially?

"A. Yes."

(Reps. Trans., p. 1214, line 20, down to 1218, line 8.)

The Court denied a challenge for cause to this juror also. The answers of this witness and his testimony given as to his frame of mind resemble almost exactly the testimony given by the juror Seklemin, which is quoted by Justice Henshaw in the Helm case. In fact it seems impossible to us to draw any distinction between the jurors in the Helm case to whom the Supreme Court held that challenges should have been allowed, and the jurors in this case to whom challenges were denied by the trial Court. So long as the District Attorney in this case was able, by hook or by crook, to pull forth from a talesman an affirmative answer to his leading and mislead-

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ing questions, the trial Judge would deny a challenge.

(11) FRED MONIA testified on his *voir dire* in part as follows:

"Q. Did you go around—have you talked from time to time with people who had or claimed to have some knowledge of the facts in connection with this matter?

"A. No, I have not, only of late, the last few months. Once I think before, is all.

"Q. And on one occasion prior to the last few months you talked to some one?

"A. Yes.

"Q. Who was that person?

"A. A neighbor.

"Q. Do you remember his name?

"A. Yes sir, Charles Matney.

"Q. What business was he in?

"A. Orange grower.

"Q. Did he claim to have some knowledge in connection with the matter?

"A. Well, I expect the way he had talked, what he had read and heard, yes, all I got out of him; that is all that I knew.

"Q. And you read about the plea of guilty having been entered, I suppose, by the two McNamaras?

"A. Yes.

"Q. You read of the plea of guilty to murder by J. B. McNamara?

"A. Yes.

"Q. When you read that report you found that it was confirmatory of the original press reports which you had read that union labor was responsible for this matter, did you?

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"A. Well, I don't think I ever read that.

"Q. Didn't I understand you to say on my examination before that when you were in Nebraska the press dispatches said that Union Labor was responsible for this?

"A. In the daily news.

"Q. That opinion——

"A. I won't say to that. I have read that information in the paper, and had other papers, might have read it in the others.

"Q. You formed that impression from what you read?

"MR. WOOLWINE—What impression?

"MR. MOORE—That the unions were responsible for the matter, is that correct?

"A. Well, just the way the paper stated it, that is the way I took it.

"Q. Then, when Mr. J. B. McNamara pleaded guilty that confirmed the original information that you had secured, the original impression that you had had through your newspaper reports?

"A. Yes.

"Q. Had you talked with anyone who was present during any of the Court proceedings in that case?

"A. In what proceedings?

"Q. In the J. B. McNamara case?

"A. No.

"Q. Have you ever heard that report of the plea of guilty to the destruction of the building with dynamite, denied, have you, or contradicted?

"A. No."

(Reps. Trans., p. 1228, line 11, to p. 1229.)

. . . . . .

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"MR. MOORE—You have never since the plea of guilty was entered to the destruction of the building by dynamite, you have never heard any other suggestion or explanation of the cause of the destruction, have you?

"A. No.

"Q. So at this time your mind is settled upon the proposition that the building was blown up by dynamite by J. B. McNamara?

"A. Yes sir.

"Q. It is so settled that as a reasonable man you would not change your mind and opinion upon the matter except that you heard or saw something of equally persuasive character to that which you already know about the matter before you would change your mind, isn't that right?

"A. Yes sir."

(Reps. Trans., p. 1233, line 7, down to line 18, on same page.)

. . . . . .

"Q. Then, having a fixed and settled opinion upon this question you couldn't, and you honestly recognize the impossibility of putting that fixed and settled opinion out of your mind entirely, don't you?

"A. Unless I had evidence, of course, to show me that I was wrong.

"Q. In other words, you recognize the utter impossiiblity of putting that fixed or settled opinion, which you have, out of your mind, except that you shall hear evidence of such character as will let you not to put it out of your mind, but to change your mind, isn't that right? In other words, you

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recognize that by no mental process can you put that fixed and settled opinion out of your mind, but the only thing that you can possibly do is to change your mind after you secure new data upon that subject, isn't that correct?

"A. Yes.

"Q. Mr. Monia, if you were taken on as a juror in this case, then you recognize that even though you were sworn as a juror it would still be impossible for you to set aside that opinion which you have except that the defense in this case shall introduce evidence of such a character as would logically and intelligently lead you not to the setting aside of the opinion, but to the changing of the kind and character and substance of the opinion, isn't that right?

"A. Yes."

(Reps. Trans., p. 1235, line 3, down to bottom of page, line 24.)

On examination by the District Attorney the juror testified:

"MR. KEYES—Mr. Monia, you never talked with anyone, have you, concerning this case, that is with anyone who claimed to know anything about the facts of the case?

"A. A neighbor.

"Q. The one you named a while ago?

"A. Yes.

"Q. You gathered what information you have about the matter then from what you

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have read in the paper and your talks with the neighbor?

"A. Yes sir, and what I heard discussed.

"Q. And if selected as a juror in this case, Mr. Monia, you realize, do you not, that it is your duty as a juror that would compel you to listen to the evidence, to decide the case as to the question of guilt or innocence upon the testimony that you hear in this courtroom?

"MR. MOORE—I object to that question. We think that he cannot be compelled to do anything. The counsel used the word compelled in there. There is no compulsion here; incompetent, irrelevant and immaterial, not a statement of the law.

"THE COURT—I think you better change it.

"MR. KEYES—I will withdraw it.

"Q. You realize, do you not, Mr. Monia, that your duty as a juror would be to listen to the evidence in this case and to decide the case of the defendant's guilt or innocence from the testimony that you hear on the stand?

"A. Yes.

"Q. And that it would be your duty to acquit this defendant unless the evidence, that is produced here of his guilt, satisfies you beyond a reasonable doubt, do you realize that?

"A. Yes.

"Q. And would you follow that line and do those things?

"A. Yes.

"Q. Do you feel, Mr. Monia, that you could fairly try this case as a juror?

"A. Yes.

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"Q. And I understood in answer to counsel's question a moment ago that you had an opinion gathered from what you had read in the newspapers that McNamara had plead guilty to the destruction of the Times building, that you had an opinion that he had destroyed the Times building by dynamite; you understand, do you not, that one of the elements in this case, which the people must prove before the defendant can be found guilty, is that he had some connection with the blowing up of the Times building? You understand that, do you?

"A. Yes.

"Q. You understand, also, that another element of the case is that the people must prove that the Times building was actually destroyed by dynamite, you understand that?

"A. Yes sir.

"Q. Now, if selected as a juror, wouldn't you require the people to prove to your satisfaction, by evidence here in the courtroom, from witnesses, or other visible objects that you could see, would you require them to prove that the Times building was destroyed by dynamite before you would bring in a verdict of guilty

"MR. MOORE—Object to the question as having been asked and answered.

"THE COURT—Overruled.

"MR. KEYES—Did you get that question?

"A. Yes.

"Q. Your answer is yes?

"A. Yes.

"Q. Then, Mr. Monia, notwithstanding this opinion or belief that you have in your mind, you believe, do you not, that if se-

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lected as a juror, you could lay aside that opinion and listen to the evidence in this case that you hear from the witness stand and act fairly and impartially upon it, and decide the question of the defendant's guilt from the evidence which you hear on the stand outside of any belief you may have, isn't that true?

"A. Yes.

"Q. And if selected as a juror, you would do that, would you?

"A. Yes sir.

"Q. You have no prejudice against the defendant, have you, or any of his counsel?

"A. I have not.

"Q. You state that your mind at this time is entirely fair and impartial as between the people and the state?

"A. Yes sir.

"Q. I mean the people and the defendant?

"A. Yes sir."

(Reps. Trans., p. 1240, line 6, down to p. 1243, line 1, inclusive.)

On further examination by counsel for the defendant the juror testified:

"MR. MOORE—Mr. Monia, this morning in response to my questions I understood you to say that you had a set and fixed opinion that the Los Angeles Times building was blown up by dynamite by J. B. McNamara, is that correct?

"A. As far as I have read in the newspapers, and with what I have talked with my neighbors.

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"Q. You formed that opinion from what you had seen in these pictures and what you had heard talked and what you had read in the newspapers, that is correct, isn't it?

"A. Yes, that is understanding that one picture.

"Q. I understood you also to say that, having that set and fixed opinion so formed, that you recognized the utter impossibility of putting that aside, a fixed opinion, out of your mind, except that evidence should be introduced of such a character as would lead you to change your mind upon that question, isn't that right?

"A. Yes.

"Q. That is correct?

"A. That is, it would have to show me the evidence different.

"Q. Then when counsel for the State asked you this morning if, notwithstanding this opinion or belief, which you had in your mind, that notwithstanding that, if you were selected as a juror, you could lay aside that opinion and listen to the evidence in this case that you heard from the witness stand and act fairly and impartially upon it, even though you answered that question affirmatively, at the same time you recognize, and do recognize now, that you have a fixed settled opinion upon this question that the building was blown up by dynamite by J. B. McNamara, and you can't change that opinion until evidence is introduced upon that question, isn't that right?

"A. Yes sir.

"Q. That correct?

"A. Yes sir.

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"Q. And you recognize, do you not, that you can not lay aside and put out of your mind an opinion once formed, but that the only thing you can possibly do is to change the kind and character and substance of your opinion after you may have had new evidence upon this question; isn't that right?

"A. Yes sir."

(Reps. Trans., p. 1246, down to p. 1247, line 8.)

The District Attorney renewed his attempt to qualify the juror and the following occurred:

"Q. Well then in other words if you were selected as a juror you would act upon the evidence which you held and would not act upon any belief that you have, is that correct?

"A. *Well, I would lay that aside the best I could.*"

(Reps. Trans., p. 1246.)

Not only was the juror Monia disqualified by reason of his holding an opinion which he said it would be impossible for him to set aside without the production of contrary evidence by the defendant, but the challenge should have been allowed upon the further ground that his testimony showed that he had discussed the case from time to time with persons who had, or claimed to have, some knowledge of the

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facts. The Supreme Court has held that where it appears that a man called into the jury box has an opinion respecting the defendant's guilt based in part upon statements of purported facts relating to the alleged crime, made to him by individuals, it must be shown in order that section 1076 of the Penal Code may apply, that the persons who stated the supposed facts were not witnesses nor interested persons, or that they were not so understood to be by the man under examination.

People vs. *Loper,* 159 Cal., 6.

In other words, it must be affirmatively shown that the persons with whom the juror discussed the case were neither interested persons nor witnesses.

People vs. *Miller,* 125 Cal., 44.

The fundamental rule is that a juror is incompetent although he states that he can render an impartial verdict, if he has formed an opinion from conversations with witnesses in the case, or with one of the parties, or some person claiming to know the facts and in whom he relies.

State vs. *Otto,* 61 Kans., 58, 58 Pac., 995;

People vs. *Thacker,* 108 Mich., 652, 66 N. W., 562;

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Shepprice vs. *State,* 79 Miss., 740, 31 Southern, 416;

Cowan vs. *State,* 22 Neb., 519, 35 N. W., 405;

Turner vs. *State* (Tenn.), 69 S. W., 774.

(12) E. W. LAWRENCE on his *voir dire* testified in part as follows:

"Q. Did you read what purported to be the testimony of any witness, which testimony was represented by the press to have been taken before the grand jury in this case?

"A. Yes, I read most of what was in the papers after I came back. I didn't always read it; I read the head lines.

"Q. Do you remember particularly the source of the information?

"A. The paper I read most all the time was the Los Angeles Times.

"Q. Los Angeles Times. You read whether or not the Los Angeles Times quoted statements made by witnesses or purported to contain quotations from the testimony of witnesses?

"A. I think it did.

"Q. Do you remember whether it was testimony that purported to come from an investigation before the grand jury, or before a coroner's jury? Have you any recollection on that?

"A. I don't remember about the coroner's jury. I remember that there were statements there about the grand jury. That is about as definite as it is in my mind.

"Q. Now, do you remember anything

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about those statements, that is to say, did you gather any opinion or come to any conclusions with respect to the merits of the controversy then before the grand jury from the testimony or what purported to be the testimony which you read in the Times?

"A. Did you say did I form any opinion?

"Q. Yes.

"A. Yes, I think I formed an opinion.

"Q. Now, as I understand you, the paper that you subscribed to was the Times, that is to say, the newspaper which at the time of this explosion was being published in this building which was owned by the Times-Mirror Company?

"A. Yes.

"Q. Did you hear any talk about the case after that?

"A. I think I have.

"Q. Did you get any information from any other source, which contributed at all to the opinion which you formed at about that time?

"A. Nothing, only just common conversation.

"Q. Common conversation. Were you present in court or before the Coroner at any time when any testimony was being taken that affected this proceeding here?

"A. No, I was not present at all.

"Q. Talk to anybody who claimed to have knowledge of the facts of the case?

"A. No.

"Q. You came back to Los Angeles shortly after that, did you?

"A. Oh, in two or three weeks, I think.

"Q. Have you formed an opinion since

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that, or was the opinion formed at the time that you read the Times?

"A. Why, I think that my opinion was mostly gathered from what I read in the Times.

"Q. Yes. Did you come into Court at any time during the McNamara trial?

"A. I did not.

"Q. Did you read the papers concerning that most of the time?

"A. Most of the time, sometimes I just read the headlines.

"Q. You, in common with every other citizen, I suppose know what the result of that trial was?

"A. Yes.

"Q. You were not here to hear anybody testify in the matter, were you?

"A. No, I wasn't here.

"Q. You weren't in court at all?

"A. No.

"Q. Well now, suppose you were chosen as a juror in this case and the Court should instruct you that it would be necessary if the prosecution depended upon that explosion of the Times building as the immediate agent of the death of the deceased, Charles Hagerty—suppose the Court should instruct you that it would be necessary for the prosecution to prove not only that an explosion occurred, but that it occurred through a criminal agency, you would insist that the prosecution prove originally from the lips of witnesses whom they would produce here, would you?

"A. Yes sir.

"Q. In other words, do you think that your condition of mind—you speak of some opinion—do you think you could set aside

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that opinion and approach the facts in this case with no bias whatever, with absolute impartiality?

"A. I don't know whether I could or not.

"Q. Well, I will ask you this question: Do you think that you could enter upon the trial of this case, actually presuming that the defendant, who sits here, is innocent of the offense with which he is charged?

"A. If I was on the jury, I would try to; I don't know just whether I could or not.

"Q. Well, you actually have an opinion, then, in respect to the merits of this cause?

"A. Well, as I stated, practically all the opinion I have, I gained from reading the Times, and I presume that—

"Q. Now then, that is of course from reading, as you have said, what purported to be excerpts from the testimony of witnesses who testified before the Grand Jury, and it would be upon that testimony that you formed this opinion?

"A. Yes, just what I read in the paper that I formed my opinion.

"Q. Would it require any testimony to remove this impression or opinion which you have in the matter?

"A. Why, I feel I would not let that stand in my way at all; he would have to prove every point.

"Q. Yes.

"A. To condemn this defendant, but as to whether that would prejudice me a little or not, I can't say; I rather believe it would. I am pretty strong in my opinions.

"Q. Well, that is a conscientious matter

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with you, is it not, on the facts, this opinion —that is your conscience?

"A. Well, I am pretty strong in my opinions, when I form one.

"Q. And it would be very hard, whatever the source of your opinion, to set it aside? Is that your condition of mind?

"A. Yes.

"Q. Well, then, if that opinion goes to the merits of this controversy, it would require some testimony on the part of the defense to remove that opinion from your mind?

"A. Yes. I would have to have something to prove to me that this opinion I had formed was not correct, before I would change it.

"Q. I will ask you again, having that in mind, could you actually enter upon the trial of this case, presuming that the defendant is innocent?

"A. Well, as I said before, it would be hard for me to do it.

"Q. Well, you mean to say, in other words, you could do it?

"A. I am afraid I couldn't.

"Q. And that is a matter with your own conscience, that could not be cured by a mere instruction of the Court?

"A. Well, it is just a state of mind I am in now in which I have the situation from what I have read in the papers, and I have nothing else to change my opinion.

"Q. Yes. What I asked you before was, whether or not you could start out right now actually presuming that the defendant is innocent, and you intimated that you could not. Now, that opinion, as I understand you, is a conscientious opinion; that is

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to say, it is with your conscience and you could not set it aside merely because someone directs you that it is the law that you ought to set it aside? Is that the condition of your mind?

"A. I believe the same opinion would be in my mind until some evidence—

"Q. Regardless of any instructions, your conscience, in other words, you feel could not be changed in this matter by any law, or any instruction of the Court or any explanation of the rights of the defendant?

"A. I think I would have a subconscious feeling all the time of the opinion I had formed, until I heard proof to change that opinion.

"Q. You were aware at the time you read the articles in the Times that the Times was the newspaper was owned by Mr Otis, of course?

"A. Yes sir.

"Q. Who was the proprietor or rather the owner or one of the owners of the Times Publishing Company?

"A. Yes.

"Q. And you knew that they were one of the chief sufferers by this disaster at that time?

"A. Yes.

"MR. COGHLAN—We challenge the juror under section 1073, subdivision 2 of the Penal Code.

"MR. KEYES—We deny the sufficiency of the facts and resist the challenge.

"THE COURT—You may proceed.

"MR. KEYES—Mr. Lawrence, you understand, do you not, that every man, who is charged with a crime in this country, is

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presumed to be innocent until he is proven guilty?

"A. I do.

"Q. You also understand, do you not, that a juror who sits in a case to try a man charged with a crime, under the law, must presume him innocent, until he is proven guilty by evidence?

"A. Yes.

"Q. Now, you don't know anything about the defendant in this case, do you?

"A. Nothing whatever.

"Q. From what you read or anything else?

"A. My personal knowledge, I don't know anything.

"Q. You don't know anything about whether or not he is connected with this case, do you, except what you have heard here?

"A. That is all.

"Q. You haven't any opinion at this time as to the guilt or innocence of the defendant, have you?

"A. Yes, I have.

"Q. Where did you get that opinion?

"A. The paper.

"Q. From what you read in the Times at the time of the explosion?

"A. Yes.

"Q. Well, did you read the Times at the time of the explosion and shortly after that?

"A. Well, I think it was during probably the trial of the McNamaras; I wasn't here at the time of the explosion.

"Q. Well, then, you did not read anything in the papers about this case until

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sometime after the explosion, did you, when you came back?

"A. Yes.

"Q. Is that right?

"A. That is all I remember of.

"Q. And that was some two or three weeks after the explosion before you came back here to California?

"A. Yes, sir.

"Q. Well, then it was some months after that before the McNamaras were arrested, was it not?

"A. I don't know about the time.

"Q. Well, do you remember anything in particular that the papers stated at the time of the McNamara trial about Schmidt, this defendant?

"A. I remember of reading somewhere that there were two others.

"MR. COGHLAN—Well, don't tell us what it was you read, excepting generally.

"MR. KEYES—Well, I have asked a question and there is no objection.

"MR. COGHLAN—Well, we won't impede the examination.

"THE COURT—Answer the question.

"A. I remember of reading that there were two others also at the time of these arrests; that is about as far as my knowledge went.

"MR. KEYES—That is as far as you read about Schmidt, wasn't it?

"A. Well, I wouldn't hardly remember the name, except I know there were two others.

"Q. Two others. Well, then, you really feel, Mr. Lawrence, at this time, that you have an opinion as to this man's guilt or

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innocence from that statement in the paper that you say you read?

"MR. COGHLAN—We object to that question as having already been asked and answered by this witness in response to the question propounded by this gentleman.

"THE COURT—Overruled.

"A. Well, from what I read in the paper I formed an opinion.

"MR. KEYES—About what?

"A. About the guilt of the parties that they were trying to apprehend.

"Q. Do you know who they were?

"A. Well, as I said before, I do now, but at the time I don't know as I would have known the name if I heard it, except just as I read it in the paper. But I gave it no particular thought, that is the particular parties, because——

"Q. You never talked with anybody about this case, any one who claimed to know the facts about the matter, did you, about the defendant's connection with it or the McNamaras connection with it or any one else's connection with it?

"A. Nothing only just my neighbors.

"Q. Just general gossip in the neighborhood?

"A. Yes.

"Q. Well now, Mr. Lawrence, if you are selected as a juror here, you realize, do you not, that it is your duty to try this case in an impartial way and to listen to the evidence and to decide the case from what you hear from the stand? You understand that, don't you?

"A. Yes.

"Q. Well now, don't you believe that if you are selected as a juror that you could

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set aside what you may have read in the papers some three or four years ago, and sit in this box with a fair and impartial mind, and try this man from the evidence that you hear from the stand here, and determine from that evidence alone irrespective of anything else, as to whether or not he was connected with this Times affair?

"A. I would only try him on what evidence I heard, but as to my own present state of mind, I can't say whether, until I heard evidence, that it would change my opinion.

"Q. Well, we are not asking you now to change your opinion. I am asking you now if you could not set aside that opinion and try this defendant not upon what you may think about it now, but upon the evidence that you hear from the witness stand and from the testimony of witnesses, and decide his guilt by the testimony that you hear from the stand and by the testimony of the witnesses and by that alone? Couldn't you do that, and would you do it?

"MR. COGHLAN—I submit the gentleman has answered that very intelligently. We object to it on that ground.

"THE COURT—Overruled.

"A. I could and would try him on that evidence alone.

"MY. KEYES—Try him fairly and impartially, by the evidence, the evidence alone?

"A. Yes, I believe I could.

"MR. KEYES—We submit it.

"MR. COGHLAN—It would require evidence for you to set aside this condition of mind, and this opinion that you have re-

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ferred to? That is what you answered me, I believe?

"A. Yes. It would require evidence to change my mind.

"Q. You don't feel—that is what you meant when you said you could try the case on the evidence?

"A. What I meant was, I might have a personal opinion formed from reading of the paper, but when I come to judging of a man's guilt or innocence, I wouldn't judge until he was proven guilty.

"Q. Yes, but you have stated to me it would require some evidence, it was a conscientious opinion, and it would require some evidence, to remove it, otherwise you would think you would be unable to enter upon the trial of this case, presuming that the defendant is innocent.

"A. Until I had heard something to change the opinion that I have at the present, I would retain that same opinion.

"Q. Then you could not, in other words, merely set it aside arbitrarily any more than you could push your conscience aside arbitrarily?

"A. No, I would retain that same opinion until I had something to change it.

"Q. That is exactly the condition of mind I thought. Now, that being the case, if it appears to you to be the law that the defendant is actually entitled to the presumption of innocence on the part of every juror, that is to say that the juror must start out actually presuming him to be innocent, that being the state of the law, do you think you would be a fair and impartial juror in the case?

"A. I don't hardly know whether I would or not.

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"Q. You are a little doubtful about it, are you, Mr. Lawrence?

"A. I am.

"Q. You could not yield entirely to the presumption that the defendant is innocent in this case. You understand that that presumption is a substantial right of a defendant, to which he is actually entitled; it is not a mere word nor mere form? You could not put yourself in that frame of mind because of this bias that you have evidenced?

"A. All I can say in answer to that is that I would retain the same opinion that I have now until I would have some evidence to change my mind.

"Q. That is a complete answer.

"MR. COGHLAN—We insist upon that challenge.

"MR. KEYES—Q. Mr. Lawrence, you would not convict a man on that opinion that you have now, would you?

"A. I positively would not.

"Q. And you would not, in entering into this case, if chosen as a juror, you would not take into consideration that opinion that you have in arriving at a verdict, would you?

"A. I would not.

"Q. And you would, if selected as a juror, try this man fairly and impartially and solely render a verdict from what you hear on the stand here, would you?

"A. My verdict would be solely upon the evidence.

"MR. KEYES—Submit it.

"THE COURT—Challenge denied."

(Reps. trans., p. 1387, line 6, down to 1399, line 7.)

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The denial of the challenge to the juror Lawrence was a ruling peculiarly flagrant, and in utter disregard of the right of the defendant to a trial by a fair and impartial jury. This juror had not only formed an opinion as to the facts of the case, but he believed that the defendant was guilty of the charge. He derived this opinion from his reading of the Los Angeles Times, the newspaper which stood in the position of the complaining witness in the case. He was, therefore, precisely in the position of a person who had gained his opinion from conversations with witnesses and interested parties. He was disqualified for that reason, no matter how often he might have said that he could set aside the opinion and act fairly and impartially.

> *People* vs. *Helm, supra;*
> *People* vs. *Loper, supra.*

But he did not make any such showing. In response to a question by Mr. Coghlan he said that he was afraid that he could not enter upon the trial of the case presuming that the defendant was innocent. In other places in his testimony, he stated very frankly and very fairly that he doubted his ability to give the defendant an impartial trial. In response to a question by Mr. Keyes he said positively that he

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had an opinion as to the guilt of the defendant. Under what conceivable theory, we ask, did the trial Court deny the challenge to this juror? We feel tempted to ask the same question asked by Justice Temple in *People* vs. *Suesser,* 132 Cal., 635:

> "Was it feared that the defendant would escape if he were allowed a fair trial?"

(13) D. J. HOGE, upon his *voir dire* testified in part as follows:

> "Q. Do you remember, Mr. Hoge, the plea of J. B. McNamara?
> "A. I read that there was such a plea.
> "Q. He pleaded guilty?
> "A. Yes.
> "Q. And that had to do with the Times disaster?
> "A. Said to be so.
> ".Q You took it as a fact he had pleaded guilty?
> "A. Naturally would think so.
> "Q. I don't think there will be any dispute on that.
> "A. No.
> "Q. You, of course, attach that to the Times disaster, you read what had been said in relation to that, it was a matter of common knowledge that the Times building had been destroyed by some explosive or by fire, and when J. B. McNamara plead guilty, did you form an opinion with respect to whether or not the Times building was

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destroyed by a criminal agency or accidentally?

"A. Well, now, not seeing the building blown up or not seeing it immediately after it was blown up, I only know from what information a person would have would be what you would read about it.

"Q. You understand and knew that J. B. McNamara had pleaded guilty to that?

"A. I understood so.

"Q. That was the part of it, that is to say, that the plea of guilty involved the theory of a criminal agency in the building being blown up?

"A. It would seem so.

"Q. Well, I will ask you if you didn't form an opinion upon that?

"A. Well, I don't know how to answer you.

"Q. Well that was your conclusion, was it not?

"A. I took it for granted.

"Q. Now, it is your opinion that that is the condition of affairs as you sit there now; in other words, that is to say that the Times building—the blowing up of the Times building was brought about by criminal agency and McNamara was one of them implicated in blowing up the Times building?

"A. You would naturally take it that way.

"Q. And that is the way, of course, you take it. That was your opinion?

"A. Well, I don't know whether I can answer that that way or not. I don't know whether I——

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"Q. Would you call it rather a conclusion?

"A. Yes, I would naturally conclude that any one really owned up to a thing, it would naturally prove it was right.

"Q. That is a firmly lodged conclusion in your mind that would require some testimony to remove it, Mr. Hoge?

"A. Yes.

"Q. And if, for instance, the theory of the defense should be that that building was blown up by gas, and not by dynamite, it would require a great deal more testimony to prove the gas theory than the dynamite theory, of course, to a person in your condition of mind?

"A. Well, if they prove it was blown up by gas and really prove it, that is proven.

"Q. I say it would require more proof to prove that than to prove it was blown up by dynamite, or by some other explosive through a criminal agency, is that your condition of mind?

"A. If they prove it was blown up by gas, and it would take more proof——

"Q. I say, you are in that condition of mind that if the defense should take the theory that the building was blown up by gas, you would require more proof of a theory of that kind than you would if the opposite theory were advanced? That is, it would require more proof to prove that the building was accidentally blown up than that it was blown up by some criminal agency?

"A. Well, I would——

"Q. Let me understand you. You start out with the conclusion which you say was a natural conclusion under those circum-

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stances. That the Times building was destroyed through criminal agency and that one of the criminals was J. B. McNamara. You start out with that, do you not?

"A. Well, that is what we are supposed to start with.

"Q. Well, that is what you really do start out with?

"A. Yes.

"Q. And such information as you have now?

"A. Yes.

"Q. That is to say, the plea of guilty of J. B. McNamara confirms that in your mind?

"A. Yes.

"Q. Now then, you could not set that conclusion as to those facts aside and enter upon this case and absolutely not considering that fact, would you?

"A. Oh, I would have to consider that fact until something was shown that was not so.

"Q. Yes. Now then, supposing that the defense contend for the opposite theory, that it was an accidental explosion, it would require a good deal of testimony, bearing upon such theory to remove this conclusion from your mind, wouldn't it?

"A. It would require the testimony to prove it.

"Q. To prove it?

"A. That would be all.

"Q. But you would start out, of course, with this prejudice, so to speak, against any other explanation of the explosion of the Times?

"A. No, sir; no special prejudice.

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"Q. Let me ask you again, now you would start out presuming that the Times building had been destroyed by the use of dynamite, through a criminal agency? That is true, isn't it?

"A. Yes, sir.

"Q. And until some testimony was offered by the defense, or otherwise, to remove that opinion or conclusion from your mind, you would, of course, still believe it? You would start into the trial of the case with that belief in your mind, that there was a criminal agency there. That is true, isn't it?

"A. Start in with the belief?

"Q. Yes.

"A. With the conclusion that when the man plead guilty he was telling the truth?

"Q. Yes.

A. Now then, I will have the belief that if it is proven to be otherwise I would have the belief that—proof was brought about to prove it otherwise, would be so.

"Q. What is that?

"A. I say, then, if it is proved to be otherwise why——

"Q. You would require that it be proved to be otherwise, would you?

"A. Yes.

"MR. WOOLWINE—Wait a minute, he has not finished.

"MR. COGHLAN—Hadn't you finished?

"A. Well, you took the question out. If it is proved to be other than true, if it is proved that dynamite is not true and that there are other proofs, why then, of course, I am open to——

"Q. That is to say, if we prove that it is not true that the Times building was ex-

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ploded and destroyed by dynamite, and that the other proofs, as you have said, you will then abandon this conclusion or opinion with respect to how the Times building came to its destruction?

"A. Yes.

"Q. That is the condition of mind you are in?

"A. Yes.

"Q. And that of course involves your conscience, does it not?

"A. Yes.

"Q. That is your unqualified view with respect to this matter?

"A. That is the way I look at it; yes.

"Q. You accepted, did you not, it to be a fact that J. B. McNamara pleaded guilty? That is a fact upon which you base this conclusion?

"A. That is the conclusion I arrived at.

"Q. Yes, you accepted that to be a fact when you came to this conclusion? That is what I understood you to say.

"A. Yes.

"MR. COGHLAN—We challenge the juror under subdivision 2 of section 1073 of the Penal Code.

"MR. KEYES—We deny the sufficiency of the facts and resist the challenge.

"THE COURT—Examine the juror.

"MR. KEYES—Mr. Hoge, you gathered your opinion and you based the opinion or conclusion, whichever it may be, as to the cause of the destruction of the Times building, entirely from what you read, did you not?

"A. From the information I got out of the paper.

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"Q. From the information you got out of the public press?

"A. Public press.

"Q. You never talked with any one of the witnesses or any one who claimed to be a witness?

"A. I don't know any of them, I never did.

"Q. And your opinion is based solely upon the information gathered from the public press?

"A. It is.

"Q. Now, if chosen as a juror here, M.r Hoge, could you not set that opinion aside and sit here and listen to the evidence in this case and judge of the guilt or innocence of this defendant solely and absolutely from the testimony which you hear in Court?

"A. If chosen, I would endeavor to do so.

"Q. And you could do so?

"A. I could do so.

"Q. And you have no prejudices for or against the defendant, I take it?

"A. Certainly.

"Q. You don't know any of the parties—and you feel that you are entirely fair and impartial, do you?

"A. I do.

"MR. KEYES—I submit it.

"MR. COGHLAN—Mr. Hoge, your knowledge of the plea of guilty of J. B. McNamara was, of course, obtained from the newspapers?

"A. That is the only source.

"Q. And that is the only source from which you draw the information of the fact

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that President Wilson is president of the United States?

"MR. KEYES—Objected to as immaterial and irrelevant.

"MR. COGHLAN—Well, I simply want to get at his frame of mind.

"Q. In other words, I mean this, that you accept that just as you do that Wilson is president of the United States or any other public thing has occurred or has been done?

"MR. KEYES—We object to that as immaterial and irrelevant.

"THE COURT—Sustained.

"MR. COGHLAN—You accept the fact that J. B. McNamara pleaded guilty as a fact, did you not?

"MR. KEYES—We object to that on the ground it is already answered.

"MR. COGHLAN—Well, do I understand it to have been answered affirmatively?

"MR. KEYES—I submit the record.

"MR. COGHLAN—Well, you ought to know now. You are making the objection to it. You answer the question so that I will know.

"MR. WOOLWINE—Just a moment.

"THE COURT—The witness was asked that, and he did not exactly, as you said, and from that he drew the conclusion.

"MR. COGHLAN—I would like now to ascertain from him, you accepted the plea of guilty of J. B. McNamara as a fact, did you not?

"MR. WOOLWINE—Just a moment.

"TH ECOURT—Overruled. Answer the question.

"A. I stated to you a while ago that I drew my conclusion from the newspaper evidence that I read that that was so.

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"Q. That it was so. You believe that it is a fact now?

"MR. KEYES—That is objected to as immaterial.

"MR. COGHLAN—I think that is material to find out what his state of mind is. You believe that is so now?

"MR. KEYES—The same objection to that question.

"THECOURT—I think the witness has been fully interrogated on that.

"MR. COGHLAN—I want to know if he has any doubt, Judge, whatever on that subject. The witness has answered me that it would require evidence, Judge, to remove what he calls this conclusion, I want to know how firmly fixed, if I can get it from the witness by one or two questions, that is his meaning. You believe the plea to be true now, do you not, that it is true, that J. B. McNamara pleaded guilty?

"A. Well, I have no—I have nothing come up to cause me to believe any other way.

"Q. You do believe, can you answer that directly?

"A. There has been no occasion for me to——

"Q. To doubt it?

"A. No question in my mind in regard to it at all.

"MR. COGHLAN—That is sufficient. We now, if the Court please, renew the challenge.

"MR. KEYES—Stand on the record.

"THE COURT—Challenge denied."

(Reps. trans., p. 1893, line 23, to 1902, line 24.)

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(14) F. C. HARVEY on his *voir dire* testified in part as follows:

"Q. Did you ever form at any time any opinion with regard to how it was that the Times building was destroyed? What the cause of the fire was?

"A. I think I have.

"Q. You have that opinion at this time, have you?

"A. It has never completely left me.

"Q. It has never completely left you. Well, did you accept the plea of guilty of J. B. McNamara as a fact, when you heard it?

"A. Yes, sir.

"Q. Did you accept it as a fact, that his plea involved his complicity in blowing up the Times building?

"A. Well, I accepted the fact.

"Q. What is that?

"A. I accepted as a fact, just as I read it in the paper.

"Q. You have no reason to doubt the truth of the fact, have you?

"A. No, sir.

"Q. You believe now that J. B. McNamara pleaded guilty here, did you not?

"A. Yes, sir.

"Q. And that he made the statement that he is represented to have made?

"A. Yes.

"Q. That is a statement which involved him in the destruction of the Times building?

"A. Yes, sir.

"Q. And he alone, you remember that statement?

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"MR. KEYES—I don't think he made any such statement, "he alone".

"MR. COGHLAN—Yes, I think so. That is not material.

"A. Well, I can't recall the statement.

"Q. No.

"A. But I read it in the paper at the time. It is pretty near effaced from my memory.

"Q. But you do remember it involved his complicity in the destruction of the Times?

"A. About the only thing I remember was that he made a confession.

"Q. And that he stated that he had been the person?

"A. Yes.

"Q. Who had put dynamite under the Times building to blow it up, something to that effect?

"A. I don't remember that statement.

"Q. What is it you do remember?

"A. He made a confession implicating himself in the destruction of the Times building.

"Q. And you believe that to be the truth, now? That is to say, you believe that McNamara did make such plea and did so implicate himself, do you not?

"A. Yes, sir.

"Q. You haven't any reason not to believe that condition of affairs. Now, upon that basis you have formed an opinion as to the cause of the destruction of the Times; you believe that it was destroyed by dynamite, do you not, or by some explosive?

"A. Yes.

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"Q. And it would require testimony to remove that from your mind, wouldn't it?

"A. Yes, I would want testimony.

Q. You would want testimony before you would be able to set it aside? Is that correct?

"A. I guess so.

"Q. Yes. Well, you are quite sure of that, are you not, Mr. Harvey? You have such an opinion as would require testimony to remove before you would set it aside, before you could enter upon the trial of this case without considering that factor? That is to say, your opinion, if it became involved in the case, you would want to have some testimony from the defense, in other words, if it took the position that the building was not blown up by dynamite, it would have some trouble and difficulty in proving that to your satisfaction? Is that correct?

"A. I think it would.

"Q. And it would require some evidence to satisfy you that the building was exploded or blown up, or that the fire was started by gas? For instance, if we would choose to take that theory, than it would to establish it to your entire satisfaction that it was blown up by dynamite?

"A. Well, just at present I rather favor the dynamite theory, although I am not convinced of it.

"Q. Although you are not convinced of it, but you have that opinion? Is that correct?

"A. I have two theories in my mind and I favor dynamite on account of that impression that I got.

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"Q. And you could not set that aside, without hearing some evidence? You could not arbitrarily drive it out of your mind? It would require some evidence to relieve your mind of that impression and opinion? Isn't that your condition of mind?

"A. Yes, sir.

"Q. Now, the mere instruction of the Court would not effect that, would not drive that from your mind, because, as I understand you, it is a conclusion you believe honestly at this time, that J. B. McNamara did actually plead guilty and that involved his participation in the destruction of the Times building, and that is a conscientious opinion, isn't it?

"A. Well, I believe conscientiously, that he confessed.

"Q. Yes.

"A. That he made a true confession.

"Q. That is the reason why you would require evidence to show that the building was not destroyed by dynamite?

"A. Yes, sir.

"Q. What you believe is that J. B. McNamara destroyed the Times building by dynamite, or started the destruction of it?

"A. That is the impression I got.

"Q. And you could not set that aside unless you found that J. B. McNamara did not make any such confession, could you?

"A. That is what I believe.

"Q. Or that if he made it it was not true, he was not telling that which was the truth? Those are the conditions upon which you could set aside the opinion? They are the only conditions? Is that correct? In other words, you would require

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evidence before you—the defense would have to show you by evidence that the opinion that you have is not based upon truth and upon facts, before you would abandon it or set it aside?

"A. I tihnk so."

(Reps. Trans., p. 1956, line 15, to 1960, line 24.)

The defense interposed a challenge for cause to the juror. On examination by the District Attorney this juror, like many of his predecessors, gave affirmative answers to the stereotyped leading questions of the District Attorney, and the Court denied the challenge.

(15) CHARLES J. WEST on his *voir dire* testitified as follows:

"MR. COGHLAN—If you have a reasonable doubt, after hearing all of the testimony, a reasonable doubt that is based on the facts of the case and not upon any opinion that you might have or any facts that you have now in your memory, and if you have a reasonable doubt as to whether the people had proven, by sufficient and competent and legal evidence, that the explosion was caused by a criminal agency, could you give the benefit of that reasonable doubt to the defendant?

"A. It would have to be pretty strong proof.

"Q. Pretty strong proof. Well, do you think, then, that you could not set aside

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the opinion that you have, unless some evidence was offered?

"A. Some proof?

"Q. Some evidence upon that subject?

"A. Yes, sir.

"Q. Now, do I understand that a sa basis, not only upon the newspapers, but upon your observation of the premises down there?

"A. From the newspapers, mostly.

"Q. To any extent on anything else, Mr. West?

"A. Nothing else more than what I have read.

"Q. You say you went to see the building, did that effect your judgment any?

"A. No.

"Q. You saw the wreck of the building?

"A. I could not learn anything there; I saw it was destroyed.

"Q. Yes.

"A. But I couldn't form any opinion of what caused it.

"Q. You saw the amount of damage that had been done?

"A. Yes.

"Q. Did that contribute at all to your opinion?

"A. I could not tell. I didn't know what——

"Q. Did that contribute to the opinion that some criminal agency had been involved in the destruction of the building?

"A. I thought so right along.

"MR. KEYES—Thought so right along?

"THE COURT—Later on.

"MR. KEYES—Yes, sir.

"MR. COGHLAN—You mean by that

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that it did contribute somewhat to your opinion?

"A. Yes, sir.

"Q. First you read the papers and thought from the newpapers that it had been a dynamite explosion and the character indicated, that is, criminal agency was involved, and then later on you saw the building and its condition of wreck, and that added something to the opinion or strengthened the opinion, did it?

"A. No, not that I seen. After I seen the destruction, but what I read and heard about it I came to the conclusion it was done criminally.

"Q. Well, what more did you learn than you read in the newspaper?

"A. Why, I didn't learn anything.

"Q. You talked to anybody, Mr. West?

"A. Some. Oh, I talked some on the street corner. I don't remember particular who I talked with.

"Q. You don't know anybody that represented they knew anything about the case?

"A. Oh, no.

"Q. And these people, who you talked to on the street corner did not represent that they were witnesses?

"A. Oh, no.

"Q. Or knew anything? That was simply rumor?

"A. Oh, just merely talk.

"Q. You still have an unqualified, conscientious opinion with respect to the cause of that explosion, destruction of the Times?

"A. Yes.

"Q. That is that it was destroyed through a criminal agency?

"A. Yes.

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"Q. And it would require strong proof to overcome that opinion?

"A. Yes, sir; it would.

"Q. In other words, you assume to be true these matters that appeared in the newspapers To that extent you could not set aside this opinion, in other words, until you did hear evidence offered by the defense in the case, if they took the position that the explosion was accidental?

"A. No, I don't think so.

"THE COURT—What is the answer?

"A. I don't think I could set it aside.

"MR. COGHLAN—In other words, you—if that fact became a factor in this case, become an issue here, you don't think that you could act as fairly and as impartially as one who did not have any opinion upon the question at all?

"MR. KEYES—What fact do you refer to?

"A. I could act fairly, yes.

"MR. COGHLAN—You could act fairly?

"A. Yes.

"Q. I have no doubt of that, but I mean that you would not be in that condition of mind that would enable you to receive with just the same degree of credit the evidence that might show, for instance, that the building was blown up by gas?

"A. If such evidence could be produced, I could consider that, sure.

"Q. Certainly. I understand you. The question is this: You believe now and have the opinion that this building was destroyed by dynamite?

"A. Yes, sir.

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"Q. You would carry that opinion with you into the trial of the case?

"A. Yes.

"Q. *And it would only be, if we offered strong evidence, that that was not true, you would have to have that strong evidence that the dynamite theory was not true, before you could set it aside at all?*

"A. *Yes, sir.*

"Q. *You would insist that we prove that it was not true?*

"A. *Yes, sir.*"

(Reps. Trans., p. 1996, line 11, to 2000, line 13.)

(16) P. WHITING testified on his *voir dire* in part as follows:

"Q. Now, this opinion, that you now hold, that the building was blown up with dynamite with a criminal intent, is a conscientious opinion, that you now have?

"A. Why, I have no reason to believe anything else.

"Q. No, of course not. And you believe that with sufficient confidence, that if you were called upon, in the affairs of your life, you would act upon that theory, wouldn't you?

"A. Well, I don't know what you mean by affairs in my life.

"Q. Well, suppose you have certain business affairs and certain business relations, I say that if you were out of the jury, not here at all, and the question were to arise, there would be no doubt in your mind but that is

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true, that it was blown up by dynamite with criminal intent?

"A. I think so.

"Q. There would be no doubt?

"A. I think so.

"Q. You are not a man who comes to opinions without evidence, are you?

"A. No.

"Q. You require evidence before you make up your mind, don't you?

"A. Yes, sir.

"Q. And are rather careful in forming your judgment—find it necessary to be careful in your affairs?

"A. I think I am.

"MR. KEYES—We object to that as argumentative, if the Court please, immaterial matter.

"Q. You have been careful in this particular?

"MR. KEYES—Same objection to that question.

"THE COURT—Sustained.

"MR. HARRIMAN—You feel that the evidence that you have had in this case has warranted, taking it all in all, you in forming such an opinion, don't you?

"MR. KEYES—We object to that on the ground it assumes something not in evidence. There is no evidence in this case yet.

"THE COURT—Sustained.

"MR. HARRIMAN—He has got evidence on which to base his opinion.

"THE COURT—That would not settle it.

"MR. HARRIMAN—I am sorry it don't. In a minute or two it won't be settled in the District Attorney's mind.

"THE COURT—I don't care whether it

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is settled in the District Attorney's mind; I am the one in whose mind it must be settled.

"MR. HARRIMAN—I will change that question. I didn't mean to put the question in that way.

"Q. You feel that the evidence you have had in this matter, regarding this forming of your opinion as to the cause, has been sufficient to warrant the opinion you have formed, do you?

"MR. WOOLWINE—Just a moment. Objected to on the ground it is immaterial, and calls for a conclusion of the witness, indefinite.

"THE COURT—Sustained.

"MR. HARRIMAN—Now, if you are chosen as a juror, it would require more evidence to prove that this building was blown up by gas, to your satisfaction, than it would to prove that it was blown up by dynamite, to your satisfaction, wouldn't it?

"A. Well, I don't know that it would require more evidence to prove either one or the other.

"Q. Well, aren't you already satisfied on one? Didn't you say you were?

"A. Only so far as McNamara's confession would go.

"Q. Well, that satisfied you, you said, didn't you, that you were convinced, that you had sufficient evidence to satisfy your mind that that was true?

"A. No, I am not convinced beyond a doubt possibly, but I see no reason for his confessing it unless he done it, so far as that is concerned.

"Q. Well, your mind is settled, knowing all the rest that you knew, and being very

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strongly inclined to the theory that it was blown up by dynamite, and their confession merely confirming your leanings, then you say your mind rested upon that point, did it not?

"A. Well, I think the building was blown up by dynamite, if that is what you are getting at.

"Q. Yes. Now, then, it would take more evidence to prove to your satisfaction that it was blown up by gas than it would to prove to your satisfaction, you already being satisfied that it was blown up by dynamite, would it not?

"MR. KEYES—We object to that as immaterial, irrelevant, calling for a conclusion and argumentative.

"THE COURT—Yes, sustained on the ground it is argumentative.

"MR. HARRIMAN—Well, it would take more evidence to prove to your satisfaction that the building was blown up by gas than it was blown up by dynamite, would it not?

"MR. KEYES—That is the same question.

"MR. HARRIMAN—No, it is not the same question.

"THE JUROR—Beg pardon; if there is any difference in the question I would like to have it read again.

"MR. HARRIMAN—If you read both of the questions you will see they are.

"MR. KEYES—We object to the last question on the same ground.

"THE COURT—Sustained.

"MR. HARRIMAN—Am I not permitted to ask this gentleman if it would

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take more evidence to prove the gas theory than the dynamite theory?

"THE COURT—Well he stated he has got his mind made up as to the dynamite theory.

"MR. HARRIMAN—Yes sir, I want to know—

"THE COURT—If he has his mind made up, it is self evident that it would take more evidence to prove it than some other proposition.

"MR. HARRIMAN—It is self evident to the court and the defense, but I am certain it will not be to the prosecuting attorney.

"THE COURT—Well, I am not interested in convincing the prosecuting attorney.

"MR. HARRIMAN—Very well then, we will challenge the gentleman for cause, under subdivision 2 of section 1073 of the Penal Code.

"MR. KEYES—We resist the challenge and deny the sufficiency of the facts.

"THE COURT—Examine the juror.

"MR. KEYES—You don't know anything about the cause of the Times explosion except what you gathered from the newspapers? Is that true?

"A. That is true.

"Q. And your opinion as to the cause of that destruction is based solely on the newspaper reports and articles?

"A. Yes, I know nothing about it only what I read out of the newspapers.

"Q. If you are selected as a juror in this case, I take it you will set that opinion aside, would you not, and decide the question of this man's guilt or innocence solely

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from the evidence which you hear from the witness stand?

"A. Yes sir.

"Q. And you would determine that question of his guilt or innocence solely from the evidence and judge of it fairly and impartially, would you not?

"A. The best of my ability.

"Q. Yes sir, and you have no prejudices for or against him, have you?

"A. No sir. You mean against the defendant?

"Q. Yes.

"A. I am not, no sir. I don't know anything about him.

"Q. You know nothing about this case?

"A. Only what I read in the paper.

"Q. Well that which you have read in the newspapers would not influence you one way or the other, I take it, in arriving at a verdict?

"A. No sir.

"MR. KEYES—I submit it, your Honor.

"THE COURT—Challenge denied."

(Reps. Trans., p. 2216, line 6 down to 2221, line 3.)

(17) E. S. ROWLEY testified on his *voir dire* in part as follows:

"Q. Now, did you assume at the time that McNamara pleaded guilty that he was implicated in the destruction of the Times building?

"A. Yes.

"Q. You remember that as a part of it, do you?

"A. Yes.

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"Q. That is to say, that he was the one that destroyed the Times building, that is, the primary cause of its desrtuction being an explosive.

"A. Yes.

"Q. So that you did form some opinion as to that?

"A. Yes.

"Q. From what you had read and from what you had seen, do I understand?

"A. Yes sir.

"Q. In the building?

"A. Yes sir.

"Q. That opinion was to the effect, generally speaking, that the Times building had been destroyed through a criminal agency, and that it had not been an accident?

"A. Yes sir.

"Q. That is, that there was dynamite set off in there by J. B. McNamara and some other person?

"A. Yes.

"Q. Such is your conclusion. Now, it would be hard for you to set aside that opinion, wouldn't it, as to the cause of the explosion, whether it was accidental or criminal?

"A. I think that I could set that aside, with proper evidence.

"Q. That is to say, if either the prosecution or the defense should offer you evidence in this case sufficient to overturn that opinion—overcome it in your mind, why, you would be willing to put it aside?

"A. I would.

"Q. And otherwise you could not put the opinion aside?

"A. No.

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"Q. What is that?
"A. I could not without—
"Q. Without evidence?
"A. Without evidence.
"Q. You would require, I suppose, a preponderance of evidence to prove—that is, a greater weight of evidence—to prove that the Times building did not or was not destroyed through a criminal agency, otherwise you feel that you could not conscientiously set aside the opinion that you have as to the reason for the destruction of the Times?
"A. Yes.
"Q. That is your condition of mind?
"A. Yes."

(Reps. Trans., p. 2243, line 11 to 2245, line 14.)

"Q. As I understand you on your examination a moment ago, Mr. Rowley, you said that you had seen the building, and that you had seen it twice and that you had read these things in the newspapers, and that you had—you knew that J. B. McNamara had plead guilty and you knew he was actually serving time now under that plea of guilty, and you assumed that that involved the destruction of the Times building, or the participation therein by J. B. McNamara. If I am wrong I would like to have you correct me. That is correct, isn't it?
"A. That is correct."

(Reps. Trans., p. 2251, line 11 to bottom of same page.)

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"MR. COGHLAN—Q. And that that opinion, as I remember, you stated it would require evidence—evidence in the case—after you had entered upon the trial of it to remove it?

"A. It would.

"Q. In other words, it is an opinion that is so bound up in your conscience that you would be unable to shed it, put it aside, set it aside, so to speak, and enter upon the trial of this case without it unless removed from your mind by evidence?

"A. Yes."

(Reps. Trans., p. 2253, line 8 to line 14.)

"MR. COGHLAN—Now you stated that you would require proof of every material element from the prosecution. You understand that it is necessary that the prosecution offer affirmative proof, beyond any reasonable doubt, of every material element in the case, do you not, Mr. Rowley?

"A. Yes.

"Q. One of the material elements under the theory here advanced bv the prosecution is that the Times building was destroyed by criminal agency; you would not require any proof at all upon that, under your opinion, would you, Mr. Rowley?

"MR. KEYES—Well, that is not the test.

"MR. COGHLAN—I think that is.

"MR. KEYES—He has already stated in answer to that question directly that he would require the People to prove that very thing.

"MR. COGHLAN—I would like to have him answer the question.

"MR. KEYES—We object to it on the

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ground it has already been asked and answered, and is not the proper test.

"MR. COGHLAN—I know, but we have the right to ask the same question and see what the condition of the gentleman's mind is. He may not have understood you.

"THE COURT—Did you understand the question, Mr. Rowley?

"A. I think I did.

"THE COURT—Very well. You may answer the question.

"A. I would require proof to convince me that the Times building had not been blown up by dynamite.

"MR. COGHLAN—You would require proof that it had not been blown up by dynamite?

"A. Yes.

"Q. You would not require any proof that it was blown up by dynamite, because you are, as I understand, of that opinion now?

"A. Yes.

"Q. And would start out on the trial of the case, of course, with that opinion?

"A. Yes.

"Q. That is your state of mind; then that is an element as we understand the situation now, of the offense upon which your conscience would not require the proof that is required by law on the part of the prosecution before you would accept the matter as proven, that is true, isn't it, Mr. Rowley?

"A. I don't know how to answer that question.

"Q. Well, I don't want to insist upon it. I think you have fully explained yourself on that line.

"MR. KEYES—I would like to ask the

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juror one more question. Just which way do you mean, Mr. Rowley? Now, do you mean that you would require the people to prove that this building had been blown up by dynamite before you would convict this defendant, or that you would not?

"A. I would go into this case with the opinion that it had been blown up by dynamite, but I think I would have to have very clear proof that it had been in the case before I would make up my mind to convict this man.

"Q. Then, you would require the defendant to prove to you by very clear evidence, and to convince your mind—

"MR. COGHLAN—The defendant?

"MR. KEYES—I mean the prosecution, and convince your mind of the fact that it had been blown up by dynamite before you would convict him, isn't that true?

"A. I certainly would.

"MR. KEYES—I thought you misunderstood counsel's question.

"MR. COGHLAN—Well, now, lest he did misunderstand it, let me ask it again. You have said two or three times to me, Mr. Rowley,—in fairness to me, let me state—you would carry this opinion into the case with you, and require some evidence to remove it, and that is the true condition of your mind, isn't it?

"A. Yes.

"Q. I didn't misunderstand you as to that. So that the theory of the dynamite advanced by the prosecution, would practically stand in your mind if you enter upon the trial of this case, as a proven thing; that is, an assumed thing by yourself?

"A. Assumed.

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"Q. Assumed, instead of proven; that is the distinction. And until the defense, if the defense advance the opposite view, offer you proof that the building was destroyed by some other means, why, you would, of course, import—carry this opinion in your mind and apply it to the case?

"A. Not if it were shown me it was not.

"Q. Not if it was shown you it was not destroyed by dynamite?

"A. No.

"Q. But you would insist upon its being shown that it was not dynamite?

"A. Yes.

"Q. And, of course, you would apply the opinion to the case if it were not shown to your satisfaction to the contrary; that is your state of mind?

"A. I think it is.

"MR. KEYES—You don't mean to say, Mr. Rowley, that you would let your opinion which you now have in this matter, step in and supply any proof that the prosecution failed to give you on the question of the destruction of that building, do you? You have stated that you would require the prosecution to show by clear evidence that this building was destroyed by dynamite. Now, if they fail to show that to your satisfaction, you stated you would not convict this defendant. Now, if they do fail to show it, you would not allow this opinion which you may have, step in and supply any proof on the part of the prosecution? Then you would not convict this man on that kind of testimony, would you?

"MR. COGHLAN—Of course, you wouldn't convict him on the mere fact that the Times building came to its destruction

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by dynamite, or by accident, or anything else Mr. Rowley. That is not it. But if it is the theory that the Times building was destroyed by a criminal agency—they advance that theory—you would require that we—upon your opinion itself, we offer some proof and remove that opinion. That is the state of your mind, as you stated it to me—as I understand it?

"A. I would require proof that it was not destroyed by dynamite.

"MR. COGHLAN—That is all.

"MR. KEYES—Well, he stated that he would require proof that it was destroyed by dynamite before he would convict.

"MR. COGHLAN—We insist on the challenge.

"MR. KEYES—We insist that the juror has qualified, your Honor, without any question.

"MR. COGHLAN—We submit the challenge.

"MR. KEYES—So do we.

"THE COURT—You understand, do you, Mr. Rowley, that it is the duty of the people to prove every material fact in the case?

"A. Yes sir.

"Q. One of the material facts which they will be required to prove, under the theory advanced so far, that this building was destroyed by dynamite.

"A. Yes sir.

"Q. You understand that?

"A. Yes sir.

"Q. That if they don't prove that—if that is their theory, if they don't prove that,

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it will be your duty to find the defendant not guilty?

"A. Yes.

"Q. Now, have you any such opinion at the present time in regard to the destruction of the building as would take the place of legal proof, which the prosecution would be required to offer, or would you enter the jury box laying aside any opinions you have and try it solely by the evidence given by the witnesses, under the instructions which will be given you by the court?

"A. I certainly should try to lay aside any opinion that I have and follow the instructions of the court, but—

"Q. Could you and would you do that?

"MR. COGHLAN—Just a moment.

"THE COURT—Could you and would you?

"A. I would.

"MR. COGHLAN — What were you about to say?

"A. I was going to say it would require some proof it was not destroyed by dynamite.

"MR. KEYES—Of course—

"THE COURT—What is it, Mr. Keyes?

"MR. KEYES—I will withdraw any remarks. I was going to make some statement.

"THE COURT—I think the challenge will be denied."

(Reps. Trans., pp. 2258, line 8, to 2264, line 13.)

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In the foregoing excerpts from the examination of the several jurors to whom challenges for cause were interposed by the defendant and denied by the Court, we have set forth all of the evidence which relates to the question of disqualification, except in a few instances. We have pursued this method largely out of regard for the convenience of the Court. Since the Legislature, a number of years ago amended the Statutes relating to criminal appeals, the appellate courts of this State are frequently put to great inconvenience in being compelled to wade through the vast stretches of a shorthand reporter's transcript, which probably in a majority of cases contains much irrelevant, redundant and useless matter. The writer of this brief remembers an address made in San Francisco by Judge Cooper at the time when he was presiding Justice of the District Court of Appeal in the First District, in which he severely criticized the new method of appeal for the useless labor which it inflicted upon the Courts, and in which he commended the old bill of exceptions as a concise and convenient method of presenting the evidence taken in the court below. The law requires the filing of only one copy of the Reporter's Transcript, and even the briefs in criminal cases may be filed in typewritten form. Counsel for the appellant

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in this case being desirous of saving this Court from all unnecessary labor in a matter which involves a vast amount of work even under the most favorable conditions, have adopted, and in the future pages of this brief shall continue to adopt, the method of setting forth either verbatim, or in substance, such portions of the evidence and the record as they desire to particularly call to the attention of the Court. In other words we shall use the method which counsel for the appellant in a civil case are required to use by the provisions of section 953c of the Code of Civil Procedure.

We believe that even a superficial reading of the testimony of the challenged jurors which is hereinabove set forth will convince this Court that the trial Judge was guilty of manifest abuse of discretion in denying challenges in each of the cases hereinabove set forth. The familiar rule is that every doubt should be resolved against the juror and in favor of the challenge, to the end that the defendant may be tried by a fair and impartial jury. In the case at bar the defendant was on trial for a crime that had shocked and horrified the entire world. The people of Los Angeles County had seen a great structure occupied by a great newspaper in the very heart of the public district of their celebrated metropolis destroyed by ex-

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plosion and fire. In this catastrophe twenty-one persons, including the deceased, had met a horrible death. Prior to that time a great industrial war had been waged in the City of Los Angeles, in which, as in all such controversies, the utmost bitterness of feeling was aroused. The destruction of the Times building, coming as it did at such a time, and followed as it was by the plea of guilty of the two McNamaras, one of whom was a celebrated leader of Trades Unionism, naturally aroused intense prejudice. In such cases it frequently happens that the detestation with which all good citizens naturally regard crimes of this character is directed, not merely to the crime, but to any person who happens to be accused of complicity in the event. It was this situation which the defendant was compelled to face in Los Angeles. Furthermore, a great newspaper published in the community in which the disaster occurred stood in the virtual position of a complaining witness in the case. For more than five years its columns had been filled with denunciation of the alleged authors of the catastrophe. In such a situation it would have been extremely difficult for any one accused of complicity in the destruction of the Times building to have received a fair trial. As most of the challenged jurors very frequently stated, they would re-

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quire the prosecution to do nothing more than connect the defendant in some way with the commission of the alleged offense. All of the elements of the *corpus delicti* were firmly established in their minds. They had already prejudged the major portion of the case. In such circumstances, the trial Judge should have guarded the rights of the defendant with scrupulous care. It is the duty of the judge who presides at such trial to administer the law as it is written, with no prejudices, with no feelings, and totally without regard to personal consequences to himself. This attitude, we feel impelled, with all respect, to say, the learned trial Judge did not assume. During the entire examination of the jury his attitude was one of endeavoring wherever possible to qualify jurors who had admitted bias, rather than an attitude of protecting the rights of the defendant at all hazards and procuring an unbiased and a dispassionate jury. For rulings far less erroneous, for denials of challenges for cause to jurors far less prejudiced, the Supreme Court of this State reversed the judgment in *People* vs. *Helm* (*supra*). For the errors in denying the challenges interposed for cause by the defendant to the above named jurors, it is submitted that the judgment in this case should be reversed by this Honorable Court.

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Due service and receipt of a copy of the within brief is hereby admitted this.....day of July, 1916.

Attorney General,

Deputy Attorney General,
Attorneys for Respondent.

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