Crim. No. 475.

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 II.

Subjects:

The Trial.
The Eastern Conspiracy Evidence.
The Restriction of Cross-Examination.
Hearsay Declarations of Co-Conspirators.

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By....., Deputy Clerk.

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APPELLANT'S OPENING BRIEF. VOLUME II.

In the previous volume of this brief we related the facts and set forth the evidence given at the trial in relation to the destruction of the Los Angeles Times building and the death of the deceased. We narrated the story of the flight and apprehension of the defendant and of his subsequent indictment. We discussed the questions which were involved upon the defendant's motion to quash and set aside the indictment, and we reviewed the rulings of

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the trial Judge on the challenges for cause which were interposed by the defendant to the various trial jurors. We shall now turn to the questions arising out of the conduct of the trial itself, and before proceeding to a detailed discussion of these questions it would seem that we should first consider the evidence introduced which tends in some degree to establish the guilt of the defendant. This is necessary in order that the Court may determine the prejudicial effect of the errors which will be later set forth and discussed. The provisions of section 4½ of Art. VI of the Constitution of this State make it obligatory upon Appellate Courts to examine the entire cause, including the evidence, to ascertain whether any error complained of has resulted in a miscarriage of Justice.

People vs. *Fleming,* 166 Cal., 357.

Where the proof of guilt of the defendant is positive and direct it frequently happens that an error may be of little moment, while in a case where the defendant's guilt is doubtful the same error may be highly prejudicial and result in a miscarriage of justice.

The testimony in the case at bar occupies thousands of pages of the reporter's transcript. One who reads the transcript, however, cannot

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fail to be struck by the fact that out of all of this vast mass of testimony there is comparatively very little that tends to connect the defendant with the alleged murder of Hagerty. Most of the testimony is as to matters and things utterly irrelevant, and which cannot have any possible bearing or significance upon the question as to whether M. A. Schmidt murdered Charles Hagerty, a human being. At least, seven-eighths of the testimony in the transcript deals solely with the acts and declarations of other persons and with a long narration of crimes with which the defendant had absolutely no connection and in which it was not claimed by the prosecution that he ever either directly or indirectly participated. The defendant was tried, not only for the murder of Charles Hagerty, but for all the crimes committed in the Eastern part of the United States by J. B. McNamara, J. J. McNamara, Ortie McManigal, George Davis, Herbert S. Hockin, Edward Clark and all of the other confederates who were alleged to have banded together for the purpose of enforcing the will of Organized Labor by the use of the torch and the dynamite bomb. With the crimes of these men, which were many and heinous, the defendant had neither complicity nor concern. Yet the record in this case is filled with them.

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To segregate from the great mass of irrelevant testimony, the evidence which actually connects Schmidt with the destruction of the Los Angeles Times building, has been a difficult task for the writers of this brief, and is a task which we have no desire to see imposed upon this Court. Accordingly, we have prepared a digest, in a form similar to that customarily used in a bill of exceptions, which sets forth the substance of all of the testimony which was given at the trial in the Court below relative to the defendant, Schmidt. The testimony as to the destruction of the Times building and the death of the deceased has already been set forth in Volume I of this brief. Upon our first reading of the reporter's transcript, we were greatly surprised to pass through page after page and volume after volume of the transcribed notes of the shorthand reporters without encountering the name of the defendant at all. Indeed, we had just about reached the conclusion that the prosecution was trying every criminal who ever operated in the United States, with the exception of the defendant. Not only was the time of the Court and jury consumed for days and weeks with listening to testimony as to the misdeeds of the alleged Eastern conspirators, but even their correspondence with each other was inflicted

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upon the jury. Finally, however, our patience was rewarded. The witness Frank Eckhoff mentions Schmidt in the course of his cross-examination at pages 4069-4070 of the reporter's transcript. This witness, who was one of the Eastern dynamiters, and who testified that he had assisted in producing several dynamite explosions in Ohio, Pennsylvania and elsewhere, testified in answer to a question by defendant's counsel that during all of the times covered by his testimony he never upon any occasion saw the defendant, Schmidt. The defendant's name then vanishes from the record, and is not mentioned again until the testimony of Mrs. Anna Boehme (pp. 4240-4287). This witness testified in substance as follows:

> During the year 1910, I was in the hotel business at Corte Madera, Marin County. I know M. A. Schmidt, the defendant in this case. I first met him when I came back to the hotel during the holidays in 1909. He was in our dining room. He was rooming and boarding at our hotel during that time. Schmidt was doing some carpenter work for Mr. Antone Johannsen. I had a cottage and he did the plumbing work in it for me. He was not paying his own room and board at our hotel. Mr. Johannsen was paying for him. When he left the hotel he said he went to live on Mission Street with a Mrs. Lavin. During the four or five months prior to October 1st, 1910, I have seen him with Mr. Tveitmoe,

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Mr. Lofthouse, Mrs. Belle Lavin and Mr. Eric Morton. I saw him at my hotel every Sunday until about one week previous to the blowing up of the Times building. About one week after the explosion I saw him at my hotel with Mrs. Belle Lavin.

* * *

GEORGE A. DICKSON (Reps. Trans., 4030-4043), testified that in the year 1910 he was Assistant Manager of the Hotel Argonaut in San Francisco. He identified the register of the hotel, one page of which contained the signature of J. B. Brice under date of August 6th, 1910. Brice, it will be remembered, was afterwards identified as J. B. McNamara.

FREDERICK HILL (ps. 4450-4456, Reps. Trans.) testified as follows:

In the month of September, 1910, I was Chief Clerk at the Hotel Argonaut. About September 12th, 1910, I had a conversation with a man known to me as J. B. Brice. He requested me to change his room. He told me that he expected a friend to come in the near future, and I suggested that a room with two beds might answer the purpose. He replied that it would answer him very well. I said, "I will give you a room with an outside telephone," and he said that that would suit him better still. I was present when the signature F. A. Perry was written on the register, September 18th, 1910. *I do not know the*

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defendant, Schmidt. I couldn't say whether he was the man who registered there as Perry or not.

* * *

GEORGE A. DICKSON, JR., when recalled by the defendant for direct examination out of order, testified:

As I testified yesterday, I was Assistant Manager of the Hotel Argonaut. I was actually performing my duties as such in the month of September between the dates of September 18th and September 25th, 1910. *I have never to my recollection seen the defendant, M. A. Schmidt before. I did not see him in the Argonaut Hotel between the dates mentioned.*

CROSS-EXAMINATION.

I did not see the men who registered there as Brice and Perry, to my recollection. I was back East during the early part of the month of September, I should judge I returned to San Francisco in the neighborhood of September 15th. It is quite possible that Mr. Brice and Mr. Perry might have been around the hotel there from the 18th of September to the 27th and I might not have seen them. (Rep's. Trans., ps. 4462-4463).

* * *

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T. T. McCACHREN (ps. 4464-4477) testified as follows:

During the month of September, 1910, I was bell-boy at the Hotel Argonaut. During the latter part of the month of September, I delivered a suit which had been pressed to Perry one evening. Wilcox, the clerk, had a conversation with me in their presence. He told me to hurry and get the suit of clothes that they were going to catch the eight o'clock train to Los Angeles. The bus was almost due at that time so I had to hurry. The man whom I knew at the Hotel Argonaut as J. B. Brice was J. B. McNamara. I afterwards saw him in the County Jail at Los Angeles. The man whom I knew as Perry is the defendant M. A. Schmidt.

CROSS-EXAMINATION.

I testified before the Grand Jury in Los Angeles. I read my testimony over two or three days ago in the District Attorney's office—Mr. Keyes was present. I was brought down here to identify McNamara after his arrest, and I picked him out from among about twenty prisoners from behind by the shape of his legs and the back of his head. After the arrest of the defendant I was brought down here and identified him in the jail.

* * *

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This witness was very badly shaken and confused when under cross-examination by counsel for the defendant.

* * *

WILLIAM J. DEEVY (ps. 5326-5344) testified as follows:

> I am a member of the Police Department of New York and have been such for twenty-nine years last past. I am the officer who arrested the defendant. I saw Schmidt on Broadway coming out of Sixty-sixth street in company with another man. He was walking down Broadway on the left hand side. I grabbed Schmidt by the left hand and he grappled me and we tussled about a bit when two of the Burns operatives, Leon and Bittenger, came along and we threw Schmidt into an automobile and then proceeded down to the police headquarters at 240 Center Street. He said, "My name is Schmidt." We brought him before a magistrate who held him over until the 24th of February for examination. He signed a waiver of *habeas corpus.*

* * *

BARTHOLOMEW MAHONEY (ps. 5698-5704) testified as follows:

> The witness, who was Superintendent of the main office of the San Francisco Post Office, identified a change of address card dated June 20th, 1910 (People's Exhibit 535), signed by M. A. Schmidt, old ad-

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dress, "General Delivery, San Francisco,"—new address, "General Delivery, Los Angeles, until notice." Also a change of address card signed by Schmidt dated August 4th, 1910, change of address to San Francisco.

* * *

F. D. ASHWORTH (ps. 6395-6402) testified as follows:

I am a dentist in San Francisco. In the summer of 1910 I resided at 2497 Mission Street. Mrs. Belle Lavin was living at 2410 Mission Street. I know Mrs. Lena Ingersoll. I first met the defendant, Schmidt, in the last part of August or the first part of September, 1910, at Mrs. Lavin's house. I met a party in San Francisco who was introduced to me as J. B. Brice. I met him one evening about eight o'clock. I came out of my office on the street and I met Mrs. Ingersoll going down the street. When she got down to Mrs. Lavin's house, she rang the door bell, and Mrs. Lavin came to the door. Mrs. Lavin said "Come up stairs," and Mrs. Ingersoll and I went up. When we got upstairs I met a man named Schmidt and a man named Brice. I had met Schmidt before. That was the first time that I met Brice. I stayed there about half an hour. Mrs. Ingersoll left with me. The man Brice whom I met on that occasion was J. B. McNamara, whom I afterwards saw here in the courtroom when he was on trial. After that night I never saw him again until I

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saw him in the courtroom. I saw Schmidt maybe a dozen times in San Francisco. He was living at Mrs. Lavin's, I think.

* * *

MRS. LENA INGERSOLL (ps. 6402-6460) testified as follows:

During the year 1910, I was living at 3650 20th Street, San Francisco. I had rooms to rent. I know Mrs. Belle Lavin, and had known her two or three months prior to September, 1910. I knew the defendant M. A. Schmidt since the 4th of September, 1910. During the month of September, 1910, I met a man called J. B. Brice. I met him on Sunday the 4th of September, when he came to rent a room at my house. The man whom I knew as J. B. Brice was J. B. McNamara, whom I afterwards saw in the County Jail at Los Angeles. He came to my home on a Sunday afternoon. He asked if I had a room to rent and I said "yes," and I showed him a room and he rented it, and paid me right away. He came back in about ten or fifteen minutes. He had two suit-cases which he took to his room. Shortly after, I received a call over the phone from Schmidt. He said, "I want to speak to Mr. Brice," and then he said "hello" to me, or something, and I didn't know who it was, and I says, "Who is this?" and he says it is "Smitty," and he says, "I will be right over," and Brice didn't even go to the phone and Schmidt came on over in a few minutes. He rang the doorbell and I went to the door. He said that he had sent Brice to

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my house. I was introduced to Smitty at that time by Brice. Brice occupied his room until the 14th of September, a period of ten days. During those ten days, Smitty came nearly every day, sometimes two or three times a day, and was talking in Brice's room, they would come in and out—sometimes they would stay an hour or so, sometimes they would come in and go right out—just different times. Schmidt 'phoned to Brice quite a number of times. They seemed to be together nearly all the time. I overheard just a word or so of a conversation between them; I couldn't connect it hardly; I didn't pay any attention what it was. I could hear them talking and it seemed as though that Brice was trying to get him to do it. I thought it was getting him a job, something of the kind. I don't know what it was. I thought it was printing business, you know, but it seems Smitty didn't want to do what he wanted him to do at first. I thought it was all about printing business. I don't remember of hearing the word "job." I remember the occasion of going to Mrs. Lavin's house with Dr. Ashworth and meeting Schmidt and Brice there. It was during the time that Brice was stopping at my house. He had told me about having previously stopped at the Argonaut. My house was about one block and a half from Belle Lavin's. Schmidt was living at Mrs. Lavin's—rooming at her house. I had a conversation with Brice at the time he left my house on September 14th. He said he was going away—that he was going out of town for a few days and that he would be at a certain number that he gave me for that afternoon and if

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Schmidt called him up to tell him to call up that number. The card shown me marked People's Exhibit No. 533 and upon which appears the words Douglas 3393, in ink, and written in lead pencil, "ask for Brice," is the card he left me at that time. I saw him write the words "ask for Brice." After he left on that day, Schmidt called up, and I gave him the number, which is the number of the Hotel Argonaut. I next saw Brice on the night of October 1, 1910. He phoned about 11 o'clock on Saturday night, October 1st. He wanted to see if he could get a room. He asked me if he could get a room and I told him I didn't have any at all for that night. A little later he came and rang the door bell, and rather than have him talking in the hallway where there were other people living, I asked him to step inside and I told him that he could go away, that I had no room for him that night. He was alone. He stated he wanted to stay there that night because he didn't want to bother getting a room somewhere else. He said any kind of an accommodation would suit him, and I told him I could not bother fixing a room at that time of night and he would have to go, and he insisted on his taking the front room just as it was, sleeping on the davenport, and told me he would pay the house rent for a whole month if I would let him stay there that night. I did not let him stay. He left, and I told him to call up next day and I would get the room prepared for him. I was figuring on getting rid of him that night and giving him the same answer tomorrow. He called up the next day around five or six o'clock in the

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evening. He didn't say anything more about a room; he just talked over the phone; he didn't say where he was rooming. I don't remember what he said over the phone, it was nothing important. I saw the defendant, Schmidt, once after McNamara left my house. I was coming out of Mrs. Lavin's house, and I met him at the door coming in. I never saw Schmidt after October 1st, 1910, until I saw him here in Los Angeles after he was arrested. The suit-case now shown me I have examined before. I think this is the suit-case that Brice brought to the room. It is the suit-case he brought the first time he came to my house. I don't know where Mrs. Lavin is now.

CROSS-EXAMINATION.

I don't know whether the conversation at which Dr. Ashworth, Mr. Schmidt, Mr. Brice and Mrs. Lavin were present occurred two or three days after Brice came or two or three days before he left. Schmidt came to the house about half an hour after Brice rented the room. When Mr. Brice left my house on the 13th he told me he was going across to Alameda. I had seen Schmidt on the street several times before the day he came to my house. I never had occasion to inspect any of Mr. Brice's baggage except between the 4th day of September and the 10th day of September, 1910. I never worked for Burns at all. I don't know that I recall stating to Joe Marshall at Venice during the month of June or July, 1915, that I had been in the employ of William J.

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Burns in connection with these cases. I might have said something in speaking about the trial. He was asking many questions and I just said anything to shut him up, I don't know what I said—I don't remember.

* * *

MRS. ROSIE BROWN (ps. 6493-6502) testified as follows:

In the year 1910 I was living at 2410 Mission Street, in the flat that was run by Mrs. Belle Lavin. I know the defendant M. A. Schmidt. I guess I knew him about eight months when he was living there. He lived there quite a while, about 8 months, sometime. His room was on the same floor that mine was. I saw J. B. Brice there, though I didn't know him by name. I know David Caplan. I remember his coming up one day before the Times explosion and asking for Schmidt. Schmidt was not in.

* * *

WILLIAM HENRY BROWN (ps. 6515-6537):

I am the husband of the witness who testified last. In the year 1910 I was living at 2410 Mission Street in the flat run by Mrs. Belle Lavin. I know the defendant M. A. Schmidt and I know Dave Caplan. I knew a man by the name of J. B. Brice. I met the defendant Schmidt right after we moved into the house. It was probably around February, 1910, not a long time be-

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fore the Times building was blown up. I have seen Dave Caplan here in the County Jail and recognized him as the man I knew as Dave Caplan. The first time I saw Brice, or McNamara, he was in a taxicab outside with Schmidt. He was there quite often but I only saw him twice face to face. I saw Anton Johannsen and his wife and Mr. E. B. Morton and his wife. I kind of believe I seen Tveitmoe up there once. During the summer of 1910 I had a conversation with Schmidt. I asked him where he had been and he said he had been down to Los Angeles. He says that "they are having an awful time down there, they are beating men up down there. They won't give a union man a chance down there at all, it is a regular Otis town. They won't allow you to stand on the sidewalk, they are going to get theirs. There is something going to happen to him pretty soon." I think this conversation occurred somewhere in August; it was before Labor Day.

* * *

GEORGE B. PARKER (ps. 6586-6592):

I am a contractor and painter of East Oakland. I am acquainted with Mr. Watkinson. About the 18th of September, 1910, I was with Mr. Watkinson at the foot of the Webster Street Wharf. I am familiar with the launch named "The Pastime." On that day it was tied to a pontoon at the Webster St. bridge right over the bridge. We were swimming a couple of dogs down there. While we were swimming the dogs, two men came and one got in the launch

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and got out. Burrows, the owner of the launch, came down there. I saw them hand a letter to him. Burrows showed the larger of the two men how to run the launch and they got in the launch and left immediately. I should judge they were there from 10 to 20 minutes before Burrows arrived,—maybe only 5 minutes. I couldn't state definitely. I was right there in their immediate presence, and saw them go away with the launch. I talked with the smaller of the two men. In my judgment the defendant Schmidt resembles the larger of the two men very much.

* * *

BERT WATKINSON (ps. 6592-6595) testified as follows:

On the occasion testified to by the last witness, I saw the launch "Peerless" and two men who left the launch. The defendant Schmidt resembles one of the men. I should say about like Mr. Parker does. To-day is the first time I have seen him since that occasion.

* * *

BRUCE MCCALL (ps. 6595-6629) testified as follows:

In the year 1910 I was shipping clerk and office salesman for the Giant Powder Co., whose office was located in the Kohl Building in San Francisco. The Giant Powder Company is engaged in manufacturing explosives and their plant is located

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at Giant, California. On the 15th day of September, 1910, I received a telephone call at the office. The parties stated that they were the Bryson Construction Company of Sacramento, and they wanted to know if we had any 90% powder and if they could take delivery by launch. I told them they could and they said that they would be down the next day to see me. On the next afternoon two men called. One of them was the defendant Schmidt. He wanted the powder, he wanted some 90% powder, and I asked him what he wanted it for and all; he told me he wanted to blow up some stumps; I tried to persuade him to take some 20%, and he told me that he had a man doing contracting work for him and he would have to give him what he wanted; he was to furnish some materials, and he would have to give him the powder he wanted. So that was a pretty good argument, and I told him we could only give him 80%, that was all we had listed at the time; so he took that and paid me $80 in currency, two one-dollar pieces, and ten cents. He placed the order with me at that time and paid for it. He ordered 500 lbs. of powder. About a week later I received another phone call from a man who gave his name as Leonard. He told me he was going to call in for the powder. I told him he would have to come up to the office and get an order or let me bring it down to him so I told him I could take it down to his boat and he told me his boat was in Sausalito, so I couldn't go over there to see it, and he said he would send somebody up, to take the order. About half an hour later a short man called; I thought

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he was a Portuguese or Italian. I have seen David Caplan in the County Jail. I couldn't identify him. I asked him for a description of his launch and he couldn't give any. Couldn't give me the name or anything. I told him he would have to give us the name and also some description of it, what kind of an engine it had, the length of the boat, and so on, and he said he would have to go to Oakland and get that information. He returned about two hours later. He gave me a certain horsepower and the name "Peerless." I gave him an order on the works. He gave the name of William Morris. The defendant Caplan looked altogether different to me than that man. I have never seen J. B. McNamara.

CROSS-EXAMINATION.

I saw some pictures of Schmidt, the defendant in this case, which were shown me by Burns detectives. I don't remember any other person who came into the office on that day; I don't remember any other sales after I made that one; I have no independent recollection of any other sale. I would have to look into my books to ascertain whether I made any sales on that day. I saw the man who made this arrangement only once. I had never seen him before and I never saw him again until I came down here.

* * *

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RONALD H. RENNIE (ps. 6629-6635) testified as follows:

In the month of September, 1910, I was general sales agent for the Giant Powder Co. I remember the occasion on which a man who gave the name of Morris called at the office sometime in the month of September, 1910. The party giving the name of Morris said that his principals knew nothing about the nature of the work, that no stump blowing was contemplated, that, as a matter of fact, the powder was wanted for blasting granite boulders on a ranch recently acquired by people that he was doing the work for. The reason sounded legitimate. He was asked what his idea was in taking it by a launch; he said that his principals owned a launch and they thought they might perhaps save a little money by taking it through that means as far as Sacramento and hauling it by team beyond that. He was told that we had to be very careful in such matters, and that we would not feel ourselves at liberty to give him an order on our works for powder without having the full details of the parties involved, also the description of the launch to call for the product and an estimate of the number of men that would be there and what names they would answer to. I don't remember just what names were given at that time as to parties who would call for it, but I do remember distinctly that he could not at that time give a description of the launch, that it was lying over at Sausalito and he would probably have to go there for it. Further discussion, how-

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ever, brought out the fact that he thought he could find out, get the description of the launch from some party over at First and Broadway in Oakland; that he would go there and get the description for us. He came back, I think, about an hour and a half later and gave a description of the launch. We told him that we had telephoned up to Auburn in the meantime following the original placing of the order, to ascertain whether Bryson was known to the post office authorities or the tax collector's office and we had found that he was not, and how did he explain that; Morris replied that they had only very recently acquired the property, and that they were expecting to work and that naturally they would not be known there. I happened to refer again to his name as William Morris and made mention that seemed more an American name than would apply to a man of his appearance, that he looked more like a Dago. He gave me an address, out in the Mission as his address, I don't recall it. Refreshing my memory from this memorandum I will state that the name and address given was William Morris, 2410 Mission Street. He was delivered an order for the powder at that time. I have seen a man pointed out as David Caplan over in the County Jail.

* * *

M. V. GILMORE (ps. 6636-6645) testified as follows:

In the month of Sept. 1910, I was Assistant Purchasing Agent and Cost Clerk for the Giant Powder Co. I remember an occa-

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sion about the 21st of Sept. 1910, when a man came into the office of the Giant Powder Company and gave his name as Morris. I was present on both occasions when this man came in. When Mr. Morris came in there and wanted an order to receive powder that was ordered by the man that came in some 5 or 6 days prior to that time, on our works, he said that he was going to take this powder away in a launch. We refused at that time to give him the order because he did not know the name of the launch and for that reason we would not give him the order. So we told him to go out and find the name of the launch and return and we would then give him the order. He returned in the course of about 40 minutes, or possibly an hour giving the name of the launch as "Peerless." He was then handed the order. I saw a man in the County Jail whom I know as William Morris.

The witness called out of order by the defendant testified:

In the month of September, 1910, I saw a man in the office that resembled the defendant Schmidt. I thought the man at the time met with some kind of an accident, like he was hit with some instrument that fractured the bone under his eye. I don't say that he resembled the defendant Schmidt very much.

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The defendant Caplan being brought into court, the witness identified the said defendant as William Morris.

* * *

MRS. A. WITTROCK (ps. 6646-6656) testified as follows:

> In the month of September, 1910, I was living at 1613 Shafter Ave. I know where a certain house is located in San Francisco known as 1622 19th Ave. I was living right across the street; that street is located out in the Bay View District sometimes known as South San Francisco. On the 14th of September, 1910, I was at home. I saw two men drive up to the house at 1622 19th Ave. with a one-horse team and unload some boxes which they took into the house. I should judge there were about eight or ten boxes,—I didn't stop to count them. It was just an ordinary one-horse express wagon. One of the men was tall and light complected, and he wore overalls and I believe a machinist's jacket; and the other just wore overalls and he was short and dark complected. I guess I was not more than 200 feet from these men. The tall man had white strips in his machinist's jacket. I saw the short one the following week twice go in there with a suit-case. I did not see him come out at all.

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CROSS-EXAMINATION.

I could not identify the defendant M. A. Schmidt as one of the two men I have just described.

* * *

MRS. R. BODEN (ps. 6651-6656) testified as follows:

On the 24th day of September, 1910, I was living at 1745 Lane Street, San Francisco, which is on the corner of Shafter Ave. and Lane on the same side that No. 1622 19th Ave. is located and about 200 feet away. I couldn't say exactly the date but I saw the team coming down Lane Street and afterwards I went to the front of the house and I saw two men unloading in front of Mr. O'Brien's. It was a delivery wagon and a bay horse. I saw one man in the act of taking down what I thought was a package of bundles of maps off the wagon and into the house. I couldn't identify either of them.

MRS. M. J. PETERSEN (ps. 6656-6668) testified as follows:

In the month of September, 1910, I was living in East Oakland at the foot of 12th Ave. We were right over the water. My husband was engaged in the boating business. Two men came to my place on the 19th day of September; one of the men is the defendant Schmidt. The other man

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who was with him was a taller man and very thin—sharp featured—and wore dark clothes with a derby hat and carried a marine glass on his side. The dark one did the talking. He came to find out if they could get a boat—wanted to know if we had a launch. I said, yes, Mr. Peterson went with his launch and he charged $10 a day for the launch for him going to run the launch, and they said they didn't want to have anybody go with them; they wanted the launch alone. I said, "Well, my husband won't let his launch go out alone," and they said they only wanted to get it for three or four days, and I said, "for what would you want the launch for," and he said, "Well, they were going up either the river or up the bay—they were going up the river, they were going up the bay. Well, I said, "Here is a launch at the side of our house moored; that is for sale, and I says—he says—"how much does he want for it?" I said, "$500," and this man offered to put $500 as a deposit on the launch and when they came back they would deduct the $10 or $5 whatever it might be, out of the $500 and I said, no. "I couldn't do business that way with you; the man that owns this launch has a pig ranch." He said he couldn't wait to see the man who owned the launch as they didn't have time and wanted the boat that day and he says we will go down the line and take the other boat.

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CROSS-EXAMINATION.

I just took a glance at the defendant, his left eye was pulled down and he looked to me as if he had a glass eye. I next saw the defendant in the County Jail. Prior to that I did not see a photograph of him that I remember. I saw a photograph of Mr. McNamara. I talked to Mr. Marshall a week ago in Oakland. My daughter and son-in-law were present.

* * *

HARRISON M. NUTTER (ps. 6669-6675).

The witness who was an employee of the Moise-Klinkner Company testified to selling aluminum letters of the word "Peerless" about Nov. 22, 1910. Could not identify the defendant, Schmidt, but said he looked like the man to whom he sold the letters, that the man to whom the letters were sold had a defective eye.

* * *

WILLIAM FLYNN (ps. 6691-6722) testified as follows:

In the month of September, 1910, I was foreman of the packing department of the Giant Powder Co. I received an order for 500 lbs. of 80% nitro-glycerine on or about the 16th or 17th of September. We had none of that kind of powder in stock and it was afterwards manufactured at the powder works. There was a stamp put on

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the wrapper. People's Exhibit 568, consisting of a package of ten wrappers is the same paper that came off that part of this powder that I manufactured at that time. Gelatin had been taken out and it was refilled with 7/8 cartridge 40% dynamite hercules. That is Dupont powder and is not manufactured by our company.

* * *

EUGENE JOSEPH BURNS (ps. 6724-6734):

In the month of September, 1910, I was in the employ of the State Board of Harbor Commissioners in San Francisco as Captain of the launch "James N. Gillett, Jr." I was familiar with the boat on the bay known as the "Pastime." She was what we call a trunk cabin launch, or a hunting cabin launch. I saw that boat at 9:30 or 10 A. M. on the 24th of September, 1910. I was on my way to Baden, better known as South San Francisco with a raft of piles in tow. When I was abreast of the Union Iron Works, pretty well out in the bay, this launch came off in the direction of Oakland, come up close to me on my port side, that would be my left hand side, and blew one whistle to me. According to the rules and regulations he should have blown two whistles to cross my right bow from the port side to the starboard, and it attracted my attention when he blew one whistle, that the man was not very familiar with the boat. He was heading in the direction of Butchertown, at the time, of the slaughter houses. About 11 or 11:30 I was changing my course and heading in towards

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Baden; I seen the boat again ahead of me; it was in between a place called Shag Rock; he was in the neighborhood or direction of Bay View. I saw the boat again on that day about 4 P. M. at 16th Street, San Francisco. I was on my way back from Baden and I noticed the boat was passing 16th Street, coming out in the neighborhood of the oil wharfs and he headed along the water front towards the Ferry. About three-fourths of an hour later I saw the boat again, she was going into pier known as "Howard 2" on the water front. As I was going into the slip to tie up for the night this boat was ahead of me on my right hand side and ran up close to the boat and I seen that the man was going to tie the boat up. I sung out to him that if he was going to tie up for the night, to tie up well in the corner; that the dredger was coming in there that night to tie up until Sunday night. After I secured my boat I went up on the dock, the man at that time was on the wharf already and I went up and spoke to him and he says to me, "I am only going to stay a few minutes." I believe I remember seeing the name "Peerless" on the boat. In a general way the defendant resembles that man, although at the present time he is thinner in the face than at that time. I am pretty positive it is the same identical man.

CROSS-EXAMINATION.

I stated to the newspaper men that the man appeared to me to have a glass eye and he had either a depression over the eye or under the eye. He had on a small

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peak cap. I know Mr. Keyes. The man who served the subpoena on me told me that the defendant would most likely have a man interview me and not to talk to him. He said it was a felony to interview a witness that was subpoenaed.

* * *

B. T. BYRNE (ps. 6745-6750):

I am acquainted with Mr. Arnerch the wharfinger. I went down to the Howard Street wharf on the 24th of September, 1910, and had a conversation with a strange man about a launch. The name of the launch was "Peerless." The defendant is the man I saw on that occasion. I did not notice a wagon on the wharf at that time.

* * *

J. H. ANNESLEY (ps. 6751-6764):

I am powder foreman of the Giant Powder Plant under the supervision of Mr. George H. Phillips. I am familiar with six boxes of nitrogelatin that was stored in the magazine at the Giant Powder Company's Works at Giant, California, designated as 80% nitrogelatin about the third week of October, 1910. Ten boxes were stored there, nine of these boxes were 80% and the other was Dupont 40%. I destroyed five boxes of this powder. The six

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wrappers shown me (Exhibit 581) are the wrappers that I took out of Box No. 2.

* * *

GEORGE H. PHILLIPS (ps. 6764-6819):

I am assistant superintendent of the Giant Powder Company. I remember in the month of September, 1910, receiving an order for 80% nitrogelatin. I delivered this dynamite about September 23rd from the wharf. There was one party came up on the wharf and there were two other parties in the boat when he got there. The name of the boat was the "Peerless." I had a conversation with a man. He said he was after some powder for J. B. Bryson, I think it was. The defendant M. A. Schmidt is the man. I have seen David Caplan; he was another man who was on that boat, I am positive of that. Schmidt gave me the order. We walked out on the wharf. I called a little Portuguese boy, a fellow that was working there, he was up on the mill, I called him out, took him with us; I says to them, "You had better pull the end around to the side of the wharf, as it will be right in front of the chute, and we can put the chute down and put the powder down easier, handier." He pulled the boat around, tied it and put down the chute, the tide was low. I said, "You better get a rope and we will lower these down, because one of them might get away or something, you would probably break the deck loose, pretty light; so he turned to the man near the left-hand side of the boat, he says: "Dave, get another rope."

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Dave kind of mumbled something—I can't tell you what he said—and the man at the lower part of the boat there, he said something about getting wise to names, or something about description. I afterwards identified that man in the Los Angeles jail, under the name of J. B. McNamara. He made that remark, about getting wise to names, on the wharf. They put the powder at the side of the boat, in the cock-pit. I saw the boat about two weeks later up in a creek in Oakland. The name of the boat then was "The Pastime." The document now shown me (Exhibit 525) is the receipt that I wrote out for the powder, the defendant signed the name there as J. B. Leonard. Some of this powder shipment was shown to me later by Mr. Burns, Mr. Brown and Earl Rogers, and later some more of it was shown to me when I testified before the Grand Jury in Los Angeles. I afterwards saw nine boxes when it was brought over to our works in a launch. I marked on the boxes "received from the San Francisco Police Department." The powder was afterwards destroyed when it was commencing to decompose. We soaked the powder with denatured alcohol and spread it out on the beach and set it on fire as it would burn with absolute safety. The boxes were preserved; they were also soaked in denatured alcohol.

* * *

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JAMES C. O'BRIEN (ps. 6869-6883) testified as follows:

I am acquainted with the house known as 1622 19th Avenue, San Francisco. It is about four miles south of the Ferry Building, roughly sepaking. I owned that house in 1910. My agent F. A. Miclo rented the house for me and brought the money every week. I went out to see the house possibly two or three times a week, but I never saw any change there, and the shades would be pulled down, and there were no curtains placed on the windows. When I saw there were no people in there, I went inside of the house about October 16th, 1910. I went to the basement and knocked, and nobody came; I then opened the door and the basement was perfectly clear, there was nothing there, no sign of furniture or anything. So I went to the front door and rang the bell and nobody came, so I thought, "Well, I will take a chance and open the door," so I got my key and opened the front door and in doing so the first thing I observed to my left was blue overalls striped with white stripes and a jumper hanging on the hat rack; and I went into the back bed-room and out into the pantry. There was nobody there. "Well," I thought, "there must be something doing with a man's overalls and jumper, and the parlor locked," and I thought, "wouldn't it be funny if the dynamiters went into the house and put dynamite in there." I had read a few days ago about the explosion. I opened the door, and I saw a canvas on the floor and I took

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the canvas and threw it off, there was a canvas on there marked "F. Thomas." The canvas now shown me is the same canvas. There were ten boxes; they were all tied up with burlap and Manila rope, except one which was open, and the burlap was underneath that box, but the rope and the cover was taken off the box with the nails protruding through the cover, the nails hadn't been taken out, just pried right up. So I looked at it and I saw sticks, and I thought they were candles, so I took one out of the box, and I looked, I says: "This is a queer thing," I says, "that is a candle without a wick." I looked at it and I took ahold of it, and I took the wrapper off, and I struck it against the end of the box and I said to myself, "These ain't wax candles," so I bent it and it was pliable,—"something like hard rubber," I says. I didn't know what to think, I didn't examine the box, so finally I lifted all the boxes; they were all about the same weight, and then I came back to the box that was open and I looked at the stamp, had a mark on it, and I saw 80% gelatin and when I saw that, I said, "Good night, dynamite." Then I saw what I was up against. I said, "My God," I says "What is this?" So when I looked, after I had made all the investigation, before I saw the stamp,—the stamp was on the side of the box and was marked 80% gelatin, I knew what that was when I read it, and I knew it wasn't wax candles then. I locked the door and I stayed out a little while in front and I thought to myself, "well, now what will I do,—will I go down to the Examiner or to the Police," and finally I came to the

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conclusion that I would go to the police station just four blocks away, so I reported the same to the station and I thought, "Well now, the best thing is to let the authorities take care of the dynamite." There were ten boxes in all there at that time.

CROSS-EXAMINATION.

I remember I was smoking a cigar when I went into the room and the ashes fell on the dynamite. I remember that well.

* * *

AUGUST MICLO (ps. 6884-6895) testified as follows:

In the month of September, 1910, I was in the real estate business and was agent for Mr. James C. O'Brien who was just on the stand. In the month of September, 1910, I rented his house at 1622 19th Avenue to a man by the name of William Cap. I asked him $16.00 a month and he says I like the place but I don't want to pay $16.00, it is too much; he says, "I like that place because the street is all full of rocks." He says, "I'd like that place for my family, I expect my family from Seattle." A couple of days later he came back and said, "I didn't find anything better so I will take the place." I gave him a receipt and asked his name. He said, "put William Cap." I gave him the receipt and told him to get the key next door at 1610 19th Avenue. He paid me a $10.00 greenback, a $5.00 gold piece and one dollar. The de-

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fendant, Caplan, looks like the man I saw. To identify is hard after five years. I really didn't pay much attention. I surmised the man was a Russian.

CROSS-EXAMINATION.

The man said he was coming from Seattle. I always testified Seattle. I testified before the Grand Jury that I took him for a Spaniard. I can't say that Caplan is the man, he was a man of his size; looks the same, but he was not so white as he is today. He did not wear glasses. I think he was smooth shaven.

* * *

M. V. BURKE (ps. 6896-6901) testified as follows:

In the year 1910 I was a Police Officer in the Detective Bureau in San Francisco and was assigned to do some investigating relative to the Times disaster. I know Mrs. Lena Ingersoll. The card shown me (Exhibit 533) on which appears in writing Douglas 3393, and written in lead pencil, "ask for Brice," I first saw on October 8th, 1910, when Mrs. Ingersoll delivered it to me. I made a search for M. A. Schmidt. I went to the residence of Mrs. Belle Lavin at 2410 Mission Street and made inquiry for him. I never found him.

* * *

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JOHN H. BAKER (ps. 6901-6922) testified as follows:

> In the month of September, 1910, I was traveling salesman for the Giant Powder Co. About Sept. 22nd I had a conversation in the office of the Giant Powder Co. with a man giving the name of William Morris, who is the defendant Caplan. He gave a certain number out in the Mission. He was told he would have to get the name and description of the boat in which he would take the powder away. He left the office and returned with a piece of paper with the name of the boat, which was "Peerless."

* * *

MRS. MAUDE W. STEWART (ps. 6942-6959) testified as follows:

> In the summer of 1910 I was bookkeeper at the Chapman Hotel of Los Angeles. I remember seeing the defendant Schmidt sometime during the summer. I knew him by the name of Perry. He was frequently in and out of the hotel. I remember seeing Olaf Tveitmoe at one time. I don't remember seeing him in company with Perry. I remember seeing Antone Johannsen in company with Perry at the hotel and also at the beach.

* * *

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MRS. TILLIE HIGGINS (ps. 6960-6965) testified as follows:

> During the year 1910, I was stenographer for the Asiatic Exclusion League at San Francisco. Mr. Tveitmoe was President of the League. I remember seeing M. A. Schmidt at the office—just reading the newspaper. I remember Mr. Johannsen calling for Mr. Schmidt.

* * *

FRED BENHKE (ps. 6965-6970) testified as follows:

> In the year 1910 I was an awning maker. The tarpaulin exhibited to me was in my store on the 17th or 18th of September. A gentleman by the name of Cap rented it and took it away. I later found it in O'Brien's house where it covered the dynamite.

* * *

DANIEL MCCARTHY (ps. 6970-6973) testified as follows:

> In the month of September, 1910, I was engaged in the real estate business at San Francisco. I am familiar with the premises known as 1565 Grove Street. I rented them on the 1st of September, 1910, to a Mrs. D. Caplan, who occupied the premises about a month.

* * *

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EDWARD H. BAXTER (ps. 6974-6983) testified as follows:

> I was the owner of the launch Pastime. I had a conversation with J. B. Brice and F. A. Perry in regard to the rental of the boat. They deposited $500 in cash as a deposit on the boat for ten days. (The receipt given Brice and Perry was read into the record.) The defendant Schmidt resembles the man who gave the name of Perry.

* * *

BERT C. SCOTT (ps. 6991-6994) testified as follows:

> The defendant exactly resembles the man whom my brother-in-law, Mr. Baxter, the previous witness, sent over to me to cash a check on September 28th, 1910.

* * *

STEPHEN D. RUSSELL (ps. 7010-7014) testified as follows:

> In the year 1910 I was Captain of the fire-boat "Dennis T. Sullivan" at San Francisco. I saw the launch once in September, 1910. The man who was running the boat had engine trouble when he tied up at the dock and I had some conversation with him with reference to gasoline. The defendant Schmidt bears a striking resemblance to that man in a general way. I

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wouldn't say positively, the man I saw I think was heavier than he is.

* * *

CHARLES WALGAMUTH (ps. 7019-7021) testified as follows:

I saw the defendant Schmidt around Corte Madera in the early part of the summer of 1910. I haven't seen him there during the last five years.

* * *

WILLIAM P. LAWSON (ps. 7022-7027) testified as follows:

If I remember correctly, I saw the defendant Schmidt on Market Street in San Francisco the morning of the Times disaster and he hailed me and I hailed him, but there was no particular conversation. I have never seen him since that time. I have known David Caplan approximately seven years. At one time my wife and myself lived with Mr. and Mrs. Caplan in the house on Grove Street in San Francisco. We occupied the house perhaps a month before the Times explosion and moved out a few days after. Since that time I have never seen Caplan.

* * *

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LOUIS C. PISTOLESI (ps. 7028-7032) testified as follows:

> I reside at Sausalito. I know Paul Stuperich and his wife. He was running a resort in Sausalito during the month of September, 1910. The building was built on a wharf. He had a large dining room and there were four or five small rooms and a few sleeping apartments. At the end of the wharf he had a float. Stuperich's place was called "The Miramar." The latter part of the month of September I was on the place of Baron de Ghetaldi, which is directly in front of the Miramar. I saw three men around on that occasion, one was in the bar-room talking to Mr. de Ghetaldi and the other two were close to what is known as the Baron's oyster beds. The defendant Schmidt resembles one of the men I saw there. A strange boat was moored off the Miramar wharf.

* * *

JOHN STANLEY (ps. 7033-7035) testified as follows:

> I saw the launch Pastime the latter part of September, 1910, when two men brought it to my place in Alameda and rented a boat. I saw the Pastime after she was returned. I noticed small touches of paint where the name was. There were some small holes there where the name had been, I don't know whether they were screw holes or nail holes. I couldn't say whether

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the defendant was one of these men, he looks a great deal smaller.

* * *

J. L. BRYSON (ps. 7037-7039) testified as follows:

In the year 1910 I was connected with the Hellister Mining Company in Placer County. I used to buy dynamite from the Giant Powder Company through their agent, Hancock, at Auburn. I never used any 80% nitrogelatin. I don't know of any J. B. Bryson or J. B. Bryson Construction Company at Auburn. I don't know a man named J. B. Leonard or William Morris.

* * *

MRS. LOUISA BERNARD (ps. 7040-7055) testified as follows:

In the year 1910 I was living at 1571 Grove Street. I know a house 1565 Grove Street, which was in the same building as mine. My door faced the door of the defendant's house or flat. During the month of September, 1910, I saw David Caplan going in and out of the house. I remember once seeing him and another man on the front door step, they seemed to be leaving. Mrs. Caplan appeared to me to be tearful. Said she was afraid she wouldn't see him any more. The Caplans lived in the flat about six weeks.

* * *

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DONALD VOSE MESERVE (ps. 7058-7090) testified as follows:

I live at Home Colony, Washington. I was in San Francisco during the month of September, 1910. I am acquainted with David Caplan and had known him about six months prior to September, 1910; while he was at Home Colony, he lived at my mother's house. On the Sunday night before the Times explosion I saw Caplan at the Chutes on Fillmore Street in San Francisco, Caplan and his wife, Edith Jarmon, Norman Muller, Terry Carlin, Marie Latter and myself were present. Caplan said that he was going to get the late train for Los Angeles; that was the last time I saw Caplan. I arrived in New York City the 12th day of May, 1914. I was employed by the Burns Detective Agency to go to New York City and locate M. A. Schmidt. After I was in the City about two or three weeks I got a room at Emma Goldman's, 74 West 119th Street. I lived at Emma Goldman's until the last of September, 1914. I believe it was the 23rd of September, 1914, that I saw the defendant Schmidt there. I had a conversation with him on the same date. Terry Carlin, Hutchins Hapgood, Emma Goldman, Eleanor Fitzgerald, Alexander Berkman and myself and Schmidt were present. Mr. Berkman said to me, "Meet an old friend of ours," and he explained to Schmidt that I was Gertie Vose's son. There was a general conversation, and after that Schmidt and Carlin and I took seats on a couch that was in the room. He told us that he had been having a hell of a

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time running around the country trying to lose himself to keep away from the police. He told us at first when they were after him that he had destroyed all of his laundry and under apparel marks by which he could be identified. He said that when he first arrived in New York, he thought he had better get a new glass eye and that he went to a shop on Fifth Avenue and got a new one, and ordered a pair of spectacles at the same time. He said that when talking to strangers, that he would explain to them that he had a glass eye on the left side, and could not see them and would ask them to get on the right hand side. He said he did this to throw them off, that is, if the party happened to be an officer or detective that they might get suspicious of that, notice he had a glass eye, but if he would call their attention to it first that it would throw them off. He said he was sorry that he had anybody working with him on that job in Los Angeles, that if he had it alone, he would have come out alright. He said there had been about four hundred people in San Francisco that knew all about this Los Angeles job before they did it, and that Johannsen got scared and called a meeting of the higher-ups. He said Tveitmoe was present at this meeting, Johannsen and E. V. Morton and others. Johannsen told him that he had been mixing around with so many girls in San Francisco, and talking about this job so much that he wanted to call the job off and Schmidt said to go to hell, that he was going to do the job, that if he wanted to get in touch with him at any time that we could do so through Emma Goldman. Terry asked Schmidt if he didn't

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think he was taking a big chance, by coming around Emma Goldman's house this way, and Schmidt said, no, that he thought it was the safest place in the world for him, because they would never think of looking there for him. At that time Schmidt was using the name of Joe Hoffman. At a subsequent time I had a conversation with Schmidt in a saloon at which Terry Carlin, Schmidt and myself were present. Schmidt told us that he had been in Los Angeles with J. B. McNamara and Caplan several times before the Times building explosion and that they were down there making plans for the explosion during these times, that when they were in Los Angeles they would go to several different hotels and register at each hotel under a different name. That they finally did stay at one of these hotels under the name they had registered, and they would explain that they did this so in case the authorities were trying to trace them, through hotels, they would get mixed up on account of that. He stated that General Otis and his paper, the Times, were the worst enemies of Organized Labor in the United States, it was for that reason they wanted to blow up the building, and that they also intended to kill Otis and get him out of the way. He said they didn't gain much by blowing up the building as long as Otis was living yet. The only thing they gained was getting rid of these twenty men that were in there, and that he was sorry there had not been more of that brand in there at the time. He said there had been three other explosions to come off and he mentioned the homes of Chandler and Zeehandelaar and Otis. He

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said that these other three bombs didn't explode for some reason. He told us that they had made an awful lot of blunders up at Frisco while they were planning this job. He said that he and Caplan had bought the dynamite, five hundred pounds of dynamite, at the Giant Powder Works; that they used to carry this dynamite across the bay; that E. B. Morton had rented a house in San Francisco to store this dynamite in when they brought it over there, but that he got on a drunk the same day he rented the house, and lost the key and forgot the street number of the house, and was afraid to go inquiring around to find it again. He said that they had used Lawson's buggy to haul the dynamite from the boat, and they stored it in a room there that was occupied by Terry Carlin and Schmidt, and that they kept it stored in their room until they got another house to store it in. He said that he had been at Seattle with J. B. McNamara, and had blown up a building there that was being constructed, the Lyons Building or Club building, I may be mistaken in the name. They had done the job in such a way that it would look like sewer gas or some gas under the building had exploded, and said they were sitting in the railroad station waiting for the train to return to San Francisco when they heard the explosion go off. He said that after they did this job in Seattle they came to San Francisco, and that they had blown up some building or something in Oakland. That was before they did this job in Los Angeles.

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CROSS-EXAMINATION.

I first met Mr. Burns in New York. I went to a representative of Mr. Burns in Seattle and offered my services to go and find Schmidt and Caplan. I don't believe that I am going to get my part of the reward that has been offered. When I first came to Los Angeles I was allowed $3.00 a day for my expenses, in the last week or two it was cut to $2.00 a day. I have been hired by the Burns agency from time to time at $5.00 a day. The Burns people put me to work the first time I ever went to their office. I know nothing about a reward offered by the Supervisors of Los Angeles County for the arrest of various persons, including Schmidt. I knew that there had been a reward at one time, but I understood that the reward had been withdrawn. I didn't know that they had withdrawn any reward at the time I proffered my services to the Burns agency. I never quit the agency, never resigned and have never been fired, that I know of. I have been transferred from the pay roll of Mr. Burns to that of Los Angeles County temporarily. I have read over my testimony several times. I sent in daily reports to the Burns office as to my conversations with Schmidt. I wrote out the statement after I came here. I told Mr. Burns that Schmidt was coming to the house on September 23rd, 1914; there was another Burns man outside the house at the time of the first conversation with Schmidt. I guess they saw him come out. On the occasion of the second conversation I went out to get a cigarette, and called up the office and told

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them to send a man up. On every occasion that I saw Mr. Schmidt I directed the attention of the Burns office if I got time.

* * *

W. A. HAMMEL (ps. 7126-7128) testified as follows:

In the year 1910 and up to the first of January, 1915, I was Sheriff of Los Angeles County. During the last four years, while I was in office I made a search for the defendant Schmidt. I made one trip to Indianapolis looking for the defendant. After the Times explosion and during my term of office I never located the defendant.

* * *

ROBERT T. BRAIN (ps. 7129-7130) testified as follows:

During the year 1910 and subsequently to the first of January, 1915, I was undersheriff of Los Angeles County. I made a search for the defendant M. A. Schmidt. I made one trip to Portland, Indiana. I did not locate him.

CROSS-EXAMINATION.

I did not go to Corte Madera or to 2410 Mission street in San Francisco, nor to the Hotel Argonaut, nor to his sister's home in Wisconsin, or to his mother's home to look for him.

* * *

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WILLIAM H. BROWN (ps. 7250-7254) testified as follows:

On the morning of the 29th of September, 1910, in the neighborhood of three o'clock in the morning, I was cleaning up the stereotype room in the Times building. A man came in and he said, "Good morning," and I spoke to him, and I noticed that he was a stranger to me, and he asked me what work I was doing, and I told him I was handling the roll paper; spoke of it being heavy work; I said it was, and we talked a minute or two that way, and I asked him if he was a route man or carrier, or if he worked in any department there; he said that he was not a route man or carrier, and was not working for the Times now, but he had worked in the mailing department, and thought of applying again for work in there again, and finally asked me where he would go to apply for work in the mailing department, and I told him if he had worked in the mailing department, that would be the place to go and apply again, but that there was nobody in this department could tell him anything about it, they had nothing to do with the work in the stereotype room. He was a stranger and I thought he had no business in there, and I looked him over carefully, and I wondered what he was there for. He talked for a minute or so, and he went away. He went west and went through the door into the partition leading up the stairway or into the mailing room, but I don't know where he went from there. This was in the east end or near the east end of the stereotype room in the basement. I

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saw this man again in the courtroom in this building during the trial of the McNamara brothers. Mr. Ford, who was the assistant district attorney, was with me. I pointed him out to Mr. Ford; the man was J. B. McNamara.

* * *

WILLIAM V. MCDONALD (ps. 7275-7278) testified as follows:

I am in the employ of the Burns detective agency. In the early part of 1915, I was employed to shadow the defendant. I picked him up at the Woodstock Hotel, Forty-third Street, New York City. I saw him in the company of Donald Meserve. I was standing at the bar and Meserve was sitting to the left of the entrance of the bar, and the defendant came in and Meserve was with another man, Mr. Baginsky. The defendant in the courtroom is the same man I saw in that occasion.

CROSS-EXAMINATION.

I did not arrest the defendant on that occasion. I knew there was a warrant out for his arrest, but I had no authority to make the arrest.

* * *

WILLIAM J. BURNS (ps. 7353-7364) testified as follows:

I am president of the William J. Burns International Detective Agency. After the

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explosion of the Times building I went to San Francisco in search of M. A. Schmidt. I searched for him in a number of places in San Francisco, and then I went to Home Colony, about thirty miles from Tacoma. I was in a hunting suit, wore a cap. I looked for him at Seattle, Portland, San Francisco, and then went back to Chicago and made a thorough search in Chicago. I furnished my officers with a description of Schmidt and went personally to Cleveland, Ohio, and searched at Canton, Ohio, and made a search of London and Paris. My search continued up to the day of his arrest. I was present at the time of the arrest of the defendant, which occurred on Broadway about Sixtieth Street in New York. He came out of the place where he had been rooming and a number of my men together with myself and Capt. Deevy saw him coming, and Capt. Deevy rushed up and grabbed him by the arm. Schmidt whirled around and threw his arm around the Captain's neck, and wanted to know what was up. The Captain told him he was under arrest, showed Schmidt his badge, and Schmidt said, "all right," and they put him in an automobile and took him to police headquarters.

CROSS-EXAMINATION.

The minute that Schmidt was shown the badge by Captain Deevy he quit struggling. He told his name at the station house. The defendant did not have a weapon at the time.

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The foregoing evidence is the only evidence which tends to connect the defendant Schmidt with the destruction of the Times Building. It will be observed that this evidence does not in any manner whatever show or even tend to show that the defendant either placed any explosive in the building or that he was present aiding or abetting in the commission of the crime. Furthermore, it must be borne in mind that there is no direct evidence that any person produced an explosion in the said building. The evidence in that behalf is entirely circumstantial. Without considering for the moment the particulars in which the testimony of the foregoing witnesses is conflicting, without considering the weight or sufficiency of the testimony, or any of the particulars in which any of the witnesses were impeached, the evidence considered in its aspect most favorable to the prosecution may be summarized as follows:

The destruction of the building was produced by a high explosive of some character, an explosive which was, in the opinion of certain alleged experts, a compound of nitro-glycerin. J. B. McNamara was in the City of Los Angeles on the day preceding the explosion and was seen in the Times Building by an employee of that newspaper. For a period of approximately one month prior to the disaster, Mc-

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Namara and the defendant Schmidt were seen together at various times and places in the City and County of San Francisco. They rented the launch "Peerless" or "Pastime" and in company with Caplan procured five hundred pounds of 80% nitrogelatin from the plant of the Giant Powder Company at Giant, California. After the destruction of the Times Building, Schmidt departed from San Francisco and the vicinity, and was not apprehended for nearly five years afterward. In addition to this evidence, there is the testimony of the witness Meserve as to the admissions made to him by the defendant in New York prior to his arrest. Stripped to its essentials this is the case of the prosecution against the defendant.

It may be conceded that this evidence is technically sufficient to warrant a verdict of guilty. On the other hand, such evidence is by no means conclusive. The defendant might have aided McNamara in procuring the powder from the Giant Company without any knowledge of the purpose for which it was to be used, even if it be conceded that any of the powder in question was used in the destruction of the building, which was not proven by any direct evidence of any kind whatsoever. The alleged flight of the defendant, while a circumstance which was admissible in evidence and which

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the jury had a right to consider, was not necessarily indicative of guilt. The testimony of the witness Meserve, who was a spy and an informer, might well have been disregarded by the jury, and in any event this testimony, like all testimony of the oral admissions of the party, was evidence which it was the duty of the jury to view with caution.

> Code of Civil Procedure, Section 2061, sub-division 4.

It must further be borne in mind that the evidence which tended to identify the defendant as one of the persons who procured the powder from the Giant Company was for the most part of an unsatisfactory character; for, while some of the witnesses were positive in their identification, others were extremely uncertain, and one of the witnesses for the prosecution was positive in his assertion that the defendant was not one of the men.

In view of the character of the evidence produced, the case against the defendant was by no means conclusive and it therefore becomes the duty of this Court to carefully consider the probable effect of any error committed in the admission or rejection of testimony, of any irregularity in the proceedings of the Court or the District Attorney, and of any instruction

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erroneously given and of any error in refusing to give a proper instruction. In other words, the case was not one of those cases in which a substantial error could be held harmless as not having affected the verdict of the jury.

In the ensuing pages we shall set forth repeated instances of what we consider the most manifest and the most prejudicial error,—of what we consider the most flagrant invasions of the rights of the defendant. We shall do so with no unnecessary prolixity, but at the same time, we shall endeavor to discuss adequately and thoroughly each of the questions arising upon this appeal relating to the conduct of the trial of the defendant.

We shall not attempt to severally set forth each of the errors committed, but we shall discuss an error separately, only where it has some peculiar significance or some peculiar bearing upon the issues involved. Perhaps the greatest number of objections which were made by counsel for the defendant during the trial of the case and which were overruled by the Court related to one subject, which we shall discuss in all probability at greater length than any other subject here involved, namely, the admissions by the trial Judge of evidence relating to the so-called Eastern Conspiracy.

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THE EASTERN CONSPIRACY EVIDENCE.

As we have already indicated, the major portion of the record in this case consists of testimony as to matters and things which are totally irrelevant to the issue. The defendant was charged with one crime, namely, the murder of Charles Hagerty. The evidence which we have set forth in the preceding pages is in substance the only evidence in the transcript that has any tendency to show that the defendant was guilty of that crime. That was the issue in the case and the sole issue, and to that one issue the evidence should have been confined. The commission of crimes in other sections of the country by other persons than the defendant was utterly irrelevant for any purpose, and yet the record is filled with it. Witnesses by the score were produced whose testimony threw absolutely no light upon the destruction of the Times Building or upon the alleged connection of the defendant with that catastrophe. The record in this case consists of ten large volumes of reporter's transcript. The first three of these volumes and a portion of the fourth are composed of the examination of the jury and the opening statement of the special counsel for the prosecution. It is not until the sixth book that the name of the defendant is even mentioned in the testimony,

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and there it is mentioned only by way of denial by a witness under examination that he had any knowledge of the defendant. The evidence which actually relates to the participation of the defendant in the alleged crime could be contained within a very narrow compass. It could all have been received in the course of a very few days. The trial of this cause, however, consumed approximately six weeks after the selection of the jury. The time of the Court and the time of the jury was wasted in listening to evidence that did not have even the remotest bearing upon the question of the guilt or innocence of the defendant. For the most part the crimes and misdeeds of others than the defendant were the subjects under consideration.

To the introduction of this testimony counsel for the defendant objected at all stages, and further preserved their rights by a motion to strike out all of the so-called "Eastern Conspiracy" evidence, which motion was denied by the Court.

(Rep's. Trans., ps. 7365-7398.)

We shall now turn to a discussion of this evidence and the question of its admissibility, and we shall point out not only its utter irrelevancy and immateriality, but the highly preju-

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dicial effect that it had upon the substantial rights of this defendant. Before discussing the law applicable to the question it may be well to set forth the substance of the evidence on this subject which was admitted over the objection of the defendant. It is not our intention to set forth all of the details of the evidence relating to the so-called Eastern Conspiracy. To do so would be to protract this brief to an unreasonable length. We shall content ourselves, therefore, with setting forth the principal testimony given as to the various acts of violence alleged to have been committed in the Eastern part of the United States under the direction of the officers of the International Association of Bridge & Structural Iron Workers.

It was the theory of the prosecution that a number of years prior to the destruction of the Times Building, a conspiracy was formed by various labor union leaders in the East, notably J. J. McNamara, Secretary-Treasurer of the International Association of Bridge & Structural Iron Workers; Frank M. Ryan, President of the said organization; Herbert S. Hockin, Frank Webb, Michael Cunnane, and numerous other persons, for the purpose of intimidating members of the National Erectors' Association, an association composed of some

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forty or fifty firms engaged in the erection of steel structures, to the end that the Erectors would be compelled to desist from their so-called "open shop" policy, and to adopt the so-called "closed shop" policy,—in other words, to employ no one except persons who were members of the Unions represented by Ryan, McNamara, and their alleged co-conspirators. For the purpose of carrying out this design, the prosecution contended that the Executive Board of the International Association of Bridge & Structural Iron Workers employed various persons to explode dynamite on structures being erected by firms which employed non-union labor. One of the dynamiters so employed was J. B. McNamara, a brother of the Secretary-Treasurer of the organization, and the person who, according to the theory of the prosecution in this case, afterwards set off the explosion which resulted in the destruction of the Times Building.

The trial Judge over the repeated objection of the defendant allowed the prosecution to introduce evidence of some seventy different explosions, which occurred in various portions of the United States and which it was contended were overt acts done in furtherance of the aforesaid conspiracy. A vast amount of documentary evidence which fills two volumes

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of the Clerk's Transcript and which consists largely of letters written by the alleged conspirators, was also admitted. Of some of this documentary evidence we shall speak in detail at a later time. For the present, however, it will be sufficient to set forth in substance the verbal testimony given on this subject. At the very outset, we desire to call the attention of the Court to the fact that *there is not a single syllable of testimony in the entire record which even in the very remotest degree has the slightest tendency to show that the defendant Schmidt ever directly or indirectly participated in the commission of any of these acts of violence, or that he ever joined or became a member of the alleged conspiracy.*

The testimony shows that the International Association of Bridge & Structural Iron Workers consisted of various Local Unions throughout the different States of the United States and in Canada. In the year 1910, F. M. Ryan was President of the Association, J. J. McNamara was Secretary-Treasurer, and the Executive Board, besides Ryan and McNamara, consisted of Eugene Clancy, Herbert S. Hockin, Michael J. Young, one Butler and one Legleitner. The Association published a magazine called "The Bridgemen's Magazine," various copies of which were introduced in evidence.

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The Erectors' Association in its present form was organized in the spring of the year 1906. It had about forty members at the time of its organization. At all times it adopted what is known as the "open shop" policy. Mr. Walter Drew, who was commissioner and general counsel for the association, testified that the Erectors had no Los Angeles members (see testimony of Drew, ps. 4026-4038, Reporter's Transcript). At the time of the organization of the Erectors' Association a general strike had been declared and was being waged against the American Bridge Company, one of the members of the association.

The first conspiracy testimony, properly speaking, in the transcript, is that of Patrick J. Dugan (ps. 3698-3742, Rep's. Trans.). This witness testified that he lived in Indianapolis, where the International Association of Bridge & Structural Iron Workers had its headquarters from 1904 to 1910. He was Secretary and Business Agent of the Local Union of Bridge & Structural Iron Workers. During the month of January of the year 1906 the witness met Clancy and J. J. McNamara at the Grand Hotel in that city, and the three of them went to view St. Peter & Paul's Cathedral in Indianapolis, which was in the course of construction at that time. Von Spreckelsen,

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the general contractor, in charge of the erection of the building, had adopted the "open shop" policy. The witness and his two companions were looking over the building. The witness testified that McNamara said to him, "I think Brown & Ketchum will put non-union men on the job, and whenever they do, you write me a letter and tell me in the letter to send you some oil, and I will know what you mean, and I will send you enough dynamite to blow this place to hell." After the three returned to the hotel, the witness had some conversation with McNamara in the bar-room, and the latter wrote the words "oil Dugan" in a note book, and said to the witness, "Now I will make a memorandum of that, so whenever you write me for some oil I will know what it is." On cross-examination, Dugan admitted that he had guilty knowledge of the expenditure of eight thousand dollars for the dynamiting of buildings throughout the country. He further testified that he was not acquainted with the defendant Schmidt and never saw him until he came into the courtoom. Schmidt, as far as the knowledge of the witness went, was not an ironworker.

The trial Court further allowed the witness Frank Eckhoff (ps. 4038-4067, Rep's. Trans.),

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to testify as to his relations with J. J. and J. B. McNamara. Eckhoff had lived in Cincinnati, Ohio, all his life and was acquainted with the McNamaras, whose family lived in the same neighborhood. In the year 1908 the Ritter-Conley, a non-union concern, was erecting an elevated railway in Cincinnati. In the month of August of that year Eckhoff testified that he had a conversation with J. B. McNamara. The witness was allowed to testify that McNamara asked him if he wished to make fifty ($50.00) dollars, and on receiving an affirmative reply, McNamara said, "All you have to do is to carry a package and place it under some iron." The witness further testified that McNamara said that it would not be necessary to light any fuse but that he had a clock device which could be placed under the iron after being set, and that it would go off at a certain hour. This device was shown by McNamara to Eckhoff a couple of days later. It consisted of a small alarm clock and battery with a wire fuse and cap connected with it, and a can which was supposed to contain a gallon of nitroglycerin. The cap was inserted in this can through the cork. The witness was further permitted, over the objection of the de-

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fendant, to give testimony which was in substance as follows:

> He (J. B. McNamara) said he would set the alarm clock just the same as if you wanted to wake up in the morning, and as the back hand would spin around it would make a connection and cause the explosion. We went and looked over the job for several days and as it was very closely guarded I told him that I wouldn't do the job. McNamara said he thought so also, but about two or three weeks later an explosion was caused there which I heard. J. B. McNamara came up by my house about 10:30 in the morning and said, "come and take a walk. I placed a bomb this morning at 8:00 o'clock." We went up on the hillside into the woods and waited until noon when we heard the explosion go off. McNamara said, "we have some money coming to us," and later on he gave me seventy dollars. He told me he secured the money from J. J. McNamara.

The witness also testified that prior to that explosion McNamara had taken him into the woods and showed him where he had some nitroglycerin buried, also some boxes that had contained dynamite at one time. McNamara stated that the nitroglycerin was old and had become a little weak and he broke up three quart bottles, saying at the same time that the nitroglycerin was used to blow up non-union jobs.

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The witness also was allowed to testify that during the month of December, 1909, he took a trip with J. B. McNamara to Beaver, Pennsylvania, where McNamara showed him a bridge which he said that he intended to blow up. According to the witness, McNamara stated that he was going to time a train which crossed the bridge daily, and that he would place a bomb upon the train set so that it would go off while the train was crossing the bridge, and wreck both the bridge and the train. The witness quoted McNamara as saying that this explosion would "learn them to give this work to Organized Labor."

Subsequent to this trip, the witness was called to Indianapolis by J. J. McNamara and while in that city he was employed by the Secretary-Treasurer to "shadow" one Mary Dye, a stenographer formerly employed by J. J. McNamara, who, the latter said, "knew too much." The witness was afterward sent by McNamara to Pittsburgh to locate Miss Dye. He succeeded in doing so and notified McNamara accordingly.

The testimony of this witness was not only highly prejudicial and calculated to arouse the animus of the jury, but certain portions of it were the most palpable hearsay. These questions, however, will be discussed later, as we

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desire at this time merely to set forth the substance of the "conspiracy" evidence. On the cross-examination of this witness it was developed that at none of the times concerning which he testified did he ever see the defendant, Schmidt, nor did he see him at any time, or any place, prior to October 1st, 1910.

(See cross-examination of witness Dugan, ps. 4067-4086).

The prosecution placed one George E. Davis, a self-confessed dynamiter, on the stand. He was allowed, over the objection of counsel for the defendant, to testify to a long series of crimes of violence. It is not our purpose to set forth even the substance of the entire testimony of this witness, as to do so would consume space out of all proportion to the value of the testimony. His testimony, which begins at page 4094 of the reporter's transcript, covers more than two hundred pages. It may be said, however, that nowhere in his testimony does he even mention the name of the defendant, Schmidt, and it is not contended by the prosecution that Schmidt was in any manner implicated in any of the crimes committed by Davis. To illustrate the connection of Davis' testimony we have constructed the following narrative from the record, which covers only a por-

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tion of the misdeeds and crimes of violence to which this man testified:

> In 1907 I was working in New York City. I was a member of the local union of the International Association of Bridge & Structural Iron Workers. Frank Webb was a member of the local Executive Board and he was also a member of the International Executive Board. Sometime around the middle of September, 1907, I had a conversation with Webb in his house at 120 Third street. He asked me how I would like to make some Christmas money, and I told him, "all right," and I asked him how I could do it, and he says, "there is the International Association who have sent $200 in here to dynamite that job at Harrison, New Jersey," and that is in Mike Gibbons' district—Newark local is No. 45; and he said Gibbon was going to do that with another party, but they have got to quarreling among themselves and one seems to be afraid of the other, and he says, "the old man wants the job done—meaning Frank Ryan—and I asked him how I could get this dynamite, and where; and he says, "we can go to Philadelphia and get it from Mike Cunnane." He was a delegate or a walking delegate of Local No. 13 of Philadelphia, and on—we looked over this job—he took me out and showed me where the job was. The job at Harrison was being done by Brann & Stuart. After I had this conversation with Frank Webb I went over to Pennsylvania and saw Cunnane. He told me I could get the dynamite but it would take him about three days to get it; that he would have to go out in the country and

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get it, and I told him I would be back in three days after it. Frank Webb and me went back to New York and took another trip out, and looked at the Harrison, New Jersey, job in the day time. On the morning of the 23d I went to Pennsylvania and met Mike Cunnane, and we walked down to the bar-room in under the hotel, and he told me he had the dynamite, and he called another party over and told him to go get it. They went out and were out about five minutes, and they came in with a suitcase of dynamite and set it down the floor and walked away. Mike Cunnane picked up the suitcase and walked with me to the street car. He told me what car to take to get to the Broadway Street station in Pennsylvania. He handed me the suitcase, and we had some little conversation while waiting for the car. He asked me what I was getting for this job, and I told him $200.00, and he says, "you are working too cheap, as I pulled off a job out here, and he says they—I gave my men $150 apiece, and I had a good bunch of money for myself." That he had four men with him besides himself. He asked me who was going to be with me and I told him no one; I was going to do it alone. He says, "you are working too cheap." I went to the Broad Street station and got a train over to Pennsylvania into New York, and I went up and crossed on the ferry, went up on the Sixth Avenue elevated to where I was rooming at, and I left this dynamite in a saloon, in George McGovern's saloon on Fifty-second Street and Sixth Avenue in New York. There were two or three boys rooming in the house; I didn't

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want them to know I was going to do anything, so I went up in Harlem and met Frank Webb at his house. I told him I had the dynamite. He says, "we will make the job yet before Christmas,"—that was on the night of December 23rd. I procured about forty pounds from Cunnane. About nine o'clock, I left Harlem and went down on the Third Avenue L. to Fifty-ninth Street, and crossed on the surface line to where I had my dynamite stored at Sixth Avenue and Fifty-second Street. I took the grip and went down the Sixth Avenue L. to Courtlandt Street, crossed into Jersey City and got what is called a Plank road car that runs out to Newark and by this Harrison, New Jersey, job. I rode on the car out to about half a mile before I got to the job, and got off and walked down the tracks to within perhaps two or three hundred yards of the structure, and I saw two or three men in blue that I took to be watchmen, and in order to avoid meeting them I went up around and up on the structure that I was to get. It was an overhead structure over the tracks and I got up and I set—it was what we call a set of through girders. I didn't know how much damage I could do,—but I was instructed by Webb to place the dynamite where I could do the most damage. So I set it on a pier and against a girder, and also there was a girder lying loose on top of the bridge. I had fixed two fuses about twenty feet long, before I went up to this job, in the dynamite, and lit both fuses, and I went down off the structure and off back for perhaps two hundred yards, and waited about fifteen minutes, and I knew it would

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be time for the explosion to occur, and nothing happened, and I concluded something must be wrong with the fuse or something, and I waited for perhaps another fifteen minutes, and nothing still happened, and so I had some more caps and fuses with me and I prepared two more fuses and went back with a little flashlight I had and I discovered the fuse had burned out at the side. It was a faulty fuse someway. So I put in these other two fuses I had prepared and lit them and went back about the same distance, about two hundred yards, and in about fifteen or twenty minutes the shot went off. I went back and caught the car about the same place, and I went into Jersey City and crossed the Courtlandt Street ferry, and on the Sixth Street elevated up to my room and stayed all night. The next morning I got two newspaper clippings out of the Journal and the World, as Webb had instructed me to always get clippings whenever I done a job, that he reported that way. On the morning of December 24th I saw Webb and handed him these clippings. He paid $50.00 for the dynamite and our trip to Pennsylvania and back, and that cost about $20.00, all told, and there was $130.00 left, and he gave me a $100 bill and three ten dollars and I handed him the three tens back. I said, "you can have that for a Christmas present." About the time he paid me, I had another conversation with him. He asked me if I wanted to continue this kind of work and I told him, "Yes." Along about the first week of January, I had another conversation with him about the Blackwell Island bridge. He told me he had heard from J. J. McNa-

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mara, and as they were a little bit short of funds, that he thought $950.00 was all that could be paid for destroying that bridge, and I told him I wanted $1500.00 anyway. He suggested that I get a room down near the job, and look it over, and observe the habits of the watchmen, and he thought he could get the $1500 from McNamara, or more money, and I got a room down on 59th Street, as near the bridge as I could. I had a room there for near ten days. Later I had another conversation concerning the Blackwell Island bridge in which Frank Webb, Billy Green and myself were present. Billy Green said, "well, if you want to get any job, why don't you get the Blackwell Island job?" He had been writing us to stay out of New York, not dynamite there. After I observed the habits of the watchmen, and had even one night gone over the fence and followed the watchmen up on top and looked at the bridge where they wanted me to place the dynamite, as they wanted me to destroy the post, and throw the cantilever on in the river, if possible. I went up and took a look at it and reported to Webb what I had done. Billy Green was there at the time. He told me that he had heard from J. J. McNamara and that $1500.00 would be forthcoming. He says, "you can go ahead and prepare to do it and get your dynamite." I had another conversation with him later. He says, "the old man, Frank Ryan, wants us to get that job." I told him if I destroyed that bridge I would kill some men in a power house under it, and that I wouldn't do that. He said, "Let's go look at the other side and see how it looks." So

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we crossed the Thirty-fourth Street ferry and looked at the opposite side of the bridge, and there was only one way of getting up on the pier. It was about ninety feet high there, and that was a ladder, a stairway, that ran right through the watchman's shanty, and there was no other way of getting up that I could see, and I told him I couldn't go in there through that watchman's shanty as there were several men, so we gave the job up. Later I had a conversation with Dugan, a structural iron worker and Tunnings, who was rooming at the same house where I was. We had this conversation in my room. Dugan told me that Billy Green wanted him to destroy a bridge out at Pelham Bay, New York. It was what is known as a jack-knife bridge, but he didn't want us to use dynamite, and Dugan got $50.00 expense money, and we went out and looked the job over. He said, "Green wants us to destroy it—to saw the guys off or burn the cables off with acid, and to try and drop it in the river, but not to use no explosive of any kind." Dugan and me went out and looked the job over one day—well, the next day after this conversation after we had looked it over, we found that the bridge was held in place by four cable guys—steel guys, and that manner of bridge they erected kind of on end, about forty-five degrees and it was held back in place by these guys, until after they get their counter-weights and pins in, so it would balance. And we looked it over and I told Dugan I thought it could be done, but he said he didn't believe it would fall if we did throw the guys off, and I told him I thought it would. Dugan then

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told Tunnings about it, and we all talked it over, and we all three agreed to go out and take a look at it that night. We talked it over at the bridge for perhaps twenty minutes, and they were both of the same opinion. They said it wouldn't fall after we did loosen the guys; I told them it would. The next day, to satisfy myself that I was right, I got on the car and went out in the daytime and looked the bridge over a little more closely, and I also looked for telephone wires in case we concluded to do it, and discovered that the counter-weights were not in place, nor were the pins that acted as a bar. It was simply setting on a blocking. I went back to the house, and that evening the three of us had another conversation, and the three of us went on the night of February 3rd, 1908, to Barnes' saloon, on the corner of One Hundred Twenty-eighth Street and Third Avenue, and got a wrench, a monkey wrench there, in this bar-room of the saloon, and the three of us went out to this job, and went to work loosening these guy clamps, the clamps that held the guys in place; there are five clamps to each one of the four guys; one of them was put in by a turnbuckle, but the other was held in place by clamps. So we worked there perhaps two hours getting these clamps off; there was only one watchman, he was across the river, and it would be some little time before he could get to us. So we loosened all three of the guys, but the one was held—the last one was held in place by a turnbuckle, and the bridge was creaking and groaning on the last guy, and I asked them what they thought about it, and they said, "I believe it

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will go," so Dugan and myself knocked the ring that holds the turnbuckle in place. Dugan had a wrench and I had the end of the turnbuckle, and we knocked that ring off, and released the hook, and the bridge immediately fell in the river. This was what was known as a "jack-knife lift," both sides of the bridge raised and lowered, and they met in the center. There are counterweights on the back and also a pin that acts as a balance. This bridge only had one-half of it being constructed at that time, and this held in about a forty-five degree by four cable guys. There are various ways of constructing them, but this one was held in place by cable guys, and we released the guys, and when we got the last one loose, why it immediately released everything and fell in the river. It was a two-track bridge, I guess about ninety foot arm. The following day Dugan and Tunnings and myself went up to Barnes' saloon at One Hundred and Twenty Eighth and Third Avenue, and we saw Green and several more there. I was paid Fifteen Dollars and Twenty Dollars at another time. On February 22, 1908, I met Harry Jones, Frank Webb and Mike Gibbons, at a dance given by the Finishing Organization. About the 25th of February, 1908, I had a conversation with Webb, and he says, "Let's take a trip over to see Nilan," and, we got on the train and went to Eastern Pennsylvania and Nilan got on the train with us, and we went to Allentown. He says, "Let's go over the Hockendaugua," that was a short distance, I guess about ten or twelve miles, out of Easton. The Phoenix Bridge Company was constructing a

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bridge over there. Roxy Kline was foreman, and they wanted me—(Webb did) to beat up Roxy Kline, or put him in the hospital. We all three of us went over, and we stayed around for perhaps an hour or so until Roxy Kline came off the work that evening. Webb told me to find out who he was, and where he stayed at and see if I couldn't get a chance to put him in the hospital. Then I asked Nilan if I could get any dynamite off of him, and he says, "Yes," we could get plenty of it as there were several quarries around there or, he says, "we can buy it," and I told him the chances are I would need considerable of it and for him to make arrangements to get it somewhere he says, "Well, the best thing we can do is to steal it, I believe." So we went back to New York, and I stayed there that evening. The next day I had another conversation with Nilan in Allentown, Pennsylvania. I told him I couldn't beat Roxy Kline as I met two men in the hotel who knew me and spoke to me, and then we talked over about dynamite, and we made up a kind of a secret code in case I wanted to wire him to have it for me. I told him if I wanted so many sticks of dynamite I would say, "So many spools of thread," and if I wanted caps I would say, "So many buttons," and if I wanted fuse why so many yards of silk; there were several silk mills in there and we thought it didn't sound so bad to do it that way. So I went back to New York and met Frank Webb. I had a conversation with him at his house—that would be along about the last of February. He told me to go ahead and get the dynamite and do the

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job out at Perth Amboy, New Jersey. There was a draw bridge which the Pennsylvania Steel Company were erecting over the Raritan River. That bridge worked on a pivot; has a bearing in the center and when a boat or anything would go to come up it would swing up and down stream and let the entrance on either side for the vessels to pass. About the 1st of March, 1908, Webb and I looked the job over and Webb told me to go ahead and try and destroy it. He said to get on the pivot pier and try to destroy the pier or the rollers that carry the bridge around, when they would swing it one way or the other; that is where he wanted me to shoot that pier, if possible. I telephoned to Thomas Nilan and used the words "get me forty spools of thread, a box of buttons and about one hundred yards of silk." I went down to Easton and got the dynamite, about forty pounds. The next afternoon I took a branch of the Pennsylvania, a branch off just before it gets to Perth Amboy, and got off there perhaps 9 o'clock in the evening. I had the dynamite caps and fuse in a suitcase. When I started out on the draw, I saw several men up in the bridge tender's shanty. One of these watchmen was smoking his pipe and I got pretty close to him before I discovered him; I heard them talking. I stopped for a moment in the shadow of a post, then I concluded I could not get to that pier, so I went to go back to what they call a batter post of the bridge right on the end that supports the two batter posts, and top cord that supported the bridge in connection with the bottom cord, they call it, so the post was large

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enough for me to get inside of it, for perhaps, four feet across, there was an opening that big inside of it—I got down in there inside of it with my dynamite, and in order to prevent the light shining out while I was lighting the fuse, I hung my overcoat up over the lacing of the post and I lit the fuse, and I had two fuses in it, about perhaps eighteen feet long and I lit one of the fuses and I couldn't get the other one started, and I would take and cut off one fuse and cut the other one the same length and try it again; I done that four or five times and they got about ten feet long, and finally I cut a stick of dynamite open and split the fuse and put a little dynamite in the fuse so that it would catch quicker and I lit one of the fuses and held the other one to it and finally I got them both lit. Before I did, I got one of my hands pretty badly burned in getting it lit, and then got out of the post and started on the return trip to the shore, and I got about half way across the set of five girders—set of ten—and lacked about five girders being to the shore when it went off. I went on into town and it was about twelve o'clock I guess, and the cars had stopped running, the street cars, and there was no more trains in town, but there was a ferry that crossed over to Staten Island that I didn't know the location of, so I went in a saloon that was open there and the proprietor was just counting up the receipts for the day and I bought a short beer and asked him to have something and he took a cigar, I believe and he treated me in return, and I told him I just came in. I got back to New York that night. The next day I reported

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to Webb and he told me he had already seen it in the World and the Journal himself. I drew $100 before I went over to get this dynamite and he gave me another $100 after I turned my clippings in to him. Later I blew up a bridge in Bradshaw, Maryland, at Webb's suggestion. When I saw Webb be said to me, "you must have made a pretty good job of it—you held up Frank Ryan's train; he was going up from Washington, D. C. to attend the Convention of the American Federation of Labor. Said he had to laugh about it." Webb had an appointment to meet Ryan on Twenty-third Street and Broadway, and I went along with him. He introduced me to Ryan and he says, "here is the fellow that delayed your train." We were on the street and Ryan said "this is no place to talk" and we walked down Twenty-third Street toward Sixth Avenue to a little bar room and Ryan said, "you must have done a pretty good job at Bradshaw, as there were several trains tied up ahead of me."

* * *

The witness was further allowed over the objection of counsel for the defendant to testify to a great number of explosions which he produced and to conversations held with various members of the alleged conspiracy. Nowhere, however, does he mention the name of the defendant Schmidt, and there was no evidence in the record which shows or tends to show that this defendant was ever implicated

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in the remotest degree in any of the transactions concerning which the foregoing witness gave his testimony.

The witness M. J. Morehart was permitted to testify that in the month of August, 1910, he sold nitrogylcerin to Ortie McManigal, and his testimony was, in some particulars, corroborated by that of his wife.

The witness Edward Clark testified that during the year 1905 he was an officer of the Local Organization of the Bridge and Structural Iron Workers at Cincinnati, Ohio. He was allowed to testify over the objection of the defendant that he had a conversation with Herbert S. Hockin in Cincinnati on the last Friday in April, 1908. Hockin asked the witness if he know anything about dynamite, and upon receiving an affirmative reply, Hockin made an appointment to meet him the next day. Under Hockin's direction, the witness set off an explosion on a bridge over the Miami River at Dayton, Ohio, which was being constructed by the American Bridge Company. At the time of the explosion a heavy rain was falling and little damage was done. In a subsequent conversation with the witness, Hockin stated that Ryan had complained about the expenditure of money when very little damage was produced.

The witness E. J. McGivena was permitted

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to testify that in March, 1908, an explosion took place one night about 9:30 on a bridge which was being constructed at Indiana Harbor by the Pittsburgh Construction Company.

(Rep's. Trans., 4718-4725.)

The witness James R. Whitehead (Rep's. Trans., ps. 4825-4827) was allowed to testify that on the 9th of July, 1909, a pile of girders and columns belonging to the Whitehead & Kales Iron Works at Detroit, Michigan, was wrecked by an explosion following several conversations had with the witness by Herbert S. Hockin during the year in which the witness had refused to unionize his shop.

The witness William J. Deevy (Rep's. Trans., ps. 5326-5344) who was a police officer in the City of New York was permitted to testify as to an explosion at the Chelsea Pier on April 5th, 1908. This pier was being constructed at the foot of West 17th Street by the McClintick-Marshall Construction Company, a corporation, against which the International Association of Bridge and Structural Iron Workers seemed to have a particular grievance.

The witness Patrick Cullen (Rep's. Trans., ps. 5344-5347) testified to an explosion at Omaha, Nebraska, on a bridge being erected by the Wisconsin Bridge & Iron Company on

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the night of July 21st, 1910, and the witness John T. Garrett (Rep's. Trans., ps. 5347-5360) was permitted to testify to an explosion at the Filer Avenue Bridge at St. Louis, Missouri, in the year 1908. This latter explosion was also described in the testimony of Theodore Coleman (Rep's. Trans., ps. 5373-5376). The last named witness was a police officer who was in the vicinity of the explosion at the time it occurred, and was thrown to his knees by the concussion.

Elmo V. Smith (Rep's. Trans., ps. 5376-5384) was not only permitted to testify to an explosion which occurred on December 29th, 1909, at Salt Lake City on the Utah Hotel building which was in course of construction at the time, but the Court also admitted evidence from the lips of this witness of preceding labor troubles in Salt Lake City and of fights and jeering between Union and non-union men. Apparently the trial Court took the position that the defendant was not only on trial for all the dynamite outrages, but that he was also to be held answerable for all unseemly conduct on the part of members of Trades Unions in any quarter of the country even if it only consisted of the use of jeering or impolite words.

Testimony as to the same labor difficulties

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in Salt Lake was also given by the witness Richard D. Jones (Rep's. Trans., ps. 5456-5466).

The chief witness produced by the prosecution to testify as to dynamite outrages in the Eastern part of the United States was Ortie E. McManigal. This precious scoundrel, who was kept concealed by the prosecution until the time for him to take the witness stand had arrived, was allowed to testify in great detail as to a long series of explosions which he had produced under the direction of J. J. McNamara, Herbert S. Hockin and others. During a portion of his career as a dynamiter he operated in concert with J. B. McNamara and had a number of conversations with him. He testified that he first met Herbert S. Hockin about May 15th, 1907, in Detroit, Michigan. McManigal was then a member of the local union of the International Association of Bridge and Structual Iron Workers. At that time Hockin stated to him that he wanted to get "a gang" together and go over to one of the non-union jobs and beat up the non-union men as they were leaving their work. This witness testified to a long series of dynamite outrages, but in his testimony he never mentioned the name of the defendant Schmidt, and it was never contended that Schmidt was in any manner implicated in any of McManigal's

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crimes. It would be a needless waste of space to set forth the entire substance of McManigal's testimony, or even to enumerate the various crimes that he committed. He was a professional dynamiter, who made a business of destroying property for hire, and when he was finally apprehended, he did not shrink from the crowning ignominy of becoming an informer,—also for a pecuniary consideration, as his cross-examination developed. Of that phase of McManigal's testimony we shall speak more in detail in discussing certain erroneous rulings of the trial Judge in sustaining objections to questions asked of this witness upon cross-examination. In the course of his long narrative of his shame and infamy the Court permitted McManigal to testify as to an explosion which he set off at McKees Rocks, a suburb of Pittsburgh, on the morning of the 15th of June, 1910 (p. 5762, Rep's. Trans.). The witness then proceeded to testify in substance as follows:

> I went to the St. Charles Hotel, paid my bill and left over the Pennsylvania Railroad, leaving Pittsburgh about 11 o'clock for Indianapolis. I went to J. J. McNamara's office and saw him there with J. B. McNamara going into the office of J. J. McNamara. J. B. McNamara was sitting there and he said, "I see you are wanted in Pittsburgh." I says, "how is that?" He

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then showed me the Indianapolis paper with a small account in it of an explosion at McKees rocks at 2 A. M. in the morning and J. J. asked me if I had heard that explosion. I told him, "Yes, I set one there last night." He wanted to know how many I set—I told him one. I only had one machine left. "Well," he says, "that is very good." I noticed that J. B. McNamara was all dressed up, I asked him where he was going and he said, "I am getting ready to go to San Francisco. I wish you could go along with me." J. J. McNamara says, "No, nothing doing." He says, "I will have to have one of you fellows here, so if there is anything comes off out on the coast, that I can have an echo in the East, and besides that, I have got four or five jobs in sight now, and I could keep you busy around here." J. B. McNamara then went to J. J. McNamara's desk and handed me a telegram from San Francisco signed "Gene." I asked J. B. who Gene was and he says, "Eugene Clancy, business agent of the local in San Francisco." The telegram read: "San Francisco, Cal., July 11-10. Mr. J. J. McNamara, 422 American Central Life Building, Indianapolis, Indiana.

"Lay Clancy Vaughn elected delegates. Has Jim left for here. If not have him come at once. Will I go North? Give Ryan my regards. Received letter about sheet metal workers decision and it was fine.

(Signed) "Gene."

I asked J. B. McNamara what he meant when he said Jim and J. B. said, "that is me." J. J. McNamara said that the Wisconsin Bridge Company had a bridge at Omaha, Nebraska, the Omaha Council

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Bluffs Power House, an addition there, and he said, "Painter is business agent at Omaha, has been writing me in regard to that matter, and I guess you better get ready and go out at Omaha, and you can leave this afternoon. You and J. B. can go to Chicago together." J. J. paid me some $350 odd dollars at that time. After the Omaha job, he had one at Kansas City, Missouri and one at Superior, Wisconsin, and he said "I got one coming up at Peoria, Illinois." I turned over a dozen tattoo junior clocks to J. J. McNamara. J. J. was talking to J. B. about what way we should go and what would be the best way to buy the tickets. He thought it would be cheaper for him to buy a round trip ticket direct from Indianapolis to San Francisco. J. B. said, "Well, supposing I get picked up on the Coast there; I will have this return ticket in my pocket that will direct right back here to Indianapolis." "Well," he says, "When you get down to the depot, you can talk the matter over down there, and see which way. Maybe you can sell the ticket after you get out there." Said, "when you get to San Francisco you get in touch with Clancy, and he will introduce you to the bunch out there and you take your instructions from Clancy, and you will probably be gone three or four months." "In the meantime," he says, "let me hear from you once in a while." J. B. then showed a dozen views of Indianapolis that he had there. He says, "these are some post-cards I have bought now, and I will write a little on these and mail them to you and you can send them down to my mother, so she will think I am still around Indianapolis. J.

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B. said he was going out to the Coast to give them "a damned good clean up" (p. 5772). When we went to the depot J. B. McNamara had two suit cases. One of them was one that I had seen him have before and the other was a new one, a yellowish colored suitcase. He told me he had a dozen infernal machines in the suit case. I had a conversation with J. B. McNamara on the train. *I don't recall that he said anything in regard to Los Angeles* (p. 5777).

He said they had plenty of money on the Coast and he was going out there for that purpose, to give them a damned good cleaning up and get some of their money. When we arrived at Chicago our train was about two hours late, and I helped J. B. McNamara off with his suit cases there. He grabbed one suit case and ran for his own train with the understanding that if he didn't get his train to get out of Chicago, he would call me up and come over to my house that night. That was the last I saw of him at that time. Shortly after that. I made a trip to Omaha taking with me eight quarts of nitroglycerin and two infernal machines and some fulminating caps. (The witness narrated numerous other explosions. The witness testified that in August, 1910, he and J. J. McNamara stored 20 quarts of nitroglycerin in the vault in the American Central Life Building in Indianapolis. I says, "what do you suppose would become of this building if this thing happened to go off now?" He says, "I suppose it would knock the God Damn monument down, and tear the top off the building." I says, "I hope I ain't around here when it goes off" (p. 5854).

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The cross-examination of this witness is illuminating. He testified that he pleaded guilty to a felony in the United States District Court of Indiana in the case of *U. S.* vs. *Ryan et al.* in October, 1912. No punishment was inflicted upon him following his plea of guilty. At the time of the trial he was living in Los Angeles. Following the Indianapolis trial he was brought to Los Angeles and remained for some time in the county jail in that city. He was given his liberty on November 3rd, 1913, and had enjoyed immunity from imprisonment or other punishment ever since. At the time of the trial of Schmidt he was receiving $6.00 per day and his house rent as a consideration for appearing in court to testify.

(Rep's. Trans., p. 5914.)

In the month of December, 1914, before he left Los Angeles and went East, he had received $1000 from Mr. Malcolm McLeran, an attache of the District Attorney's office in Los Angeles.

(P. 5914, lines 15 and 16.)

He further testified that he did not know the purpose for his receiving the money, or why it was paid to him; that *it was just a gift.*

(P. 5916, line 2.)

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The testimony of McManigal in this case proves absolutely nothing except the truth of Aaron Burr's observation that the most contemptible, depraved and unregenerate of all criminals are those who turn State's evidence. As far as the defendant Schmidt is concerned, the testimony of McManigal is utterly worthless. It stands in the same category as the testimony of the witness Davis and the testimony of all the other witnesses who gave evidence touching the so-called Eastern Conspiracy. That it was highly prejudicial to the defendant on trial, however, must be apparent. It confused the issues in the case. In common with the other evidence of like import, it naturally aroused the prejudice of the jury in that it showed that the members of the Executive Board of a Labor Union in the East had been engaged for a number of years in wholesale dynamiting. It showed the participation of J. B. McNamara in some of these outrages, and, since there was evidence in the record to show that Schmidt and McNamara afterwards associated with each other in San Francisco, this testimony would irresistibly arouse the prejudice of the jury against the defendant on trial, by reason of its tendency to show that he had associated with a person who had participated in these crimes. But this phase of the

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evidence will be discussed more in detail as we proceed.

The witness, Harry E. Burns (Rep's. Trans., p. 6004-6008) who was a police officer at Chicago, Illinois, was allowed to testify that on the 6th of August, 1908, he heard an explosion on his beat at about three o'clock A. M. Two or three stringers of a bridge were badly bent and broken in some places. This bridge was being erected by the Blodgett Construction Company of Kansas City.

William B. Fortune (ps. 6008-6014) testified that from 1909 to 1912, he was Superintendent of a firm known as the Seaboard Construction Company. In 1909 this firm was engaged in constructing a bridge at Steubenville, Ohio, across the Ohio River. This company was operating under the "open shop" policy. The witness testified that while he was engaged in the construction of this bridge, he met John H. Barry, the vice-president of the International Association of Bridge and Structural Iron Workers. Barry stated to the witness that he wished him to make a "union job" of the work and on being informed by the witness that he could not do so, Barry answered, "You may have to." The witness was further allowed to testify that on the morning of the 26th of June, an explosion occurred upon four or five

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cars loaded with steel which were standing upon a side track.

Hugo Lucas (ps. 6014-6019) was allowed to testify to an explosion that occurred at his shop in Peoria, Illinois, on September 4th, 1910. This witness was engaged in the structural steel and ornamental iron business.

Frank Barker (ps. 6019-6021) was a police sergeant in Indiana Harbor in the month of March, 1910. He was permitted to testify as to explosions that occurred at certain foundries being constructed at that place by the McClintick-Marshall Company.

The witness Jesse D. Smith (ps. 5681-5698) gave the following testimony over the objection of the defendant:

> I am general manager of the Pan-American Bridge Company which is engaged in fabricating and erecting structural steel material. In 1910, I was engaged in constructing two factory buildings for the Avery Manufacturing Company, in Peoria, Illinois. I had communications from J. J. McNamara and from Herbert S. Hockin during that time. We were using non-union men. McNamara called me up by long distance telephone with reference to the erection of that steel material for the factory building. I afterwards met Mr. Hockin at the Fay hotel in Peoria, Illinois. I wrote a letter to Mr. Hockin (People's Exhibit 546.) Shortly after 3 o'clock in

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the morning of the 5th day of April, I went to our plant. The south end of the factory building was very badly wrecked. About sixty feet of the slate roof, the entire width of the building, at the south end was shattered and broken loose; the windows about all blown out; the walls on the south and west ends bulged outward. The residences along the street about one block away had a number of windows broken. I afterwards received a visit from a man named Smythe of Peoria and had a conversation with him with reference to the question of unionizing the job. About one week later I met him and Herbert S. Hockin in Peoria. They asked me to discharge the men we had employed and place union men on the job. I told them the men were satisfied with their jobs and we were satisfied with their work, and we saw no reason why we should discharge them and employ some one else. I finally agreed to place a gang of their men on my job. Mr. Hockin says: "Now, Mr. Smith, you may go back to Newcastle and discharge all the extra guards and watchmen you have about your place. You will not have any more explosions."

* * *

Further testimony as to dynamite outrages in the Eastern part of the United States was given by various witnesses as follows:

Louis E. Roddewig (ps. 6022-6026) testified as follows:

I am a police magistrate of Davenport, Iowa, and was engaged in said occupation

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in June, 1909. A wrecking building was being constructed at the Davenport Locomotive Works. They were running open shop. A little after 4 A. M. of June 4th, 1910, I arrived there and stayed until a little after seven in the morning. The southwest end of the building was blown out. The columns had been twisted at the bottom, and some of the rivets and bolts were pulled out at the corner of the building. Witness identified the hotel register of the Kimball hotel, (People's Exhibit 530) containing the signature of J. B. Brice, Cleveland, Ohio, June 3, 1910.

* * *

August Seifert (ps. 6027-6029):

The witness testified to an explosion on a bridge across the Mississippi at Clinton, Iowa on the 16th of February, 1908.

* * *

Martin J. Morgan (ps. 6031-6033):

The witness, who was a police officer in Green Bay, Wisconsin, in November of 1909, testified to an explosion at that place on November 21st, 1909, on a bridge of the Wisconsin Bridge & Iron Company.

* * *

Lee Trawer (ps. 6034-6049):

The witness who was superintendent of the Pittsburgh Construction Company testified to an explosion at Newark, New Jersey, in June, 1906, and an explosion at Cleve-

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land on the Cuyahoga viaduct and an explosion at Whiskey Island on a bridge being built for the Baltimore & Ohio Railroad and several other explosions.

* * *

John W. Ghilon (ps. 6058-6064):

The witness, who was a foreman for the Pittsburgh Construction Company, testified to a conversation in Cincinnati in 1909 with Edward Clark and to an explosion, and the finding of dynamite on September 26th, 1906, on a derrick car on the Lake Shore front at Cleveland, Ohio.

* * *

In addition to the verbal testimony given as to the so-called Eastern conspiracy, the trial Judge, over the objection of the defendant, admitted in evidence a vast amount of documentary matter. We shall not attempt to even set forth the substance of the documentary evidence as no purpose could be subserved thereby, other than to encumber this brief and to inflict useless labor upon this Court. This documentary evidence fills at least three-fourths of the Clerk's transcript, which transcript is composed of three volumes of more than five hundred pages each. In brief, the documentary evidence consists of a vast amount of correspondence between persons alleged to have been members of or con-

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nected with the so-called Eastern conspiracy. Some of the letters contained expressions that apparently referred to various dynamite explosions that occurred throughout the Eastern part of the United States between the years 1906-1910. Numerous issues of the "Bridgemen's Magazine," published weekly by the International Association of Bridge and Structural Iron Workers from its headquarters in Indiana were also admitted in evidence. The books and numerous canceled checks of the organization were also read into the record. Much of this documentary evidence was subject to the objection that no proper foundation was ever laid for its introduction. These objections will be discussed later, as at present we are confining ourselves solely to the question of the general admissibility of the so-called conspiracy evidence. If this evidence was inadmissible, then the documentary evidence was obviously irrelevant for any purpose. As the documentary evidence must stand or fall with the rest of the so-called Eastern conspiracy evidence, it seems to us that the entire question of the admissibility of any of this evidence can with perfect propriety be discussed under one head. It would seem, indeed, that this is the only logical and orderly method of proceeding.

The Eastern conspiracy evidence was irrele-

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vant for any purpose and was inadmissible under any theory.

The evidence relating to the dynamite outrages perpetrated in the Eastern part of the United States under the direction of J. J. McNamara, Ryan, Hockin and others, the substance of which we have set forth in the foregoing pages of this brief, was obviously evidence of crimes other than the crime with which the defendant was charged in the indictment. It should scarcely be necessary to point out the reasons why such testimony was inadmissible. In the thousands of pages of transcript containing the oral testimony of witnesses who testified as to the Eastern crimes, in the tremendous mass of correspondence and other documents relating to the same with which the clerk's transcript is encumbered, *there is not one word or one syllable of evidence which tends in the remotest degree to show that the defendant Schmidt ever directly or indirectly participated in any of the numerous crimes committed by the so-called Eastern conspiracy, or that he ever had, even in the slightest degree, any guilty knowledge of these crimes.* The truth of this statement cannot and will not be questioned. We challenge the Attorney General to point out a single particular in which it was shown, even by the remotest inference, that this

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defendant was ever concerned in any manner whatsoever with this so-called Eastern conspiracy.

It must be borne in mind that the defendant was not charged in the indictment with having entered into any conspiracy with Ryan, McNamara and the others. He was not charged with complicity in any of their crimes. The sole charge was that he did wilfully, unlawfully, feloniously and with malice aforethought kill and murder Charles Hagerty, a human being. This was the charge for which he was placed on trial, and the only evidence which the trial court had any right to admit was evidence which would be relevant to the single question as to whether the defendant, Schmidt, participated as principal or as an accessory-before-the-fact, in the alleged murder of Hagerty.

The testimony as to the so-called Eastern conspiracy could not throw, and did not throw any light whatever upon that question. Even if the defendant Schmidt had participated in any of these crimes that were committed in the Eastern part of the United States, it would not have been permissible to show his connection with those crimes, when he was on trial for the crime charged in this indictment. Evidence that the defendant on trial has been guilty of other offenses is, with certain well defined ex-

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ceptions, utterly inadmissible. If the defendant himself had commited murder in New York, arson in Illinois, larceny in Texas, bigamy in Iowa and polygamy in Utah, the prosecution would admittedly not have been permitted to introduce testimony as to those crimes when he was on trial for the crime of murder alleged to have been committed in the State of California. But it was not alleged or proven that this defendant had ever committed any other crime in any jurisdiction, unless the prosecution should contend that his membership in a Labor organization, and his affiliation with the leaders and members thereof, should be counted as a crime. It was not contended that he assisted J. J. McNamara, Ryan and Hockin in planning the destruction of bridges and foundries being constructed by members of the International Erectors Association. It was not contended or shown even by a scintilla of evidence that he ever participated in the crimes of Davis, of J. B. McNamara, of Clark or of Ortie McManigal. It was not contended or shown that he plotted the destruction of the Blackwell Island Bridge or that he even jeered at non-union laborers in Detroit or Salt Lake. The prosecution did not even attempt to show that he did any of these things or that he was even implicated in any of these crimes. If evidence of the commis-

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sion by the defendant of other collateral offenses is inadmissible, how much more inadmissible is testimony as to the crimes and misdeeds of other persons? The wise and humane rule of our law that a defendant on trial shall be called upon to answer only for the offense with which he stands charged in the indictment, also, by the most obvious implication, requires that he shall not be called upon to answer for the crimes of other persons. As was said by Justice Cooper in *People* vs. *Schmitz,* 7 Cal. App., 355: "The sages of the law and the learned "judges have established the rule that the inde- "pendent acts and declarations of one man shall "not be evidence against another. It is suffi- "cient for everyone to answer for his own sins, "and not for the sins of his neighbor."

It should not be necessary to cite authorities in support of the foregoing principles. In these days, however, when prosecuting attorneys and trial judges seem to have either forgotten or to have utterly disregarded those fundamental safeguards with which our law from the very earliest days has surrounded the man who is on trial for his life or liberty, it may not be amiss to quote a few historic and notable decisions which lay down the fundamental principles as to the admissibility in criminal cases of evidence of collateral crimes.

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The general rule is that evidence of a distinct and substantive offense cannot be admitted in support of a charge of the commission of another offense. This rule is laid down by all the authorities. It excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute.

In the case of *People* vs. *Molineux* (N. Y.), 61 N. E., 286, the defendant was indicted for murder by the administration of a deadly poison feloniously sent through the mails on Christmas evening, in a box which contained a bottle in which the poison was disguised with a harmless powder in common use. The box also contained a silver bottle holder, into which the bottle fitted, and an empty card envelope. It was held by the court that evidence connecting the defendant with the alleged killing of another person some time before, by means of the same poison mixed with a medicinal powder alleged to have been sent through the mail, is incompetent, where such evidence does not tend to establish a motive for the crime, or the intent with which it was committed, the absence of mistake, or a common scheme for commission of both crimes so connected that proof of one

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would establish the other or the identity of the defendant. The Court says in part:

> "The general rule of evidence applicable to trials is that the State cannot prove against a defendant any crime not alleged in the indictment either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the crime charged.
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> 1 *Bishop New Crim. Procedure,* 1120.
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> "This rule, so universally recognized and so familiarly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual, which has distinguished our jurisprudence from all others, at least from the birth of *Magna Charta.* It is the product of that same humane and enlightened public spirit which, speaking through our common law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proven guilty beyond a reasonable doubt. This rule, and the reasons upon which it rests, are so familiar to every student of our law that they need be referred to for no other purpose than to point out the exceptions thereto. The rule itself has been stated and discussed in this court in a number of cases, but we will cite only a few. In *People* vs. *Sharp,* 107 N. Y., 427; 14 N. E., 319; 1 Am. St. Rep., 851, it was said:
>
> " 'The general rule is that when a man is put upon trial for one offense he is to be convicted, if at all, by evidence which shows that he is guilty of that offense alone, and that, under ordinary circumstances, proof

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of his guilt of one or a score of other offenses in his lifetime is wholly excluded.'

"In *Coleman* vs. *People,* 55 N. Y., 81, it is laid down as follows:

" 'The general rule is against receiving evidence of another offense. A person cannot be convicted of one offense upon proof that he committed another, however persuasive in a moral point of view such evidence may be. It would be easier to believe a person guilty of one crime if it were known that he had committed another of a similar character, or, indeed, of any character; but the injustice of such a rule in courts of justice is apparent. It would lead to convictions, upon the particular charge made by proof of other acts in no way connected with it, and to uniting evidence of several offenses to produce conviction for a single one.' In *People* vs. *Shea,* 147 N. Y., 78; 41 N. E., 505, the rule is thus stated:

" 'The impropriety of giving evidence showing that the accused had been guilty of other crimes, merely for the purpose of thereby inferring his guilt of the crime for which he is on trial, may be said to have been assumed and consistently maintained by the English courts ever since the common law has itself been in existence. Two antagonistic methods for the judicial investigation of crime and the conduct of criminal trials have existed for many years. One of these methods favors this kind of evidence in order that the tribunal which is engaged in the trial of the accused may have the benefit of the light to be derived from a record of his whole past life, his tendencies, his nature, his associates, his practices, and

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in fine all the facts which go to make up the life of a human being. This is the method which is pursued in France and it is claimed that entire justice is more apt to be done where such a course is pursued than where it is omitted. The common law of England, however, has adopted another, and, so far as the party accused is concerned, a much more merciful doctrine. By that law the criminal is to be presumed innocent until his guilt is made to appear beyond a reasonable doubt to a jury of twelve men. In order to prove his guilt it is not permitted to show his former character or to prove his guilt of other crimes, merely for the purpose of raising a presumption that he would be more apt to commit the crime in question.' The highest court in Massachusetts has said:

" 'The objections to the admission of evidence as to other transactions, whether amounting to indictable crimes or not, are very apparent. Such evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it, and by showing the defendant to have been a knave on other occasions creates a prejudice which may cause injustice to be done him.' (*Com.* vs. *Jackson,* 132 Mass., 16.) The court of last resort in Pennsylvania thus states the rule:

" 'It is the general rule that a distinct crime unconnected with that laid in the indictment cannot be given in evidence against a prisoner. It is not proper to raise a presump-

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tion of guilt on the ground that, having committed one crime, the depravity it exhibits makes it likely he would commit another. Logically, the commission of an independent offense is not proof in itself of the commission of another crime. Yet it cannot be said to be without influence on the mind, for certainly if one be shown to be guilty of another crime, equally heinous, it will prompt a more ready belief that he might have committed the one with which he is charged. It therefore predisposes the mind of the juror to believe the prisoner guilty.' *Shaffner* vs. *Com.*, 72 Pa., 60; 13 A. M. Rep., 649.

"The exceptions to the rule cannot be stated with categorical precision. Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) Motive; (2) Intent; (3) The absence of mistake or accident; (4) A common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) The identity of the person charged with the commission of the crime on trial.

"Wharton Crim. Evidence, 48; *Underhill Evidence,* 58; *Abbott's Trial Brief Cr.,* 598."

The doctrine pronounced in the Molineaux case has been repeatedly followed by the Supreme Court of California, and, indeed, by the courts of last resort of every State in the United States.

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In *People* vs. *Lane,* 100 Cal., 379, the court says:

> "That evidence of a distinct and substantive offense cannot be admitted in support of the charge of the commission of another offense is a general rule laid down by all the authorities. This rule excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute. The most familiar exceptions to the general rule above stated are cases of passing or offering to pass counterfeit money. As one may innocently pass or offer to pass, a counterfeit bill or coin, not knowing that it is such, proof of prior passing or offers to pass, the same, or similar counterfeits, is competent for the purpose of proving guilty knowledge, even though such proof shows the commission of another complete offense.
>
> "The general rule above stated is in fact but the reiteration of the still more general rule that in all cases, civil or criminal, the evidence must be confined to the point in issue. 'No fact which, on principles of sound logic, does not sustain or impeach a pertinent hypothesis is relevant; and no such fact therefore, unless otherwise provided by some positive prescription of law should be admitted as evidence on a trial. The reason of the rule is obvious. To admit evidence of such collateral facts would be to oppress the party implicated by trying him on a case for preparing which he has no notice, and sometimes by prejudicing the jury against him.' (*Wharton's Crim. Ev.,* Sec. 29.)

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> "'In criminal cases there are peculiar reasons why the test before us should be applied to proof of collateral crimes.' (*Wharton's Crim. Ev.,* Sec. 30.)"

A case in which the facts and issues were extremely similar to those in the case at bar is *People* vs. *Glass,* 158 Cal., 650. In that case the defendant who was vice-president and general manager of the Pacific Telephone and Telegraph Company in the City and County of San Francisco was charged with the crime of bribing one of the members of the Board of Supervisors of the City and County of San Francisco. On the trial of the case, the trial judge allowed evidence to be admitted to the effect that several years prior to the alleged commission of the offense charged in the indictment, the telephone company with which the defendant was connected, in an endeavor to prevent competition in the City of Oakland procured the organization of a dummy corporation which secured a franchise and which was kept in existence for the sole purpose of excluding a rival company from the field. For the error in the admission of this testimony the judgment was reversed by the District Court of Appeal of the First Appellate District. A hearing was granted by the Supreme Court, which also reversed the judgment. In deliver-

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ing the opinion in that case Justice Henshaw said:

> "A vast mass of evidence was introduced in this case which, for brevity, may be designated evidence touching the Oakland franchise. Admittedly, the transactions covered by this evidence, in point of time, long antedated any of the occurrences properly embraced within the charge of bribery. Admittedly, also, the transactions were entirely separate and distinct, the earlier one having no casual connection with the latter. By the Oakland evidence it was sought to be shown that the Telephone Company, with which defendant, Glass, was connected, in an endeavor to prevent competition in the City of Oakland and to exclude from that territory the Home Telephone Company, its competitor, and an applicant for a franchise, had itself, through a third person—'a dummy'—secured a franchise, and had aided and abetted in the organization of a corporation which did not enter the field of competition and was not designed to enter the field of competition, but was organized and kept in existence for the purpose of holding the franchise and raising objection to the issuance of the third franchise to the Home Telephone Company, upon the ground that two companies were already in the field and that it was useless and injurious to them that a franchise should be issued to a third corporation. Most of what was done in this regard was done not by Mr. Glass but by Mr. Sabin, the then president of the Company. To the repeated objections of the

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defendant's counsel to the introduction of this vast mass of testimony, the only reason assigned by the court for its admission is found in the statement that 'it (the evidence) was all addressed to the question of the activities of this defendant in the corporation during the period that is material here.' This language lacks in lucidity much to be desired. The only 'activities' of the defendant which could be legitimately inquired into under this charge of bribery were activities having a bearing thereon and a connection therewith. The only 'period that is material here' is the period from the formation of the alleged conspiracy to bribe the San Francisco Supervisors down to and including the criminal accomplishment of the conspiracy upon which this charge of felony is based. It should seem unnecessary to state—but apparently it is not—that a multitude of acts, facts, and happenings upon which men base their opinions and judgments of their fellowmen do not come within the definition and scope of evidence as known to our law. If a man is informed, and believes his informant, that another man is dissolute, is a gambler, is an associate of known thieves, is a petty larcenist, and makes his home in a house of prostitution, he will justly look upon such a person with suspicion, will properly govern his dealings and relations with that person by this information, and would most naturally say, if he learned that the man had been arrested for burglary, that 'it was to be expected.' Yet, upon the trial of that man for burglary no word of these matters would be admissible against him. Not because they would not have a

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tendency to show that a man of such character would be much more likely to commit the given offense than would a man of proven upright and honorable life, but because the law, for reasons good and sufficient unto itself, has declared that a man shall be put upon trial for but one offense, and that he shall not be embarrassed by being called upon to defend or exculpate himself or to explain any damaging act or fact which is not embraced within the charge he is called upon to meet. The law will not even permit a defendant's reputation to be assailed unless he shall have made that reputation an issue in the case. This, perhaps undue, tenderness goes to the extent that his guilt of petty offenses may not even be shown, and in his impeachment it may be established against him only that he has been previously convicted of a felony. It would, no doubt, have made most potently against this defendant in the minds of the jurors if, for example, it could have been shown that in this separate and distinct Oakland transaction he had bribed the councilmen there. But no one has been bold enough to assert that such evidence would be admissible, and the decisions of every court, including our own, are against its admissibility. Not only is the prosecution thus forbidden to permit another crime but the law does not sanction the introduction of evidence falling short of crime and designed merely to degrade and prejudice the defendant in the minds of the jury (*Commonwealth* vs. *Jackson*, 132 Mass., 16; *People* vs. *Molineux*, 168 N. Y., 264, 61 N. E., 286). As has been said, the language of the court holding that it was permissible to show 'the activities of the de-

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fendant during the period that is material here' is not illuminating, nor is it adopted by the people in their briefs. By the people it is contended: 1. That the evidence is admissible as showing identity of plan; 2. As showing motive, and, 3. if inadmissible still, as the evidence did not tend to prove any other crime against the defendant its admission was without injury. The People's brief declares it to be admissible as showing 'identity and plan.' We construe this to mean identity of plan, because, of course, the identity of the defendant was never for a moment in question. Identity of plan must mean a desire and effort upon the part of the Pacific States Telephone and Telegraph Company to exclude competition in Oakland, and the same desire and effort displayed to exclude competition in San Francisco. But indisputably there was no identity of plan. It is not contended that in any of the Oakland transactions any crime was committed, while the contention is that in the San Francisco transaction crime, and nothing but crime was contemplated and perpetrated. As to the second reason assigned, that of motive, there never was any doubt, never any question, never any suggestion from any source whatsoever, but that if this crime was committed, it was committed for the sole and single purpose of preventing competition. Indeed, the uncontradicted evidence of the supervisors, if direct evidence upon so plain a proposition was needed, was all to this effect. A boy of ten years might justly be regarded as gravely deficient in intellect who would need any enlightenment upon so plain a proposition. In fact, so far from the question of the

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motive ever having been in doubt, it would call for the acutest ingenuity to conceive of any other motive than this most obvious one. Yet, nevertheless, it is said that this vast mass of evidence dealing with transactions wholly detached in time and place, is admissible as establishing the motive which prompted the defendant to commit an alleged crime, separate and distinct from the Oakland transactions in time, in place, and in methods. The real reason why the evidence was offered is most obvious. It was not offered to show motive. It was not offered to show identity and plan or identity of plan. These are the veriest pretences. It was designed to besmirch and degrade the defendant and to be made use of in argument, to show that the defendant had gone to the length of organizing a fraudulent corporation, and by secret device and artful chicane had endeavored to prevent honest competition; that the defendant had gone to the border land of crime in the Oakland transaction and found, that stopping there, his efforts to prevent competition were without success. What more natural, therefore, than that when the same problem arose in San Francisco, the defendant, finding even the efforts of fraud and trickery unavailable, should have stepped over the line and become a law-breaker and a criminal? Such, we say, was the obvious purpose for which the evidence was introduced, and this the briefs of the People here on file establish. For in those briefs, while endeavoring to support the admissibility of the evidence on the grounds above stated, it is said that if 'the evidence also casts suspicion on defendant he cannot be heard to

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complain.' In the history of the transactions Glass is charged with having organized this 'bogus' company. There is described the policy of the Pacific States Telephone and Telegraph Company employing political bosses, and paying salaries to supervisors. It is directly stated that 'the history of the contest waged against the Home Company in Oakland shows so clearly Glass's activity in his company's behalf; . . . these and many other circumstances lead irresistibly to the conclusion that Louis Glass, vice-president, acting president and general manager of the Pacific States Telephone and Telegraph Company, aided, abetted, advised, directed and encouraged Halsey to pay the bribe to Lonergan.' And, finally, again, quoting from the People's brief it is said: 'To Glass, this experience in Oakland must have taught a bitter lesson. For one thing, Beasly's "bogus" company had proved a losing investment—no small consideration, for the executive committee had listened very reluctantly when Glass had personally pleaded for its succor. But the lesson stamped indelibly on his mind must have been that the Home Telephone Company could not be kept out of San Francisco except by drastic measures.' That this evidence was potent for the purpose of degrading the defendant in the eyes of the jurors will at once be conceded. That it had a tendency to inflame the mind of the jurors against the defendant, by showing that in the past he had resorted to the arts of trickery and fraud to prevent honest competition is quite apparent. That men in the every day affairs of life would have

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been influenced by such evidence is unquestionably true. But these things go to establish merely the wrong which its admission worked upon the defendant, and not its admissibility. It was not admissible. Clearly, in the everyday affairs of life, if it should be established to the satisfaction of a jury that upon another and distinct occasion a defendant had offered or solicited a bribe, it would have great weight with them in determining whether in the instance charged he had been guilty of the offense. It would establish, at least, that he was the sort of man who would be willing to do this criminal act. Such was the line of reason and argument here employed. Yet such matters are never legal evidence. In discussing precisely such a case where evidence had been admitted against the defendant charged with bribery, of a former act of like character, the Court of Appeals of New York says: 'The mental ability and disposition of the defendant to commit a crime of this sort, while it might persuade a jury, raises no legal presumption . . . Yet the inference drawn by the prosecuting officer, and permitted by the Court left it for the jury to say that the desire of Sharp manifested by the offer of a bribe in one instance, was the same desire which led to the actual giving of a bribe in the other; hence that the two crimes had the same origin. . . . It was put in near the beginning of the trial, and the impression then made must have continued with the jury, and in their minds colored and deepened, if it did not distort, the subsequent evidence. It did indeed cast a dark shadow upon the defendant's character. It not

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only tended very strongly to prove the defendant guilty; it was absolute proof, but it was of a different crime from that charged. It was offered and received directly on the main issue, and was of great and persuasive force against him. Such evidence is uniformly condemned, as tending to draw away the minds of the jurors from the real point on which their verdict is sought, and to excite prejudice, and to mislead them. It was improperly received, and the exception to its admission well taken' (*People* vs. *Sharp,* 107 N. Y., 427, 1 A. M. St. Rep., 851, 14 N. E., 319).

"Of the third proposition that the evidence, even if erroneously admitted, was without prejudice to the defendant, the argument of the People adverted to in their brief should be sufficient to show the untenableness. But, moreover, the rule does not limit the exclusion of such evidence only to transactions which amount to crime. It includes all evidence which as here, would have a tendency to degrade the defendant, to arouse the prejudice of the jury, to divert their minds from the real issues in the case, or to persuade them by matters not judicially cognizable, that the defendant, for reasons other than those contained in legitimate evidence was more likely to have committed the offense (*People* vs. *Molineux,* 168 N. Y., 264, 61 N. E., 286). Quite apposite in this connection is the following language of the circuit court of the United States in *Miller* vs. *Territory of Oklahoma* (149 Fed., 330; 79 C. C. A., 268): 'The foregoing incident strikingly illustrates where the responsibility for the miscarriage of justice in criminal prosecutions should

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sometimes be placed, instead of imputing the reversal of convictions by the appellate courts to what is properly termed "mere technicalities." The zeal, unrestrained by legal barriers, of some prosecuting attorneys, tempts to an insistence upon the admission of incompetent evidence or getting before the jury some extraneous facts supposed to be helpful in securing a verdict of guilty, where they have prestige enough to induce the trial courts to give them latitude. When the error is exposed on appeal, it is met with the stereotyped argument that it is not apparent it in anywise influenced the minds of the jury. The reply the law makes to such suggestion, is: that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless. As the appellate court has not insight into the deliberations of the jury-room, the presumption is to be indulged, in favor of the liberty of the citizen, that whatever the prosecutor, against the protest of the defendant, has laid before the jury, helped to make up the weight of the prosecution which resulted in the verdict of the jury."

The same rule is laid down in *People* vs. Cook, 148 Cal., 334, in which the Court says in part:

"Regarding the other ground of objection, the rule that a defendant in a criminal cause can be tried for no other offense than that charged in the indictment or information is universally recognized, and it is equally well established that in order to convict the de-

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fendant of the particular offense charged the prosecution is not allowed to introduce evidence of other offenses for the mere purpose of showing that he is a bad man, and therefore more likely to have committed the offense than if he had been of good character. The prosecution is not even allowed under our law, to attack his character by evidence of general repute, except in rebuttal of evidence on that point first introduced by him. But when some distinct offense is so connected with the crime charged in the indictment, that proof of the former, in connection with other evidence, would sustain a probable inference of guilt as to the latter, such distinct offense may be proved,—as, for instance, to show a motive on the part of defendant to commit the crime charged, or the intent with which an equivocal act has been done, such as passing a counterfeit bill, or receiving stolen goods. The general rule and its exceptions are very elaborately discussed in the opinion of Justice Werner in the celebrated case of *People* vs. *Molineux,* 158 N. Y., 290, 61 N. E., 286, where many of the principal authorities are cited. The result of the discussion, I think, may be summed up in the proposition that evidence which is relevant to any material fact in issue in a criminal case cannot be excluded because it may prejudice the defendant by proving him guilty of other crimes than that for which he is on trial (*People* vs. *Walters,* 98 Cal., 141, 32 Pac., 864). The rule as thus stated has been applied in a number of cases decided in this court of which the following are examples: *People* vs. *Lane,* 101 Cal., 513, 36 Pac., 116; *People* vs. *Wilson,* 117 Cal., 688, 49 Pac.,

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1054; *People* vs. *Valliere,* 123 Cal., 576, 56 Pac., 433; *People* vs. *Brown,* 130 Cal., 594, 62 Pac., 1072. These were all cases in which the prosecution was allowed to prove distinct offenses for the purpose of showing a motive on the part of the defendant to commit the crime charged in the information. But in order to render evidence of this character admissible it must have a direct tendency in view of the surrounding circumstances, to prove the motive or intent or other material fact, and whether it is relevant or not is a question for the court; and in several instances this court has reversed convictions for the admission of evidence of distinct offenses upon the ground that such evidence had no tendency to prove the charge laid in the information (*People* vs. *Lane,* 100 Cal., 379, 34 Pac., 856; *People* vs. *Wright,* 144 Cal., 165; 77 Pac., 877). In *People* vs. *Lane* it was held that evidence of a distinct substantive offense cannot be received unless there is some clear connection between the two offenses, from which it may be logically inferred that if guilty of one he is also guilty of the other."

It is unnecessary to multiply authorities or to give further quotations in support of a principle so elementary and so well founded. To the general rule that evidence of other transactions whether they amount to indictable crimes or not, is inadmissible, there are, as we have previously stated, certain well defined ex-

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ceptions. These exceptions are where the evidence is admitted:

(1) To show guilty knowledge on the part of the accused. A good illustration of this class of cases is in the trial of an indictment for passing counterfeit money. Evidence of the passage of money within a reasonable time before or after the commission of the offense for which the prisoner is on trial is admitted for the purpose of showing that when he passed the money in question it was not through ignorance of its character.

People vs. *Sharp,* 107 N. Y., 467.

(2) Where such evidence tends to establish the identity of the defendant. The most striking instance of any case included under this class is perhaps *Commonwealth* vs. *Choate,* 105 Mass., 451. In this case certain materials and tools of a similar character were admitted for the sole purpose of showing that the defendant possessed the requisite skill, materials, tools and opportunity to have made the implement causing the fire (arson being the charge). But there was evidence that the defendant had possessed all the tools and implements used and that a piece of the wood used in the second fire was a part of that used in the first.

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(3) Where the several offenses are a part of the *res gestae*. The case of *People* vs. *Walters,* 98 Cal., 138, illustrates the necessity of this exception. In that case two persons were killed at the same time and as a part of the same transaction.

(4) Where the evidence tends to show intent. In this category we naturally find cases in which evidence is introduced tending to rebut a probable or an avowed defense of mistake or accident.

(5) Where such evidence tends to show motive. The cases falling under this class are so varied in character that it would not be profitable to sub-divide them, but all of the authorities hold that such evidence is not admissible to show motive except where there is a doubt as to motive or where it is a hidden or concealed fact as, for example, in cases of homicide arising out of illicit sexual intercourse, or homicide committed in the preparation of, or as a means of committing, concealing or escaping from other crimes. In prosecutions for murder the question of motive is rarely important, for proof of motive is never essential. As was said by Justice Hen-

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shaw in the case of *People* vs. *Durrant,* 116 Cal., 179:

> "Where the perpetration of a crime has been brought home to a defendant, the motive for its commission becomes unimportant. Evidence of motive is sometimes of assistance in removing doubt, and completing proof which might otherwise be unsatisfactory, and that motive may either be shown by positive evidence, or gleaned from the facts and surroundings of the act. The motive then becomes a circumstance, but nothing more than a circumstance, to be considered by the jury, and its absence is equally a circumstance in favor of the accused, to be given such weight as it deems proper. But proof of motive is never indispensable to a conviction (*People* vs. *Bennett,* 49 N. Y., 137; *Pointer* vs. *United States,* 151 U. S., 396; *Johnson* vs. *United States,* 157 U. S., 320; *Clifton* vs. *State,* 73 Ala., 473; *Sumner* vs. *State,* 5 Blackf., 579; 36 Am. Dec., 561). The well-springs of human conduct are infinite, and infinitely obscure. An act may owe its performance to complex and multitudinous promptings. Who
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> . . . " 'knows each chord its various tone,
> Each string its various bias.'
>
> "Or the deed may be due to a single dominant impulse. In this case, what the motive may have been it is not the province of this court to inquire."

In other words the presence or absence of motive only makes the evidence more or less

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persuasive. Motive and intent, far from being one, often have no connection. Intent must exist in every crime, while in no crime is motive necessary.

(6) To show a plan or scheme to commit similar crimes. While evidence is admissible for this purpose, *it is essential that the defendant in fact participated in the other offenses.* But in no case can such evidence be received or considered to establish the charge on trial.

Now let us consider whether the so-called Eastern Conspiracy evidence in this case was admissible for any of the foregoing purposes. In other words, the question to be determined is this: Does this testimony belong to or can it be justified by any one or more of the six exceptions hereinabove noted to the general rule which excludes all evidence of collateral crimes or acts?

(1) Certainly the introduction of this evidence cannot be justified under the first head. The fact that the McNamaras, Ryan, Hockin and others committed crimes in the Eastern part of the United States would obviously have no tendency to show guilty knowledge on the part of the defendant Schmidt, there being absolutely no showing that the defendant ever participated in any of the said Eastern crimes.

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As we have previously pointed out, there is not even a scintilla of evidence in the entire record that tends to show either in the slightest degree, or by the remotest inference, that the defendant on trial had ever taken part in the commission of any of these crimes, or, for that matter, of any other crime. Since the prosecution absolutely failed to connect the defendant with these Eastern crimes or to show that he had any knowledge of them, it naturally follows that proof of these crimes would not in any manner tend to show any guilty knowledge on the part of this defendant.

(2) Of course, the Eastern Conspiracy evidence was not admissible to show identity, as there was absolutely no question as to the identity of the defendant.

(3) Were these Eastern crimes a part of the *res gestae?* Were the acts and declarations of the so-called Eastern Conspirators admissible against the defendant upon that ground? We do not believe that the prosecution will attempt to justify the introduction of this evidence upon that ground.

These crimes and offenses, committed elsewhere and by persons other than the defendant, certainly cannot be said to have been a part of the surrounding circumstances. In

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civil cases the law very rigidly protects a party from the prejudice which he would suffer by the admission of the acts and declarations of other persons in evidence against him. Such acts and declarations to be admissible at all must be practically contemporaneous with the main occurrence. Such declarations are admissible as a general rule when, and only when, the act which they accompany is itself admissible and they reflect light on or qualify that act.

In one case it is stated "where an act done "is evidence *per se,* a declaration accompany- "ing that act may well be evidence, if it re- "flect light upon or qualifies the act. But I "am not aware of any case where the act done "is, in its own nature, irrelevant to the issue, "and where the declaration *per se,* is not ad- "missible, in which it has been held that the "union of the two has rendered them admissi- "ble."

Wright vs. *Tatham,* 7 A. & E., 313.

For example,—On the trial of an action for personal injuries it appeared, that a peddler's wagon had been struck by a locomotive and the peddler had been injured. The question was as to the admissibility of a declaration by the engineer that the train was behind time,

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to show carelessness and negligence. It was held admissible and the Court said:

> "We cannot say that the declaration of the engineer was no part of the *res gestae.* It was made at the time in view of the goods strewn along the road by the breaking up of boxes, and seems to have grown directly out of and immediately after the happening of the fact. The negligence complained of being that of the engineer himself, we cannot say that his declarations, made upon the spot at the time and in view of the effects of his conduct are not evidence against the Company as a part of the very transaction itself."

Hanover Railroad Company vs. *Coyle,* 55 Pa., 402.

But further than this the courts in civil cases absolutely refuse to go, so rigid are they in enforcing the rule that the acts and declarations of one man shall not be evidence against another. How much more rigidly should the rule be enforced in criminal cases where the defendant is on trial for his liberty or his life. As a matter of fact, the rule is the same in criminal as in civil cases. The crimes committed in the East by McManigal, McNamara, Davis and others certainly formed no part of the transaction in which the building of the Los Angeles Times was destroyed and in which the deceased, Charles Hagerty, lost his

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life. In order to constitute part of the *res gestae* the transaction involved must be a part of the very transaction in issue. So long as the two transactions are separate and distinct, the admission of evidence of the one upon the trial of the defendant on a criminal charge growing out of the other cannot be justified. We believe that it does not require any argument to show the absolutely separate and distinct character of the murder of Hagerty from the dynamiting operations of McManigal and Davis. In *People* vs. *Lane* (*supra*) it is very clearly held that evidence of a collateral offense cannot be admitted as part of the *res gestae* unless the act sought to be proven constitutes a part of the acts under investigation. It is scarcely necessary to say that the acts, declarations, crimes and misdeeds of the so-called Eastern conspirators in furtherance of the alleged conspiracy to coerce the members of the Erectors' Association form no part of the acts which resulted in the destruction of the Times Building. Furthermore, as we have previously indicated, the case at bar is even stronger than any of the cases which we have quoted, for the reason that in the Molineux case, in the Glass case, in the Lane case, and in all of the other authorities, judgments were reversed for the erroneous admission of evi-

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dence showing or tending to show the commission of other crimes or wrongful acts by the defendant actually on trial, or which at least tended to prove his participation in such acts, while in the present case there is absolutely no evidence of the participation of this defendant in any other offense whatever. To the claim of the prosecution that the blowing up of the Times Building was but an overt act done in furtherance of one gigantic conspiracy we shall make our answer presently. Meanwhile, however, we submit that the introduction of this evidence cannot by the wildest stretch of the imagination be justified upon the ground that the acts and declarations of persons other than the defendant, many of whom the defendant had never seen or heard of and who never saw or heard of the defendant, and which occurred many years prior to the time of the offense for which the defendant was on trial—constitute a portion of the *res gestae.*

(4) (5) During one of the numerous arguments held in the court below upon the question of the admissibility of the so-called conspiracy evidence it was contended by counsel for the prosecution that the evidence in question was admissible for the purpose of showing motive. How the crimes of other persons could furnish a motive for the murder of Hagerty

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by the defendant on trial was not pointed out by the prosecution, and we apprehend that an explanation of this point would have involved them in considerable difficulty. Even if the prosecution had been able to show some participation by the defendant in these previous crimes, the evidence would nevertheless have been inadmissible, because it is a fundamental rule that before evidence of collateral offenses can be admitted for the purpose of proving motive, it must be shown that one offense constituted the motive for the commission of the other. An example of this would be where a defendant had committed one crime in an attempt to conceal another or to aid him in escaping from the consequences of the former crime. No such situation presents itself in the case at bar. On this question we respectfully call the attention of the Court once more to *People* vs. *Glass,* 158 Cal., 650. On the question of the inadmissibility of the so-called Oakland franchise evidence in that case for the purpose of proving motive, Justice Hall, who delivered the opinion of the District Court of Appeal, this part of which was adopted by the Supreme Court, has the following to say:

> "Over the objections of appellant the Court permitted the prosecution to introduce evidence as to acts and doings of the Home Telephone Company of Oakland, and its

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officers and agents. The effect of this evidence was to show that in 1902, one Mr. Beasly, an attorney of San Jose, acquired a franchise to operate and maintain a telephone system in the City of Oakland, where the Pacific States Telephone and Telegraph Company, of which defendant was vice-president and general manager, had a telephone system, operated in connection with its system throughout the State; that Beasly was induced to procure such franchise by one Halsey, who was a general agent of said Pacific States Telephone Company. This franchise was eventually assigned to the Home Telephone Company of Oakland. All the expenses of this Telephone Company, amounting to from twelve to fifteen thousand dollars, were furnished by Mr. Halsey. The evidence tended to show that the purpose of organizing this company, and procuring such franchise, was to forestall competition and opposition to the Pacific States Telephone and Telegraph Company.

"Also, over the objection of appellant, the Court permitted the prosecution to introduce a large amount of evidence in regard to proceedings had before the City Council of the City of Oakland in the matter of the application of the Home Telephone Company of Alameda County to obtain a franchise for a telephone system in the City of Oakland. This evidence tended to show that the Pacific States Telephone & Telegraph Company through its employees and an attorney employed for that purpose, opposed such application, and that its president, Mr. Sabin, who died before the bribery charged in this case occurred, signed

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a statement which was read before the City Council of Oakland, objecting and protesting against the granting of a franchise to the Home Telephone Company of Alameda County. At the instance of the local attorneys of the two companies a visit was made by certain members of the City Council of Oakland to the City of Los Angeles, to examine the operations and workings of the different systems used in that city, and the expenses of such trip were borne equally by the two companies. It was shown that Mr. Glass met two of the councilmen of the City of Oakland at a lunch, arranged by the attorney of the Pacific States Telephone & Telegraph Company and explained to them the merits of the system of his company (the manual system) over the system of the other company (the automatic system). Much other testimony concerning the Oakland proceedings was given over the objection of appellant. It is not suggested by any one that any of the proceedings in Oakland involved any criminal act by any person. Appellant does contend, however, that it was all irrelevant to the offense charged against defendant, and for which he was on trial, to-wit, the bribery of Lonergan, as a member of the Board of Supervisors of the City and County of San Francisco, and for that reason should not have been permitted.

"It appears to us to be so. As a general rule, evidence of the commission of a different offense cannot be admitted in proof of the offense for which the defendant is on trial, and this rule excludes all evidence of collateral facts or matters which are incapable of offering a reasonable presumption

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or logical inference as to the principal fact or matter in dispute (*People* vs. *Lane,* 101 Cal., 379, 34 Pac., 856; *People* vs. *Hurley,* 126 Cal., 351, 58 Pac., 814; *People* vs. *Sharp,* 107 N. Y., 427, 1 Am. St. Rep., 851, 14 N. E., 319; *People* vs. *Tucker,* 104 Cal., 440; 38 Pac., 195).

"*People* vs. *Sharp,* 107 N. Y., 427, 1 Am. St. Rep., 851, 14 N. E., 319, is a very pertinent case in support of the contention of appellant. In that case the defendant was on trial for giving a bribe to a member of the common council of the City of New York, with intent to influence him as such member regarding an application for a franchise to construct a street railway desired by defendant. The trial Court allowed evidence of an attempt to bribe an attache of the Legislature concerning a bill that would eventually aid him in procuring the franchise concerning which he was charged with bribing the New York councilman, or, as stated in the argument addressed to the Court: 'Jacob Sharp was accused and brought to trial for bribing the aldermen of the City of New York, and by that means procuring the grant of a valuable right. Evidence was offered to show that not long before he had attempted to bribe another official person to do an act which, as he thought, would promote the scheme which he had so long pursued.' The Court held the action of the trial Court to be error.

"The case of *People* vs. *Hurley,* 126 Cal., 351, 58 Pac., 814, is also a bribery case. Defendant was a member of a nominating convention, and was charged with offering to receive a bribe from one Imrie to vote for him for the nomination for school super-

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intendent. The Court allowed evidence that he offered to accept a bribe as a member of the same convention from another candidate for the same office, and for this error alone the judgment was reversed. The Court said: 'The Court erred in receiving the testimony. There was no connection between the interview with Miss Thompson and that with Mr. Imrie. The only effect would be to show that he was likely to ask other candidates for a consideration for his vote or influence, or, as said by the district attorney, "it will tend to show whether or not he approached this other candidate"; but if it had that tendency it was only because he had shown himself capable of perpetrating such offenses. There is no necessary or logical connection between the two cases.'

"So in the case at bar, there is no necessary or logical connection between the fact that defendant, or the company of which he was general manager, attempted to prevent a rival company from obtaining a franchise in Oakland, and that he or his company attempted to forestall competition in Oakland, and the offense charged that he bribed a member of the Board of Supervisors of the City and County of San Francisco to prevent a rival company from getting a franchise in the City and County of San Francisco.

"The attorneys for the prosecution concede that the evidence did not tend to show that the defendant committed any crime in connection with the attempt to forestall and prevent competition in Oakland, but they claim that the evidence was admissible for the purpose of showing defendant's motive.

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To this we cannot agree. By no reasonable hypothesis can it be said that the proceedings in Oakland furnish or prove a motive for the bribery of Lonergan. There was no causal connection between the two proceedings. Undoubtedly the primary motive for the several different proceedings was the same, to-wit, the advancement of the interests of defendant's company by preventing competition. But the connection between such motives is no diffrent from the connection that exists between the motives for several distinct larcenies committed by the same person, the motive in each case being pecuniary gain for the perpetrator of the larcenies. The defendant had the right to be tried upon the issue made by the indictment and his plea of 'Not guilty' and to have all irrelevant and immaterial matters excluded from the jury, as its only effect would be to cloud the issue and injure defendant. The rule that the evidence shall be confined to the point in issue is elementary even in civil cases. In criminal cases, where the liberty of the defendant is involved, and where collateral matters often influence the jury, the necessity for the rule is much stronger. The defendant is expected to come into Court prepared to meet the charge in the indictment, but cannot expect to be prepared with evidence as to any collateral matter. The rule is well established that such evidence is not admissible unless it conduces to the proof of a pertinent hypothesis which, if sustained, would logically influence the issue. To admit evidence of collateral matters that do not tend to prove either the issue, the motive, the guilty knowledge, or the probability of a theory, or the

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identity of the defendant, would be but to oppress the defendant by trying him on a case as to which he has not been notified, and for the trial of which he is not prepared. The indictment charges the defendant with giving a bribe in March, 1906, to a supervisor in the City and County of San Francisco. Any person of ordinary understanding would at once say that defendant had no notice by the indictment as to the many acts and the conduct of the Home Telephone Company of Oakland, in another county, which took place in 1902.

"That evidence as to offenses other than the one for which defendant is being tried, may be given to show a motive for the commission of the crime is not doubted. *But the motive for the commission of the crime charged must grow out of the collateral crime.* Such are *People* vs. *Cook,* 148 Cal., 341, 83 Pac., 43; *People* vs. *Brown,* 130 Cal., 594, 62 Pac., 1072. *It is not sufficient that both crimes spring from the same motive. If so, one charged with a particular larceny might be proved guilty of many other larcenies, for all spring from the same motive —the desire for gain.* So, too, a collateral crime may be proved against a defendant which shows the intent with which he did the act under investigation (*People* vs. *Wilson,* 117 Cal., 688, 49 Pac., 1054; *People* vs. *Valliere,* 123 Cal., 576, 56 Pac., 433), or that directly tends to show that the defendant committed the crime of which he stood charged (*People* vs. *Rogers,* 71 Cal., 565, 12 Pac., 679).

"There is nothing in *People* vs. *Craig,* 111 Cal., 460, 44 Pac., 186, that supports the contention of respondent that this evidence

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was admissible. In the Craig case defendant had testified that the killing of his wife, for which he was being tried, was accidental. To rebut this the people were allowed to prove that immediately after killing his wife he drove to the house of her father and mother, and at once deliberately killed them both. It was held that this, in connection with evidence of previous threats made by him against his wife and her family, tended to show that the killing of his wife was not accidental, but was in pursuance of a previous plan. The facts of the Craig case bear no similarity to the conditions of this case in the matter now under discussion.

"The evidence as to the Oakland proceedings was clearly irrelevant to the charge upon which defendant was being tried, and the rulings permitting its introduction were clearly erroneous."

The reasoning of the opinion of the Appellate Court in *People* vs. *Glass* is decisive upon the question as to whether the Eastern Conspiracy evidence in the case at bar was admissible for the purpose of proving motive. There was certainly no causal connection between any of the crimes of Ortie McManigal or George Davis and the destruction of the Los Angeles Times Building. The latter transaction was separated not only by the space of several years but by three thousand miles of distance. The prosecution might with equal logic have introduced evidence of the crimes of Ali Pasha or

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evidence of the Black Hole of Calcutta, and have asked the jury to infer that the crimes of these oriental despots supply a motive for the destruction of the Times Building. It must be borne in mind that the first evidence as to the defendant, Schmidt, relates to the fact that he was residing in Corte Madera in Marin County in the month of December, 1909. This is the testimony of the witness Mrs. Anna Boehme, who testified that when she first knew him he was living in that locality, apparently an eminently respectable working man. He was not at that time engaged in any conspiracy; he was not committing any crime, unless the prosecution should contend that the fact that he was assisting in the construction of the residence of Mr. Anton Johannsen, a labor leader, constituted a crime. He had not associated at that time with J. B. McNamara; as far as the testimony in the record shows he was never even acquainted with any of the other members or alleged members of the so-called Eastern Conspiracy. He was never even seen with McNamara until the early part of the month of September, 1910. Under what conceivable theory then, can the previous crimes committed by McNamara, much less the operations of George Davis and Ortie McManigal or the plots and counter-plots of J. J. McNamara,

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Ryan, Hockin and others have constituted a motive for the destruction of the Los Angeles Times building? It must further be borne in mind, as we have previously pointed out, that proof of motive in a murder case is usually of little moment. The classic quotation which we previously made from Judge Henshaw's decision in *People* vs. *Durrant* expresses concisely the rule of the law applicable to this question. The evidence was utterly incompetent and irrelevant from this standpoint and must of necessity have been highly prejudicial to the defendant.

(6) Let us turn to the sixth and final exception to the general rude which excludes evidence of collateral crimes or offenses. Was the Eastern Conspiracy evidence admissible upon the theory that it showed a plan or scheme to commit similar crimes? The prosecution contended at the trial of this cause, and the Attorney General will doubtless contend in his brief, that the destruction of the Times Building was merely one of a series of overt acts in furtherance of a vast conspiracy on the part of certain leaders of union labor in the Eastern part of the United States to strike terror to their opponents by the use of the torch and the dynamite bomb. The evidence, however, is entirely insufficient to show that the

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destruction of the Times Building was such an overt act. The theory of the prosecution, as set forth in the opening statement of Mr. Noel, the special prosecutor imported from Indiana to assist in the conduct of the trial, was that Ryan, J. J. McNamara, Hockin and others had unlawfully conspired, confederated and entered into a criminal partnership for the purpose of forcing the National Erectors' Association to abandon their previous policy of operating with the so-called "open shop" and to adopt the "closed shop" system, which signified that only members of the labor organization represented by these men should be employed. It appears from the testimony of Mr. Drew, who was general counsel for the Erectors' Association, that this organization never had any members or representatives in Los Angeles. All of the crimes of violence committed in the Eastern part of the United States were directed against work that was being constructed by the various members of this association. The general plan seemed to be that when a building or bridge was in course of construction one of the paid dynamiters in the employ of J. J. McNamara and the others would set off an explosion, on the theory that these acts of violence would not only terrorize opposition, but by the consequent and resulting

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damage and destruction would make it impossible for the construction companies to perform their work at a profit. During the long series of explosions and other crimes that were committed by the so-called Eastern Conspiracy, not a single life was lost. It appears both from the testimony of Davis and McManigal that these two members, although they were in many particulars scoundrels of the most abandoned nature, were extremely careful not to set off explosions where a loss of life would probably be the result. General Otis, the proprietor of the Los Angeles Times, was not a member of the National Erectors' Association; that association, as hereinbefore noted, had no members in the City of Los Angeles. In other words, the destruction of the Times Building was a separate, distinct and independent crime which had no relation whatever to the so-called Eastern Conspiracy. It must be borne in mind that the defendant in this case was not charged with having entered into an unlawful conspiracy or combination to dynamite buildings or bridges or to commit any other crime. He was charged solely with the crime of murder. To compel him to answer for the crimes of the Eastern Conspirators was not only a manifest injustice, but it was contrary to the most fundamental and elementary rules of criminal law and procedure.

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We do not contend for a moment that in homicide cases it is not permissible in many instances to prove the existence of a conspiracy. But the conspiracy in order to be admissible in evidence must be either (1) A conspiracy to commit the particular crime charged in the indictment, or (2) a conspiracy to commit some unlawful act in the execution of which the crime charged in the indictment was committed. For example, two or more persons conspire to commit the crime of robbery. In the attempted execution of this crime one of the conspirators commits a murder. Under the law, all of the members of the conspiracy are guilty of the murder under the fundamental doctrine that one who enters into a criminal co-partnership becomes responsible for the acts of his co-conspirators committed in furtherance of the conspiracy. The general rule is that when several parties conspire or combine together to commit an unlawful act, and a homicide results, each is criminally responsible for the act of his associates or confederates if committed in furtherance or in prosecution of the common design for which they combined.

People vs. *Lawrence,* 143 Cal., 148;
People vs. *Olsen,* 80 Cal., 122.

And the rule is the same in such case whether or not the person sought to be held was present

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at the time of the homicide and whether he or a co-conspirator did the deed.

> *People* vs. *Brown,* 59 Cal., 345;
> *Ferguson* vs. *The State,* 134 Ala., 63;
> *Kennedy* vs. *People,* 40 Ill., 488;
> *State* vs. *Johnson,* 7 Ore., 210.

These rules are so elementary that discussion of them at any length is unnecessary. The law is the same in California as elsewhere upon the subject.

In *People* vs. *Kaufman,* 152 Cal., 331, the Court says:

> "There is no dispute about the rules of law governing the criminal liability of each of several parties engaged in an unlawful conspiracy or combination. An apt statement of them, abundantly supported by authority, is to be found in 8 Cyc., 641, in the following language: 'The general rule is well settled that where several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine. In contemplation of law the act of one is the act of all. Each is responsible for everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan. Nevertheless the

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act must be the ordinary and probable effect of the wrongful act specifically agreed on, so that the connection between them may be reasonably apparent, and not a fresh and independent product of the mind of one of the confederates outside of, or foreign to, the common design. Even if the common design is unlawful, and one member of the party departs from the original design as agreed upon by all of the members, and does an act which was not only not contemplated by those who entered into the common purpose, but was not in furtherance thereof, and not the natural or legitimate consequence of anything connected therewith, the person guilty of such act, if it was itself unlawful, would alone be responsible therefor.' "

The reports are full of cases of homicide in which evidence of a preliminary conspiracy of which the homicide in question was the outgrowth, was properly admitted. But we know of no case, and, of course, there is no case in any of the reports of any jurisdiction in which it has been held that in a prosecution for murder alleged to have been committed by the defendant on trial it might be shown that a conspiracy was entered into by persons other than the defendant to commit crimes other than the one for which he was on trial and with which there was no logical connection of any kind. To illustrate: Under the well known principles of the law relating to criminal combinations

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and the responsibility of one conspirator for the acts and declarations of a co-conspirator, it is always competent to show that several persons banded together for an unlawful object and that in the execution of their common design and in furtherance thereof a homicide was committed. In such a case, each of the members of the conspiracy is guilty of the crime of murder, provided the homicide was committed in furtherance of the common design. Thus, in the present case, it would undoubtedly have been proper to produce evidence which would have a tendency to show that the defendant Schmidt had entered into a conspiracy with other persons (J. B. McNamara and Caplan, for instance), for the purpose of destroying the Times Building with dynamite, or for the purpose of doing any other unlawful act which resulted in the death of the deceased. We do not wish to be understood for a moment as questioning this elementary principle of law. In fact if this defendant were to be held at all, he could be held only on the theory that he had assisted in planning and devising the destruction of the Times Building, as it was never contended by the prosecution that he did the deed with his own hand. Any evidence, we repeat, that would have a reasonable tendency to show that the defendant and other persons entered into a

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criminal combination for the purpose of doing any unlawful act which resulted in the death of the deceased, would have been competent.

But the only purpose of admitting testimony tending to show conspiracy in a homicide case is to connect the accused with the commission of the offense itself. In other words, such evidence is admissible for the purpose of charging him with an act done by another person, in the same manner as in a civil case evidence of agency is admissible where it is sought to charge one with civil liability for the act of another. To that extent, therefore, evidence tending to show conspiracy is always pertinent to the issue.

But the rule which permits the introduction of such evidence, does not mean that any evidence tending to show a conspiracy is admissible. To justify the introduction of evidence tending to show a conspiracy two things are necessary, (1) *that the conspiracy must have been to do an unlawful act, in the execution of which the substantive crime charged against the defendant was committed;* and, (2) *it must be shown that the defendant on trial was a member of the Conspiracy.*

The first of these propositions is supported by the Kauffman case and the other authorities hereinabove noted, and by a great mass of

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authority in the cases and in the text writers. The second proposition is so plain that it needs no authority to support it. Only those who actually enter into a conspiracy can be held criminally responsible for the acts of the conspirators. In 8 *Cyc.*, p. 677, it is stated: "It is hardly necessary to add that a defendant is not affected by such proof" (that is, proof of a conspiracy) "unless supplemented by proof bringing the matter home to him or to an agent employed by him."

All of the so-called Eastern Conspiracy evidence in this case was utterly inadmissible because neither of the two foregoing requirements was met. It was not shown that the destruction of the Times Building was ever contemplated by the Eastern Conspiracy, or that it followed incidentally in the execution of the common design as one of its probable and natural consequences. There is no evidence in the record from which any such inference could be drawn. Even if it should be conceded for the purpose of argument that the evidence in the record (scanty though it be on that subject) is legally sufficient to show that the destruction of the Times Building was consummated by J. B. McNamara, yet there is nothing to show that he committed the act in furtherance of the so-called Eastern Conspiracy. We have fully set

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forth in the foregoing pages of the brief the substance of all of the evidence relating to the crime with which the defendant was charged and we have also set forth the substance of all of the principal and important evidence relating to the so-called Eastern Conspiracy. It is obvious from the reading of the foregoing evidence that the destruction of the Times Building was an independent act on the part of J. B. McNamara (if it be conceded to have been his deed); in other words, it was another adventure embarked upon in a distant State, in company with new associates and having in contemplation different victims and a crime of an altogether different character from any previously committed.

But in any event, the objection most fatal to this evidence is that it was not shown by a syllable of evidence that the defendant Schmidt ever joined the so-called Eastern Conspiracy, or that he ever had any connection with it. It was not contended, even by the prosecution, that he ever either directly or indirectly participated in any of the crimes or acts of violence testified to by the Eastern dynamiters, or that he ever devised or plotted any of these acts. His name is entirely absent from that portion of the record which deals with the Eastern Conspiracy. Yet in the face of repeated objections

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of his counsel and over numerous motions to strike out, all of this testimony was permitted to enter and remain in the record, and the defendant was forced to stand trial not merely for his own alleged connection with the murder of Hagerty, but for more than seventy explosions caused in the Eastern part of the United States by persons with whom he had absolutely no connection. He was made to bear all of the sins of the criminal directorate of the International Association of Bridge and Structural Iron Workers, an organization to which he never belonged and in whose misdeeds it was not contended, even by the prosecution, that he had ever participated. To point out the highly prejudicial effect of such testimony should not be necessary. But it is the habit of district attorneys and public prosecutors in these days to seek to palliate the grossest errors of trial Courts by the contention that under the provisions of section 4½ of Art. VI of the Constitution, no miscarriage of justice resulted. In anticipation of some such contention, we desire at this time to refer to the recent case of *People* vs. *MacPhee,* 26 Cal. App. 218, a case decided by the District Court of Appeal of the First Appellate District, and in which one of the writers of this brief was counsel. In that case MacPhee and Taylor, two members of the

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police force of San Francisco, were charged by the indictment with having entered into a conspiracy with one Mike Gallo, and a number of other persous alleged to have been bunko men, by which the latter were to be given leeway for the perpetration of various frauds and crimes out of which the police officers involved in the conspiracy were to receive a share of the ill-gotten gains as the reward for their lack of molestation. The further facts are set forth in the opinion of the Court, written by Justice Richards, from which we quote as follows:

> "The appellants further contend that the Court committed numerous errors in the admission of certain testimony going to show that upon specific occasions prior to the time when the defendants are claimed to have entered into this alleged conspiracy, or to have had any knowledge of its existence, between the designated bunko men and their co-defendants, other specific crimes had been committed by one or other of the bunko men with whom these defendants are charged with having afterward conspired with a view to the commission by the former of later and similar offenses; and in this same connection it is further contended by the appellants that the Court erred in its instruction to the jury that 'a person coming into a conspiracy after its formation is deemed in law a party to all acts done or declarations made by any of the other alleged conspirators either before or after-

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ward in furtherance of the common design.' The particular facts to the admission of which in evidence objection was made and respecting which the foregoing instruction was given are these: The evidence offered by the prosecution showed that the defendants were first assigned to the bunko and pickpocket detail by their superior officers in charge of the police department on January 29th, 1912, and there is no evidence of any knowledge of or connection with the alleged conspiracy on their part prior to that date. One of the main witnesses for the prosecution was Mike Gallo, a bunko man, and one of the alleged co-conspirators whose acts of crime and fraud were to be winked at by the police. Gallo was asked by the prosecution to testify to specific acts of swindling and crime committed by him prior to the time of the first connection of the defendants with the alleged conspiracy; as, for instance, to the swindling of one Bonacosi on April 23rd, 1911; of one Pennelli on June 19th, 1911; and of one Nadotti on November 29th, 1911. Several other bunko men were also called to testify to a number of other specific acts of fraud and crime committed by them during the years 1910 and 1911. The prosecution also, by these several witnesses, sought to introduce evidence of conversations had from time to time during a period prior to January, 1912, and dating as far back as the year 1910, between these several witnesses and members of the police force other than the defendants, who were asserted during this period to have been co-conspirators with these witnesses. To the testimony of each of these witnesses and to

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the admission of each detail of the foregoing evidence, the defendants introduced the specific objection that as to them the matters sought to be elicited were incompetent, irrelevant, immaterial, hearsay, and not binding upon these defendants, for the reason that these alleged acts were committed and conversations held without the presence or knowledge of the defendants and before the time of their alleged entrance into the conspiracy in question, and that no foundation had been laid for the admission of such evidence by proof *aliunde* of the existence of the conspiracy at the time the several acts were done and declarations made. The justification of the prosecution for the offer and of the Court for the admission of this line of proof is to be found in that portion of the transcript from which it appears that after the people had presented some evidence tending to show that the connection of the defendants with the conspiracy began in January, 1912, the district attorney stated to the Court that he proposed to go back to 1910, and trace the conspiracy down from that time, showing its then existence and the members who then were enlisted in it; and that he proposed to show that the same body of conspirators were in it before 1912, when the defendants joined themselves to it; that the same class of crimes were being committed and were being protected in the same way by the police officers who were indicted with these defendants, and that they were receiving the same percentages as their profits from the nefarious scheme. The Court in passing upon the admissibility of

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this proposed line of evidence, said: 'It is proper when an individual is shown to have become a member of the conspiracy after the conspiracy was formed, to prove the acts and declarations of the conspirators prior to that time upon the doctrine of adoption; that is to say, when the latter member becomes identified with the conspiracy, by such connection he thereby assumes responsibility for all that has been done up to that time.' Acting upon this ruling, the Court admitted, over the specific and repeated objections of the defendant, all of the foregoing line of testimony, and later in its charge to the jury gave the above quoted instruction.

"It is a well established principle of evidence in cases of conspiracy that after the foundation has first been laid by proof tending to establish the fact of the conspiracy, every act and declaration of each member of the confederacy in pursuance of the original concerted plan and with reference to the common object is, in contemplation of law, the act and declaration of them all, and is therefore original evidence against each of them; and it makes no difference at what time any one of the persons charged entered into the conspiracy, for every one who does enter into such a common purpose and design is deemed in law a party to every act which had before been done by the others, as well as a party to every act which may afterward be done by any of the others in furtherance of such common design. (*1 Greenleaf on Evidence,* 16th ed., p. 305, and cases cited; *2 Wharton on Criminal Law,* 19th ed., sec. 1399; *Id.,* p. 1434, and cases cited.) The

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statement of the foregoing principle of law, however, presupposes that before the acts or declarations of one or more of the co-conspirators done or made at a time prior to the entering into the conspiracy by the particular person charged can be used in evidence against him, the fact of the existence of the conspiracy at the time such acts were done or declarations made must have been shown by some degree of proof sufficient to justify the Court in admitting the evidence of such prior acts or declarations; and that such proof cannot consist merely in the acts and declarations of the alleged co-conspirators, but must be in the nature of an independent showing as to the existence of the conspiracy at the very time when the acts were done or declarations made by which the persons alleged to have subsequently joined the conspiracy are sought to be bound.

"That this is an equally well-settled principle of law relating to the proof essential in conspiracy cases will be found fully supported in *2 Wharton on Criminal Evidence,* 2d ed., p. 1430-2, and cases cited. Let us seek to apply this principle to the case in hand. The defendants McPhee and Taylor, according to the evidence and admissions of the prosecution, first joined the alleged conspiracy in January, 1912. It is claimed by the respondent that this conspiracy had then been in existence for a period of about two years, during which prior period a number of acts of fraud and crime had been perpetrated by the bunko men, and a number of incriminating talks and transactions had been indulged in by the policemen then included in the con-

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spiracy. These acts, talks, transactions among the then alleged co-conspirators are offered and admitted on behalf of the prosecution against these particular defendants upon the theory that, having entered into a going conspiracy, they are bound by what had gone before. It is indispensable, however, that before this evidence could have been rightfully admitted some degree of proof *aliunde* must have been presented tending to prove the existence of the conspiracy among those then associated in it and whose acts and declarations are sought to be so used. The record in this case is voluminous, but a patient and careful examination of it fails to disclose any evidence whatever, either direct or circumstantial, outside of the statements of the co-conspirators themselves, tending in any degree to establish the existence of the conspiracy during the years 1910 and 1911, to which the defendants are alleged to have allied themselves in January, 1912. Not a single victim of any of the acts of fraud and crime to which the bunco men Gallo, Cordino, and others testify in detail as occurring during these former years is produced to support their story; nor is any evidence or record of any kind presented which tends in any degree to establish the commission of the offenses to which these admitted co-conspirators themselves testify with great particularity. In the entire absence of such proof *aliunde* tending to establish the existence of such conspiracy, during these prior years, the action of the Court in admitting in evidence the acts and declarations of the alleged co-conspirators during those years

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against these defendants must be held to be prejudicial error; and it therefore necessarily follows that the giving of the instruction of the Court above quoted, which would be correct in a proper case, but which is predicated upon the admissibility and existence of such evidence in the pending cause, must also be held to be error materially affecting the defendants' case.

"There are certain other assignments of error on the part of the appellants, but as these chiefly refer to the rulings of the Court upon matters involved in the taking of the testimony erroneously admitted as above set forth, they do not require particular consideration.

"The foregoing conclusions require a consideration of section 4½ of article VI of the constitution as to its application to the case at bar. That the errors of the trial Court above set forth were substantial and highly prejudicial to the defendants' case a brief reconsideration of the evidence will serve to demonstrate. The defendants are alleged to have become members of the conspiracy in question in the month of January, 1912. After that time there were four overt acts of the conspiring buncomen, largely if not chiefly supported by their own evidence, and in the knowledge, protection, and profits of which the defendants are claimed to have participated, but which participation each of the defendants under oath circumstantially denies. On the other hand, the reporter's transcript discloses that the Court permitted a number of these same self-confessed buncomen to testify to at least twenty specific cases of swindling and larceny committed during

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the years 1910 and 1911, with much of circumstance and detail, and with numerous conversations with the policemen other than the defendants, who were there alleged co-conspirators during this period, at which interviews percentages of division were agreed upon, and a distribution had of ill-gotten gains. This mass of testimony, occupying several hundred pages of the transcript, was, as we have seen, erroneously admitted in evidence by the Court. That its admission would have a highly prejudicial effect upon the minds and judgment of jurors there can be no doubt; and that its consideration, especially in view of the charge of the Court, would contribute materially to their verdict we think to be a matter beyond dispute. After a most careful consideration of the entire cause, including the evidence, but without the presence of the actual witnesses, before us, we are unable to determine whether the defendants would or would not have been convicted by the jury had this erroneously admitted testimony been withdrawn from their consideration. This being so, we do not feel that section 4½ of article VI of the constitution can be given application to uphold the judgment in the case at bar. (*People* vs. *O'Bryan,* 165 Cal. 55, 130 Pac. 1042; *People* vs. *Fleming,* 166 Cal. 357, 136 Pac. 29; *People* vs. *Wilson,* 23 Cal. App. 513, 138 Pac. 971)."

The foregoing decision is, in our judgment, absolutely decisive of the issue involved on this appeal relating to the introduction of the evidence of the so-called Eastern Conspiracy. In

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the McPhee case the Court held that the evidence of the swindling operations of the buncomen committed at a time prior to the alleged entrance of the defendants into the conspiracy, and with no proof of the conspiracy other than the acts and declarations of the alleged co-conspirators, was highly prejudicial to the rights of the defendants and that the so-called "miscarriage of justice amendment" to the Constitution could not be invoked to avoid a reversal. But if the admission of the evidence referred to in the McPhee case constituted reversible error, how much more in the case at bar should this Court hold that the testimony as to the Eastern Conspiracy, with its endless ramifications and the long series of resultant dynamite outrages, is of such a character as to demand a reversal of the judgment? The evidence against the defendant is by no means conclusive as to his guilt. There is no direct evidence of any character that he participated in the commission of the crime. He might, for all the direct evidence there is to the contrary, have been an innocent employee of McNamara in the procurement of the dynamite. His subsequent flight was a mere circumstance which might be perfectly consistent with innocence.

People vs. *Gee Gong,* 15 Cal. App., 28.

The testimony as to his admissions of guilt given by Meserve might very well have been

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disbelieved by the jury. But the defendant was not permitted to face the jury on the question of his own guilt alone. By permitting the prosecution to introduce this vast mass of utterly irrelevant evidence, the Court conveyed to the jury the irresistible inference that a group of union labor leaders in the eastern part of the United States had engaged in a wholesale dynamiting plot. When the prosecution introduced testimony tending to show some association between Schmidt and J. B. McNamara, one of the dynamiters, at a time when the latter was in San Francisco, the prejudice aroused was such that from that time on a fair trial for the defendant was impossible. The defendant was tried and convicted, not for any offense of his own, but for the crimes and misdeeds of others.

THE CONDUCT OF THE TRIAL.

So numerous and so varied were the other errors committed by the trial Court in the admission and exclusion of testimony, in restricting arbitrarily and unjustly the cross-examination of witnesses for the prosecution, and in commenting upon the weight and sufficiency of the testimony, that an adequate discussion of each of the said errors severally would protract this brief into thousands of pages. We shall notice, therefore, only the most important and the most striking of the errors other than those

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in admitting testimony of the Eastern Conspiracy, which we have discussed under the one head. It is not our purpose to discuss all of the erroneous rulings or to refer even in passing to purely technical errors which probably would not have any influence upon the result. The errors which we are about to note and discuss are each and every one of them, in our opinion, of the most highly prejudicial character, and their accumulated effect could not have been otherwise than to have deprived the defendant of a fair trial. Some of these errors, as we shall point out in due time, are sufficient of themselves and standing alone to make it obligatory upon this Court to reverse the judgment.

(1) The witness MARCUS S. BENTLEY on his direct examination had testified to the finding of the body of the deceased. It will be recalled that the body was recovered some five or six days after the destruction of the building. On re-direct examination the following proceedings occurred:

> "Q. How many bodies did you take from the ruins?
> "A. Well, I suppose I was there and seen taken out sixteen or eighteen bodies altogether.
> "Q. What was the condition of those bodies, in a general way, with the excep-

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tion of Hagerty's body, to which you have already testified?

"A. Well, mostly—

"MR. McKENZIE—We object to that as not being proper redirect examination, and being incompetent, irrelevant and immaterial.

"MR. WOOLWINE—I asked permission to recall the witness and this is original testimony on direct examination.

"THE COURT—It is not offered as redirect; it is offered as direct testimony now, a matter I suppose Mr. Woolwine overlooked. Overruled.

"(Question read.)

"A. They were mostly burned in pieces."

(Page 2512, line 25; page 2513, line 13, Rep's. Trans.)

It was manifest error for the Court to permit this testimony to be given. Of course, we do not question the right of the prosecution in proving the *corpus delicti* and establishing the fact of the death of the deceased to prove incidentally that other persons lost their lives in the same catastrophe. Where several persons met their death from the same cause, the defendant cannot complain that the evidence reveals that fact. But evidence as to the condition of the other bodies taken from the Times building was not essential or relevant to the proof of the *corpus delicti*. There was no dispute as to the death of Hagerty. His body was

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easily recognized and there was no question as to its identification. The fact that the other bodies taken from the building were burned in pieces was merely a harrowing detail which was utterly irrelevant for the purpose of establishing the death of the deceased, and the only possible effect of the introduction of such testimony would be to arouse the prejudice of the jury against the defendant. Neither can the ruling of the Court upon the objection to this testimony be justified upon the ground that the evidence in question is part of the *res gestae.*

In *People* vs. *Lane,* 100 Cal., 379, it was held that upon the trial of a charge of murder against a constable who had entered a house of ill-fame with a posse for the purpose of arresting the deceased and a third person for residing therein, and who, while in the house, in a scuffle with the deceased, fired the shots which caused his death, evidence as to a subsequent shooting by the constable out of the house, at the third person after the deceased had fallen in the house, and after such third person had examined him and found the wound and had started out of the house to find a physician, is not admissible as part of the *res gestae.* We are unable to perceive how testimony as to the condition of the bodies of the other victims of the disaster, which, as the evidence shows, had been almost entirely consumed by fire and followed the explosion could possibly be relevant to the

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question of the defendant's guilt of the murder of Hagerty. Such evidence, however, when improperly admitted, could not fail to be highly prejudicial to the rights of the defendant on trial.

(2) The Court erroneously and without the laying of any proper foundation whatever permitted the same witness to give testimony tending to negative the theory that dynamite or some other high explosive might have been stored in the building. It appears from the testimony of this witness on his direct examination that at the time of the catastrophe he was mechanical superintendent of the Times and had occupied that position for approximately eighteen years. The prosecution, in an endeavor to disprove by this witness the storage of any high explosive in the Times building at the time of the disaster, asked repeated questions in various forms, and, over the reiterated objection of the defendant, the trial Court allowed the testimony to be given. The proceedings that occurred in that behalf are as follows:

> "Q. Mr. Bentley, were there any high explosives of any nature, dynamite, or anything of that nature, in the Times building on the night of September 30th and October 1, 1910—that is, used by the Times building?
>
> "MR. COGHLAN—We object upon the ground—
>
> "MR. WOOLWINE—I withdraw that

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question. I will ask you if there were any high explosives in the building, any dynamite or anything of that nature in the Times building so far as you know, immediately preceding the catastrophe that happened there?

"MR. COGHLAN—That is objected to upon the ground that it is leading; that it is not relevant, competent or material; it is not redirect examination; that it has no proper foundation laid in the evidence.

"MR. WOOLWINE—I haven't asked just exactly what I want to ask yet. I withdraw that question.

"MR. WOOLWINE—Were there within the Times building any high explosives or any dynamite—

"MR. COGHLAN—Same objection.

"MR. WOOLWINE—Wait a moment.

"MR. COGHLAN—Pardon me.

"MR. WOOLWINE—Up to the time you left the Times building on the evening of September 30, 1910, so far as you know?

"MR. COGHLAN—We offer the same objection, if the Court please, to this question as we offered to the last one.

"THE COURT—Overruled.

"MR. WOOLWINE—I withdraw that question.

"THE COURT—Overruled. Answer the question.

"MR. WOOLWINE—I withdraw the question.

"A. To my knowledge there was nothing of that nature kept around the building at all for any purpose.

"Q. At any time?

"A. At any time, that is in our business.

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We have nothing like that at all kept in the building, for no purpose whatever.

"MR. COGHLAN—We move now the answer be stricken out as not responsive and upon all the grounds heretofore interposed by way of objection to the question.

"THE COURT—The first part of the answer is responsive. He was asked whether there were any there, so far as he knew; he said there was not. The rest may be stricken out.

"MR. WOOLWINE—I will ask you if you ever knew of any high explosive or dynamite having been brought in or placed within the Times building?

"A. No, sir, not to my knowledge.

"Q. So far as you know anything about it?

"MR. COGHLAN—Just a minute. We ask to be allowed to object to that.

"MR. WOOLWINE—That is previous—

"MR. COGHLAN—You haven't finished your question.

"MR. WOOLWINE—No.

"MR. COGHLAN—I move his answer be stricken out until you complete the question.

"THE COURT—Stricken out.

"MR. WOOLWINE—I ask if you know of any high explosive, or dynamite, having been placed or brought within the Times building previous to September 30, 1910, and up to the time of the destruction of the building or immediately preceding that time

"MR. COGHLAN—Just one minute. We object to that on the ground it is lead-

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ing, suggestive of an answer, not relevant, competent or material; on the ground that no proper foundation has been laid for the asking of it, and it is not redirect examination.

"THE COURT—The objection goes to the weight of it and not to its admissibility. Overruled.

"MR. WOOLWINE—Answer.

"A. No, sir.

"MR. WOOLWINE—That is all."

(Testimony of witness Bentley, p. 2516, line 22, to 2519, line 23.)

This Court will observe that even when the District Attorney practically conceded that an objection to one of these questions was well taken, the Court repeated its previous ruling and directed that the question be answered. No foundation had been laid for the question. It was not shown that the witness had any knowledge of the matters as to which he was called upon to testify, and the testimony adduced by these questions was obviously, in a very large degree, hearsay. Of course, the witness was limited to testifying to those facts which he knew of his own knewledge.

Code of Civil Procedure, Section 1845.
Sneed vs. *Marysville etc. Electric Co.*, 149 Cal. 704.

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(3) On the re-cross-examination of the witness Bentley the following proceedings occurred:

"MR. McKENZIE—Mr. Bentley, you testified here yesterday, didn't you?

"A. Yes, sir.

"Q. And you were excused at that time?

"THE COURT—The record shows that.

"MR. McKENZIE—Yes. You finished your testimony at that time, didn't you?

"A. At that time, yes.

"MR. WOOLWINE—I object to that.

"MR. McKENZIE—How did you happen to come here this morning? Were you told to come by anyone?

"A. Yes, sir.

"Q. By whom?

"A. By the District Attorney's office.

"Q. The District Attorney's office. At what time did they tell you to come back?

"THE COURT—Oh, that is not material now.

"MR. McKENZIE—What time were you at the District Attorney's office?

"MR. WOOLWINE—Objected to on the ground it is not cross-examination.

"THE COURT—Sustained.

"MR. McKENZIE—Is the objection sustained?

"THE COURT—Yes.

"MR. McKENZIE—Did you go up to the District Attorney's office after you testified here yesterday?

"A. No, sir.

"Q. Were you up there last night?

"A. No, sir.

"Q. Were you telephoned to last night?

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"THE COURT—Well, now, that line of questions is not competent here.

"MR. McKENZIE—Did you testify before the grand jury in this matter?

"A. Yes, sir.

"Q. Did you read that testimony over previous to testifying here yesterday?

"A. I think so.

"Q. Do you remember whether you did or not?

"A. Yes, sir.

"Q. When did you read it over?

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

"THE COURT—Sustained.

"MR. WOOLWINE—Not proper cross-examination.

"MR. McKENZIE—Are you basing your present testimony on what you read or upon your recollection of five years ago?

"A. Why, it is right in front of me; I would not have to read it.

"Q. Sir?

"A. I say it is right in front of me. I can remember all that stuff.

"Q. And so you did not have to read it?

"A. I did not, no.

"Q. Why did you read it?

"MR. KEYES—That is objected to upon the same ground, immaterial and irrelevant.

"THE COURT—Sustained.

"MR. COGHLAN—To test the memory of the witness.

"THE COURT—That would not tend to test the memory of the witness.

"MR. COGHLAN—Whether it has been consciously or unconsciously suggested to him.

"THE COURT—Sustained."

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The foregoing is only one of many examples of the manner in which the trial Judge repeatedly impeded the cross-examination of witnesses for the prosecution. In the first place it was certainly competent for counsel for the defendant to show if they could by cross-examination of the witness that he had been interviewed by the District Attorney, by telephone or otherwise. This line of questioning was competent for the purpose of showing the relationship of the witness to the adverse party and any possible interest that he might have had. In other words, it went to the question of the interest of the witness, and the defendant had a right to have the question answered. Wharton states the rule as follows:

> "A witness may also be compelled to answer questions concerning his relationship to the prosecution or the defense, his interest in the suit, his capacity of discernment and expression, his motives and prejudices, so far as concerns the parties in the litigation or the question involved. (Citing *Chicago City Railway Co.* vs. *Smith*, 226 Ill. 178, 80 N. E. 716; *State* vs. *Glynn*, 51 Vt. 577; *People* vs. *Noelke*, 1 N. Y. Crim. Rep. 252; *Patman* vs. *State*, 61 Ga. 379; *Sylvester* vs. *State*, 71 Ala. 17; *Miller* vs. *Territory*, 149 Fed. 330; *State* vs. *Miles*, 199 Mo. 530, 98 S. W. 25; *Heninburg* vs. *State*, 151 Ala. 26, 43 So. 959; *State* vs. *Baird*, 79 Vt. 257, 65 Atlantic 101.")
>
> *Criminal Evidence*, Sec. 477.

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As to the other matter, namely, the questions directed to the reading by the witness of his testimony given before the grand jury, it seems to us that these questions were so obviously proper that it is inconceivable why the Court should have sustained objections to them. The witness had given highly important testimony. He had testified previously before the grand jury. He admitted reading over his testimony. He was asked whether he based his testimony upon the actual memory of the occurrences that he was describing or upon his recollection of his grand jury testimony which he had read over. Human memory is remarkable for its treachery. The most conscientious and scrupulous of witnesses frequently give testimony which is at utter variance with the facts by reason of their failure to accurately remember the occurrences concerning which they are testifying. In his famous charge to the jury in the Tichborne case, Lord Chief Justice Cockburn said: "There are things which pass every day, which make no impression on the mind of one man, but which do make an impression on the mind of another. Men dine at the same mess or table. Something occurs in the course of the conversation; one man remembers it, the other does not think of it any more, and the next morning it is forgotten. One man recollects some event in his past life, more or less important, or more or less trivial, which some one

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else present at the same time, if you were to ask him about it, would have no knowledge or recollection of it at all. Of all the unfathomable mysteries which the human mind presents, there is none in my view so astonishing as the faculty of memory, especially in the matter to which I am now adverting; that is, how something comparatively trivial remains indelibly impressed on the recollection, while others far more important fade into the darkness of eternal night and are totally and entirely forgotten."

The credibility of a witness who is testifying as to events or conversations must depend very largely upon the accuracy of his memory. To ascertain the state of the memory of the witness for the purpose of determining whether he was testifying from his own recollection of the event itself, or from a purported transcript of his grand jury testimony which he had admitted reading before coming to the trial, was undoubtedly permissible. In fact, it was the duty of counsel for the defendant to pursue the inquiry. The witness in an effort to convey the impression that his memory was entirely accurate stated that it was not necessary for him to read over his testimony, as the events concerning which he was testifying were "right in front of me." He was then asked why he read over the testimony, and the Court sustained the District Attorney's objection to the question.

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If the witness was not compelled to read over his testimony given before the grand jury to refresh his memory as to the occurrences concerning which he was testifying, it is highly probable that he read over the transcript of the evidence in order to avoid the possibility of making contradictory statements when on the stand, or statements that would be at variance with his grand jury testimony, thus giving defendant's counsel an opportunity to impeach him and attack his credibility. In either event, in view of the previous answer, the Court should have overruled the objection and permitted the question to be answered. If the witness was testifying in good faith, his answer to the question as to his reason for reading over his testimony could have done no harm either to the witness or to the people; if he was not, the defendant had an absolute right to show it. Why not have given the defendant the benefit of the fullest inquiry along this line?

(4) The prosecution placed on the stand several alleged powder experts, who testified that in their opinion the explosion was produced by dynamite or nitro-glycerin. One of these witnesses was Frank A. Garbutt. In order to demonstrate the error committed by the Court in allowing him to state his opinion as to the cause of the explosion it will be neces-

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sary to set forth the following excerpts from his testimony:

"MR. WOOLWINE—Where do you reside, Mr. Garbutt?

"A. 321 South Alvarado street, city of Los Angeles.

"Q. How long have you resided in the city of Los Angeles?

"A. Thirty-two years.

"Q. What is your business or occupation?

"A. I don't know. I am engaged in a good many different lines of business.

"Q. Well, have you ever had any experience in handling dynamite, nitrogelatin, nitroglycerin and other high explosives?

"A. Yes, sir.

"Q. And what has been the extent of that experience, please?

"A. In time? My experience extended over a period of about thirty-five years—36 years.

"Q. Well, could you state more in detail as to what your experience has been, what you did?

"A. Well, I have been engaged in mining business a great part of the time; I worked underground three years; I have had occasion in my business to build roads and use explosives in building roads, and also in the oil well business in drilling of oil wells, we use dynamite and nitroglycerin in that business—dynamite principally.

"Q. Do you mean that you have used these explosives continuously for thirty-five years?

"A. No, it has been off and on during that time.

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"Q. How long in addition to the three years, that you have mentioned, were you continuously engaged in that?

"A. Well, there has hardly been a year or two gone by but what I haven't had something to do with explosives.

"Q. Now, what were these explosives that you used?

"A. The first that I used was black powder; the next was nitroglycerin, and after that what is known as dynamite or giant powder, when that came in. That wasn't in general use when I started to use explosives.

"Q. Have you ever used any nitrogelatin?

"A. No, I never have.

"Q. Were you in the City of Los Angeles on the 1st day of October in the early morning hours, I will say, of the 1st day of October, 1910?

"A. Yes, sir.

"Q. And where were you about 1 o'clock in the morning of that day?

"A. I was just going to bed at my residence.

"Q. And what did you hear that night with reference—

"MR. HARRIMAN—We object to that unless it is that, in calling this witness, you are calling him merely for his experience. As an expert, I don't think—

"THE COURT—Overruled.

"MR. WOOLWINE—I will ask you first, where is your residence?

"A. 321 South Alvarado; the corner of Alvarado and Ocean View Avenue.

"Q. How far is that, approximately, from the Times building at the corner of

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First and Broadway in the City of Los Angeles?

"A. I should say, approximately, about two miles.

"Q. Now, at the time indicated, at or about 1 o'clock on the morning of October 1st, 1910, tell what you heard with reference—

"MR. HARRIMAN—If the Court please, we object upon the ground that there is no foundation laid, unless it is merely connecting a statement of fact, as a matter of fact, not as an expert.

"THE COURT—Overruled.

"A. I had just gotten into bed when I heard an explosion.

"MR. WOOLWINE—Now, from the experience that you have had, are you familiar with the sound caused by dynamite and nitroglycerin when exploded?

"A. Yes, sir.

"Q. And also nitrogelatin?

"A. It would make practically the same sound.

"Q. And from such experience have you an opinion as to what caused the explosion that you heard on the morning indicated?

"MR. COGHLAN—Of course, we object upon the ground it has no proper foundation; it is not competent, relevant or material. It comes from a long train of suggestive questions in which the answer was practically put in the mouth of the witness.

"THE COURT—Overruled.

"A. Yes, sir.

"MR. WOOLWINE—And what is your opinion as to what caused the sound?

"A. My opinion at the time was that it was a dynamite explosion.

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"Q. And what is your opinion now?

"MR. McKENZIE—That is objected to as being incompetent, irrelevant and immaterial; no proper foundation.

"THE COURT—Overruled.

"A. I have the same opinion.

"MR. WOOLWINE—Did you form any conclusion, or have you any opinion as to what the strength of that charge was that caused the explosion

"MR. McKENZIE—The same objection.

"THE COURT—What was the objection?

"MR. McKENZIE—Has no foundation; it is not competent, relevant or material.

"THE COURT—Possibly not sufficient foundation laid. It is relevant and material.

"MR. McKENZIE—It cannot be competent until it has the proper foundation.

"MR. WOOLWINE—I will ask you, in the experience that you have related here with explosives of the various characters indicated by you, or will you state in some detail as to the strength or sizes of the shots that you have witnessed or heard?

"A. Well, the size of the shots that I have used or heard varied from a pinch of dynamite, which would be a part of a stick about as large as your thumb, up to possibly one hundred pounds—one hundred and fifty pounds would probably be the maximum.

"Q. Now, from your experience are you able to judge from the sound of the explosive as to the strength of the same?

"A. Within broad limits.

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"MR. McKENZIE—Just a moment.

"A. I beg your pardon.

"MR. McKENZIE—We object to that as calling for an opinion or conclusion of this witness; as being incompetent, irrelevant and immaterial, and having no proper foundation.

"THE COURT—He is trying to lay the foundation now.

"MR. McKENZIE—No, he is asking him for his opinion as to whether he could judge or not without laying the foundation. May I ask a preliminary question, your Honor?

"MR. KEYES—Well, we are asking preliminary questions ourselves.

"THE COURT—You can cross-examine afterwards.

"MR. McKENZIE—This is merely as to the foundation, your Honor.

"THE COURT—No.

"MR. COGHLAN—Are you seeking to qualify this gentleman as an expert?

"MR. WOOLWINE—That is what I am going to do.

"MR. COGHLAN—We submit the question would tend to elicit evidence from the lips of an expert before the expert is qualified.

"MR. WOOLWINE—The last question was for the very purpose of qualifying him, laying the foundation.

"THE COURT—Overruled.

"A. Within broad limits.

(Ps. 2820-2825, Rep's. Trans.)

"MR. WOOLWINE—I will ask you this, Mr. Garbutt: From your experience are

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you able to state whether or not it is possible to ascertain the intensity or strength of a charge of an explosive, about which you have testified, simply from the sound of the explosion?

"MR. McKENZIE—We will object to that on the same ground; incompetent, irrelevant and immaterial; no foundation.

"THE COURT—Overruled.

"A. Only within very broad limits; very broad, indeed.

"MR. WOOLWINE—What percentage have you handled?

"A. From nitroglycerin, which is pure, down to a 25% dynamite.

"Q. Now, were you able from your experience in that regard to—or, are you able to form an opinion as to the strength or intensity of the charge you heard on this occasion, to which you have testified?

"A. Yes.

"MR. McKENZIE—The same objection—I move to strike the answer out, your Honor, until we can get our objection in.

"THE COURT—Overruled.

"MR. McKENZIE—Your Honor, I desire that the record show an objection, and the witness already answered yes. We ask that the answer go out so that we may make the objection.

"THE COURT—The objection is entered, and overruled.

"A. Yes.

"MR. WOOLWINE—And what was that opinion?

"MR. McKENZIE—The same objection.

"THE COURT—Overruled.

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"MR. WOOLWINE—And what is that opinion?

"A. The opinion at the time I heard the explosion, from its intensity, was that it was nitroglycerin. It was quick, sharp and vicious, and sounded to me like nitroglycerin, or a very high-power dynamite.

(Rep's. Trans., p. 2829, line 15, to and including page 2830, line 16.)

"MR. WOOLWINE—Could this beam have been shattered in the manner it has—or, rather, in the way in which you observed it, by a lower explosive?

"MR. McKENZIE—The same objection.

"MR. WOOLWINE—What is your opinion on that?

"MR. McKENZIE—The same objection.

"THE COURT—Overruled.

"A. Absolutely impossible to break that beam with a low explosive.

(Rep's. Trans., p. 2844, line 24, to 2845, line 6.)

"MR. HARRIMAN—Well, the point is not whether you can tell it by sound, whether or not you know whether nitrogelatin is not a higher explosive than nitroglycerin; that is what I want to know.

"A. I don't think that 80% nitrogelatin would be as high an explosive as nitroglycerin; that is my opinion. I don't know it.

"Q. As true nitroglycerin?

"A. Yes.

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"Q. Did this sound to you like pure nitroglycerin?

"A. I thought it was nitroglycerin. That was the opinion I formed from the explosion.

"Q. From the explosion?

"A. Yes.

"Q. Then the sound of 80% nitrogelatin would not correspond to your experience with nitroglycerin?

"A. Well, I didn't know at that time that as high an explosive as 80 or 90% of dynamite or nitrogelatin was made.

"Q. What is that?

"A. I didn't know that that high an explosive of nitrogelatin or dynamite was made; I had never come in contact with it, and, therefore, I likened this sound to the highest explosive with which I was familiar. It sounded more vicious than a 60% or 50% dynamite, to me.

"Q. And you are only familiar with 50% or 60%?

"A. Sixty is the highest per cent I have ever used.

"Q. Ever heard of?

"A. I have ever used, yes.

"Q. When did you first form your opinion it was dynamite?

"A. I first formed that opinion when I brought in the nitrogelatin from Mr. Zeehandelaar's house, when I saw that.

"MR. McKENZIE—Well, now, we will ask that go out as being incompetent, irrelevant and immaterial.

"THE COURT—That is an answer to the question.

"MR. COGHLAN—That is not an an-

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swer to the question; we asked for a time and he gives us an instance.

"MR. McKENZIE—He gives us an incident of stuff that is immaterial and immaterial to your Honor's knowledge and incompetent and irrelevant.

"MR. COGHLAN—I move that the answer be stricken out on the ground it was not responsive, it is not relevant, competent or material.

"THE COURT—Motion denied.

"MR. COGHLAN—We move also that the jury be instructed to disregard it upon the same grounds.

"THE WITNESS—I didn't feel confirmed in that opinion then.

"MR. HARRIMAN—That is when you first formed the opinion?

"A. First commenced to think that it might be.

"Q. It might be dynamite?

"A. Yes.

"Q. Then you did not base it on sound?

"A. I thought it was nitroglycerin from the sound."

(Rep's. Trans., p. 2861, line 1, down to 2862, line 20.)

While there are numerous erroneous rulings in the foregoing excerpts from the testimony of this witness, they can all be discussed under one head, namely, whether there was a sufficient foundation laid to justify the trial Court in allowing the witness to state his opinion as to the cause of the explosion. That the testi-

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mony of the witness was utterly ridiculous and his opinion was utterly worthless is apparent from the most casual reading of his testimony. He first testified that he formed his opinion that the explosion was caused by dynamite or nitroglycerin from the sound of the explosion, although at the time that the explosion occurred he was in his bedroom in a house approximately two miles away. Then, toward the end of his testimony, he stated that he first formed the opinion that the explosion was produced by dynamite when the Zeehandelaar package was discovered. Furthermore, he was only able, as he testified, to tell the source of the explosion from the sound of it "within very broad limits." To permit so-called experts of this character to state their opinions in capital cases is a travesty on justice. It was the theory of the prosecution that the Times building was destroyed by a dynamite explosion. That was part of the *corpus delicti* which it was incumbent upon the prosecution to prove beyond a reasonable doubt. Until the *corpus delicti* was established, no other testimony would be competent, and without its proof, the defendant could not be convicted. To permit part of the *corpus delicti* to be established by the opinion of a witness two miles away at the time of the explosion whose own testimony shows that he could tell the source or cause of the explosion from the sound only "within very broad lim-

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its," and who then testified that after seeing the Zeehandelaar package he changed the opinion which he had formed from the sound, was to violate the fundamental rule that no man can be convicted by reason of the opinion or conclusion of another. Of course the opinions of qualified experts may be received in proper cases, although all the text writers on evidence lay down the rule that such testimony should be received with caution. But in this instance, the opinion of the witness was entitled to absolutely no weight. The trial Judge might just as well have permitted any other person in the City of Los Angeles to testify that he believed that the Times building was destroyed by dynamite, as to have permitted this witness, after he had so thoroughly disqualified himself, to state his opinion. It is undoubtedly true that even a non-expert witness may be permitted to testify as to the character of a sound which he has heard. For example, in *People* vs. *Chin Hane*, 108 Cal., 597, the prosecution claimed that the shots which killed the deceased were fired from inside a house. The defense insisted that they were fired in the open air. A witness who was near the scene of the affray and heard the shots was allowed to testify over objection that the shots sounded as though fired inside the building. He further testified that it sounded like it was a drum or something deep. It did not sound like it was in the air. The Court held

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that this evidence was simply a statement as to the nature of the impressions of sound left upon the ear, and was therefore admissible. In *People* vs. *Clark*, 130 Cal., at page 646, the Supreme Court held that a witness was justified in testifying that certain shots sounded like those fired from a shotgun. The Court, however, proceeds to say: "Even if it be conceded that this evidence should only come from the mouth of an expert, still there was no objection to the question upon that ground, and the witness also stated that he was able to distinguish by the sound the difference between shots fired from a shotgun and those fired from a rifle." In the present case, counsel for the defendant made the proper objection that no foundation had been laid, and the witness did not make any pretense of being able to determine the source of the explosion from the sound except within "very broad limits." It was a manifest abuse of discretion and an invasion of the rights of defendant, therefore, for the Court to permit him, not only to state his opinion as to the nature of the explosion, but to answer questions calling for his opinion as to the size and intensity of the charge.

(5) The witness Mulholland, another purported powder expert, was called by the prosecution to prove that the explosion at the Times building was caused by dynamite. On cross-

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examination the following question was asked and the following answer given:

> "Q. But the heat generated by the reaction is the cause of the expansion of the gas, is it not?
>
> "A. I wouldn't say that. Oh, I doubt it, if the action is thoroughly understood, *even by experts, which I am not.* I think the heat generated is due to combustion, and the force generated is due to violent expansion. I will modify my statement in saying I think that; I am not going to say that I know that. *I am not an expert in the physiological or the physical, I should say, the physical action of powder.* I know the physical result of it, the explosion, but the details of what happens, I doubt if anyone knows, *but if they do, at least, I am willing to admit I don't.*"

(Rep's. Trans., p. 3087, line 8 to 18.)

Counsel for the defendant moved to strike out the testimony of the witness on the ground that the foundation as to his qualifications had not been laid. This motion was denied by the Court. It would seem that no argument should be necessary to establish that a witness who frankly admitted that he was not an expert, should not have been permitted to give expert testimony and to express an opinion as to the cause of the explosion.

(6) HEARSAY EVIDENCE ADMITTED. The witness A. W. Rinehart was permitted over

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the objection of counsel for the defendant to give hearsay testimony as to telegrams sent through the Postal Telegraph & Cable Company. The witness was permitted to testify over the objection of the defendant as to the general customs of the telegraph company in the receipt and transmission of messages. As a number of telegrams alleged to have been sent by various members of the alleged Eastern Conspirators to their co-conspirators were admitted in evidence, we think it well to set forth the testimony of this witness verbatim:

"MR. NOEL—Where do you live, Mr. Rinehart?

"A. Pittsburgh, Pennsylvania.

"Q. What is your business in Pittsburgh?

"A. Manager of the Postal Telegraph & Cable Company of that City.

"Q. The Postal Telegraph & Cable Company is a company engaged in the transmission of telegraphic messages all over the United States, and all over the world?

"A. Yes, sir.

"Q. And were you manager of that company in the year 1909?

"A. Yes, sir.

"Q. I will ask you to state who had custody of the messages received for sending and of the copies of messages received from foreign points, and the records of the transmission of messages in that office during the years 1909 and 1910?

"A. I am custodian of all the files.

"Q. And were you at that time?

"A. And was at that time.

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"Q. I now call your attention to what purports to be a telegram dated March 31, 1909, and which bears a number 192, and ask you if you have seen that before (paper shown to counsel for the defendant.)

"MR. COGHLAN—What is the date of that again?

"MR. NOEL—March 31, 1909.

"A. Yes, I have seen that telegram before.

"Q. Where and when?

"A. This telegram was produced in the Pittsburgh files on March 31, 1909, in reply to a subpoena from the United States District Attorney at Indianapolis.

"MR. McKENZIE—We move that be stricken out.

"MR. NOEL—You needn't make any reference to former subpoenaes, unless these gentlemen ask for it.

"THE COURT—Just give the time.

"MR. NOEL—I will ask you if you recognize that as the telegram you produced from the files of the Postal Telegraph Company for that month?

"MR. McKENZIE—We object to that as incompetent, irrelevant and immaterial, calling for hearsay testimony.

"MR. KEYES—That is the same objection.

"MR. NOEL—My questions may be a little objectionable, because I am trying to exclude any reference to the subpoena you don't want any reference to.

"MR. COGHLAN—You can get in your evidence without any reference to that.

"MR. NOEL—We will try to accommodate you, but if we cannot—

"MR. COGHLAN—Whether you can or

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not, it is not your duty to insert anything in the record that don't belong there.

"MR. NOEL—We are not attempting to insert anything in the record that does not belong there.

"MR. COGHLAN—We will see you don't.

"THE COURT—Now, what is all this discussion about?

"MR. HARRIMAN—The fact he is trying to get in some stuff that is immaterial and don't belong here, and he knows it.

"THE COURT—Well, the proper way is to make objections to the Court.

"MR. HARRIMAN—We have made it and they are objecting to our objections.

"MR. KEYES—We are not objecting to your objection.

"MR. COGHLAN—Counsel is trying to do something the law does not permit.

"THE COURT—There hasn't been any chance for the Court to rule on account of the numerous objections and conversations of counsel. If counsel desire to take this matter out of the hands of the court, that would be satisfactory to the court. If you think you could settle this yourselves without the services of a referee, all right, but if I am supposed to pass on these I don't want everybody talking at once. Now, what is the question? (Question read.)

"THE COURT—Objection overruled.

"A. Yes, sir.

"MR. NOEL—And you may state, Mr. Rinehart, at that time and since, unless change has been made, what was done in the ordinary course of business with the telegram received for sending?

"MR. COGHLAN—We object to that as

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not relevant, competent or material, and we call it to your Honor's attention to the fact that neither the custom or ordinary custom or business, can be used as proof in a criminal case.

"THE COURT—Objection overruled.

"A. After the telegram was written by the sender, it is handed to the counter-clerk. or operator, authorized to take the said telegram, and is entered on the received record in consecutive order. It is then handed to the operator for transmission, after having had the check put on the telegram and the filing time.

"Q. And then what is done with the telegram itself after it is sent?

"A. After the telegram is sent it is sent —booked up and sent to the main office for filing.

"Q. And when it gets there what is done with it?

"A. It is filed in the day's business and put away in its proper receptacle.

"Q. State whether you found this for the day's business for March 31, 1909?

"A. Yes, sir.

"MR. NOEL—I will ask the clerk to place a mark on this exhibit for identification.

"THE COURT—You offer it for identification, Exhibit No. 13?

"MR. NOEL—For identification only.

"Q. I now call your attention, Mr. Rinehart, to an exhibit consisting of two parts, and which bears the number "349" and ask you to state whether you have ever seen this exhibit before? (Shown to defendant's counsel.) Please state whether you have ever seen those papers before.

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"A. Yes, sir.

"Q. And state where, Mr. Rinehart, and what you did with them?

"A. They were produced—

"THE COURT—What you did with them in regard to the handling of the documents of the company, of which you were the manager.

"A. They were taken from my files of July 1st, 1910.

"MR. NOEL—And without stating the contents of it, state what the first sheet is.

"A. The first sheet is the impression, water copy, of a telegram received in the Pittsburgh office.

"MR. COGHLAN—We move that be stricken out, if the court please, as not relevant, competent or material, and upon the ground it is hearsay and no proper foundation has been laid for it.

"THE COURT—The witness has not been asked if he knows what it is.

"MR. COGHLAN—And upon the further ground that it expresses an opinion of the witness.

"MR. NOEL—I thought I included in my first question what it is, if he knows. You may state whether you know what that is, Mr. Witness.

"MR. COGHLAN—Of your own knowledge.

"MR. NOEL—The first sheet and second sheet?

"A. The first sheet is the impression.

"Q. Well, do you know?

"A. Yes.

"Q. Please state what the first sheet is and then state what the second sheet is.

"MR. COGHLAN—Same objection.

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"THE COURT—Overruled.

"A. The first sheet is the impression copy of a telegram taken from our files of July 1st, 1910.

"MR. NOEL—And what is the second sheet?

"A. The second sheet is the delivery sheet of the telegram.

"Q. Now what is the number of the telegram, of which this water impression is a copy?

"A. R. 51.

"Q. And state whether the second sheet shows a record of the delivery of the telegram attached to it?

"A. Yes, sir.

"Q. Now, Mr. Witness, please tell the jury what is done, in the ordinary course of business in the receipt of a telegram for delivery in Pittsburgh; first, whether there is a record of it and a delivery of it and a record of its delivery.

"MR. McKENZIE — Objected to as being incompetent, irrelevant and immaterial, and on the further ground that common usage is not admissible in evidence.

"THE COURT—Overruled.

"MR. McKENZIE—Under section 1870 subdivision 12 of the Code of Civil Procedure and the further objection that there is no foundation, secondary evidence.

"THE COURT—Overruled.

"A. When the telegram is received, an impression copy is made thereof, and the telegram is then entered on the delivery record, and also on the delivery sheet, with the time filed and the number, and is handed to the proper messenger for delivery.

"Q. I call your attention to the words

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written in lead pencil on the upper right hand corner of the first sheet of this paper that I have handed you, and I ask you to state whether those were a part of the message in the telegram?

"A. By me.

"Q. When?

"A. On the date the telegram was taken from the file.

"Q. When the telegram is received at the office of the telegraph company, please state what is done with it, what is put on the telegram as a means of identification for determining the source of it in case of receiving a telegram by the operator, if you know?

"MR. COGHLAN—We object to that, if the court please, as not competent, relevant or material, on the ground no proper foundation has been laid.

"THE COURT—Overruled.

"A. The identification marks, and the telegram is numbered, giving the number, the office and the signal, the personal signal of the receiving operator; the next word following is the check of the telegram, showing the number of words in the telegram.

"Q. Now, I call your attention to the figures R 51 at the upper left hand corner of this telegram; what does that mean? What does that indicate?

"A. That is the number R 51 is the number of the telegram from the main office to the branch.

"Q. And the next character to the right, G., what does that indicate?

"Q. That is the office call, of the main

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office, showing from what office the telegram was received.

"Q. And what the next character, B C?

"A. B C indicates the private signal of the receiving operator.

"Q. And 6, the next character?

"A. 6 is the check showing the number of words which should be in the body of the telegram.

"MR. NOEL—I now offer for identification and will have the clerk mark it 14a and 14b respectively, 14a being the number of the impression copy and 14b being the delivery sheet.

"THE COURT—It will be so marked.

"MR. NOEL—I now call your attention, Mr. Witness, to a thin sheet of paper placed between paraffin paper, for identification, and on the outside of which, on a tag, bears the No. 445, and ask you to look at this and state whether you have ever seen it before. (Document shown to defendant's counsel.)

"A. Yes, sir.

"Q. State when and where you have seen it before?

"A. This telegram is taken from my files of December 4, 1910.

"Q. And from what files? In what files was it then found?

"A. In the proper file of December 4, 1910.

"Q. Files of message or of the delivery sheet?

"A. Files of received copy, of received telegrams.

"Q. In the files of the Postal Telegraph Company?

"A. Yes, sir.

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"Q. I call your attention to the words, written in ink at the top of the telegram, by whom were they placed there?

"A. Placed there by me.

"Q. When?

"A. On the day the telegram was produced from the files.

"Q. And are those any part of the original telegram?

"A. No sir.

"Q. What is the date of that telegram?

"A. December 4, 1910.

"Q. I call your attention to some—to the marks of a stamp including the words 'telephoned at ——— received by Mr. Legleitner.'

"MR. McKENZIE—We object to this.

"MR. NOEL—I want him to explain those words and how they came to be there.

"MR. McKENZIE—We object to this as being incompetent, irrelevant and immaterial; as being hearsay, and as being no part of the *res gestae*. We call your Honor's attention to the date of that December 4, 1910.

"THE COURT—Well, ask him if he knows how they came to be there.

"MR. NOEL—If you know.

"A. Yes, I know.

"MR. COGHLAN—Of your own knowledge?

"A. That stamp was placed there by the night telephone operator, after having telephoned the telegram to Mr. Legleitner.

"MR. NOEL—Now, when a telegram is delivered by telephone, please state the ordinary course of business with reference to such transaction in your office at that time.

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"MR. McKENZIE—We object upon the ground it calls for hearsay testimony.

"THE COURT—Overruled.

"A. A telegram, after being telephoned to the addressee is stamped showing who it was telephoned to and by whom. A Press copy is then taken, and if the addressee desires, the telegram itself is mailed to him later.

"MR. NOEL—I call your attention to the letters 'M. W.' what do those letters mean?

"A. Those are the personal signals of Mary Wolgemuth.

"Q. State, at that time whether Mary Wolgemuth was in the employ of the Postal Telegraph Company?

"A. Yes, sir.

"Q. In what capacity?

"A. Night telephone clerk.

"Q. And state whether it was part of her duties when she telephoned a message, to put her signature thereon?

"A. It was part of her duties to do so.

"MR. NOEL—I now offer this copy of telegram for identification and ask that it be marked for identification Exhibit No. 15.

"Q. State whether Miss Wolgemuth, whom you have named, was an employee of the Postal Telegraph Company at Pittsburgh, worked under your direction?

"A. She was,—worked under my direction.

"MR. NOEL—That is all.

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"MR. McKENZIE—Calling your attention to People's Exhibit No. 15, for identification, to that square which includes the words 'telephoned,' did you see that stamped on there?

"A. No sir.

"Q. You don't know anything about it of your own knowledge ?

"A. No, done at night.

"Q. When did you first see this copy of the telegram, what year?

"A. I think it was about December, 1911, that I couldn't state positively now. I made no record.

"Q. And this telegram is dated December 4, 1910?

"A. Yes sir.

"Q. People's Exhibit No. 15. It was not until a year after until you first saw the copy?

"A. Practically a year.

"Q. And you didn't see this copy made, did you?

"A. No, it was made at night.

"Q. You didn't see it made, though?

"A. No.

"Q. And all your knowledge is that it came from the files, is that it?

"A. Came from the files of that date.

"Q. Did you see it taken from the files?

"A. Not personally.

"Q. When did you first see it?

"A. The moment it was taken from the files it was brought to my office.

"Q. You didn't see it taken from the files, and you don't know who took it from the files?

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"A. I had several clerks working on the files at that time. I don't know just the clerk, but he brought the telegram to me.

"Q. Did you see him take it from the files?

"A. No, sir.

"Q. How many telegrams are received daily at this office?

"A. Well, there are about 1000 original telegrams. By original telegrams I mean, there are a great many telegrams passing through Pittsburgh every day—thousands of them, which we call relays, passing from one city to another. There are about 1000 telegrams in the delivery department about every day. That is just in the main office alone.

"Q. Have you anything outside of the designated list of telegrams and of this copy, have you any other record of telegrams received in your office?

"A. Why, we have a delivery record just showing the number—the number of the boy to whom the telegram was given.

"Q. You haven't that with you?

"A. I haven't that with me, no.

"Q. Any mistakes ever occur in that office?

"A. Oh, yes, some mistakes. We make mistakes sometimes.

"Q. Ever discharge anybody for making mistakes in reference to filing telegrams?

"A. No, sir.

"Q. Ever have occasion to reprimand anybody?

"MR. NOEL—To which we object upon the ground it is not cross-examination.

"THE COURT—Sustained.

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"MR. COGHLAN—A test of the witness's recollection.

"MR. McKENZIE—And the other telegrams, which you testified to, the first one, that is, calling your attention—

"Q. You mean the very first original telegram was sent from our office?

"Q. Yes. Have you any direct knowledge of that yourself?

"THE COURT—What do you mean, one of these other exhibits, or the telegram of which this is a press copy?

"MR. McKENZIE—We haven't a press copy—they are both press copies. Exhibit No. 14—for identification.

"Q. What is the question?

"Q. Have you any knowledge of the receiving of that, of your own knowledge?

"A. No personally.

"Q. And the first time that you ever saw this telegram was when, 1911?

"A. Yes, about December, 1911, or early in January, 1912. I couldn't state exactly.

"Q. And that was brought into your office by some clerk?

"A. Yes.

"Q. That is all the knowledge you have of that?

"A. Yes.

"MR. McKENZIE—That is all.

RE-DIRECT EXAMINATION.

"MR. NOEL—State whether the search for these telegrams were made by clerks under your direction?

"A. Yes, sir.

"MR. McKENZIE—Objected to as incompetent, irrelevant and immaterial.

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"MR. NOEL—Not at all.

"THE COURT—Overruled.

"A. The search was made under my direction.

"MR. NOEL—State whether they were produced subsequent to your direction to search for them?

"MR. McKENZIE—The same objection.

"THE COURT—Overruled.

"MR. NOEL—By the clerk to whom you gave the direction.

"A. They were.

"MR. NOEL—That is all.

"MR. McKENZIE—Just a minute. Were you present when the files were actually searched?

"A. I was not in the file room, no.

"Q. Well, now, we ask that his last three answers be stricken out on the ground it is hearsay.

"THE COURT—Motion denied. That is all" (Rep's. Trans., p. 3099-3119).

The testimony of this witness is the very rankest hearsay and should not have been permitted. He was testifying as to matters and things of which he had no knowledge. Certainly the general customs of the Telegraph Company could not be binding upon the defendant. All of this evidence comes within the rule which excludes evidence of *res inter alios actae*. The witness certainly should not have been permitted to testify as to entries made or stamps placed upon documents out of his presence. It is a fundamental rule of

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law that written hearsay is no better than verbal hearsay. Entries in books are admissible in evidence only where they are made by the witness himself in respect to his own business and in due course thereof, or when they were made in due course of business by a person since deceased, and there is evidence of other circumstances which tend to show the correctness of the entries. A learned writer on the law of evidence says:

> "It has long been a settled rule of law both in England and in this country that a minute or memorandum in writing, made at the time when the fact it records took place, by a person since deceased, in the ordinary course of his business, corroborated by other circumstances which render it probable that the fact occurred, is admissible in evidence. Entries of this class are not received on the theory that they are declarations against the interest of the person who made them, but on the ground that they were made in the due course of business as part of the *res gestae;* and this is deemed to afford sufficient presumption that the facts are as stated in the memorandum. Said a learned judge: 'What a man has actually done and committed to writing when under obligation to do the act, it being in the course of the business he has undertaken, and he being dead, there seems to be no danger in submitting to the consideration of the jury.' The entries to be thus admissible should be *contemporaneous* with the act to be proved, that is within so short a time thereafter as rea-

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sonably to be considered a part of the transaction, in the due discharge of duty and by persons having knowledge of the facts. Such memoranda do not generally afford evidence, except as to those matters necessary to be recorded; in other words, they are not evidence of collateral matters. Thus, although the return of an officer, since deceased, was held admissible to show that an arrest was made and also its date, yet such certificate was deemed no evidence of the particular spot where the arrest was made as it was no part of the officer's duty to state such fact" (*Jones on Evidence,* section 319).

Chief Justice Marshall has thus stated some of the grounds for the rule excluding hearsay evidence: "That this species of testimony sup-
" poses some better testimony might be ad-
" duced in the particular case is not the sole
" ground of its exclusion. Its intrinsic weak-
" ness, its incompetency to satisfy the mind of
" the existence of the fact, and the frauds
" which might be practiced under its cover,
" combine to support the rule that hearsay is
" totally inadmissible."

Mima Queen vs. *Hepburn,* 7 Cranch, 296.

And in another portion of his discussion of hearsay testimony Jones says:

"Other considerations are that legal proceedings might be indefinitely delayed and

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rendered practically fruitless, if mere extra-judicial assertions were to be received as evidence; moreover it is contrary to the spirit of the common law that statements made out of court, without any opportunity for cross-examination and under none of the sanctions of an oath, should be received as evidence. Moreover it might be urged that the practice of allowing the statements of witnesses to a transaction to be given second-hand would, in criminal cases, be a violation of the spirit of the constitutional provision that the accused shall enjoy the right of being confronted with the witnesses testifying against him. Judges acting as triers of the facts, and skilled in the art of scrutinizing and weighing evidence have sometimes believed that they could admit hearsay testimony without danger; that they could trust themselves entirely to disregard the hearsay evidence or to give it such little weight as it might seem to deserve. The dangers of admitting hearsay evidence are specially obvious when issues of fact are to be determined by jurors who are not trained to discriminate between different grades of testimony; between those statements which in a legal sense are only gossip and others which are tested by cross-examination and sanctioned by the solemnity of an oath. The rigor with which the rule excluding hearsay has been adhered to under the common law system is no doubt due in part to a jealous preservation of the right of trial by jury. So rigidly is the rule adhered to that, except with the qualifications hereafter stated, the statements of persons who have since died or otherwise become disqualified as witnesses cannot be received as

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> evidence, if such statements are in the nature of hearsay. In other sections we shall see that the declarations of persons since deceased are received under certain well established exceptions to the general rule. But the admission of such declarations depends upon fixed rules, and not upon any theory that it rests in the discretion of the court to admit hearsay because other testimony cannot be obtained" (*Jones on Evidence,* 2nd. edition, section 297).

The law is very plain that where a telegraph company is the agent, not of the receiver but of the sender of the dispatch, the written message which is delivered to the addressee is the original. Where the receiver of a telegraphic dispatch is the employee of the company, the writing delivered to the company's operator by the sender is the original. It is necessary in order to bind the alleged sender of a telegram, to show either that he signed or sent it, or that he acted thereupon if the telegram had been received by the addressee.

> *Underhill, Crim. Rv.,* Sec. 44;
> *Young* vs. *People,* 221 Ill., 51.

(7) The trial court further permitted hearsay evidence to be given by the witness Hulbert J. Smith, the manager of the Stubbins Hotel at Indianapolis, who was called to identify the register of that hotel which bore the signature

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of J. B. McNamara. Counsel for the defendant made the same objection to this testimony as was made to the testimony of the witness Rinehart. The entries in the book which was offered in evidence were not made by the witness, or in his presence. Substantially the same argument, therefore, may be directed to this ruling of the Court as has been directed to the preceding ruling. The record book or register of the hotel, made by a person other than the witness under examination was clearly inadmissible under the hearsay rule. One of the most noteworthy opinions on this subject which we have ever read,—an opinion which seems to us decisive on this subject is that of Judge Sanborn, United States Circuit Judge of the Eighth Circuit, in the case of *Thomas* vs. *U. S.*, 17 L. R. A. (N. S.). In his concurring opinion in that case Judge Sanborn deals with the question of the introduction of similar hearsay evidence as follows:

> "I concur in the reversal of the judgments in these cases for the reason stated in the foregoing opinion, and also because it seems to me that the testimony of George A. Barton to the contents of the record book, or of the memoranda, which he swore that Kimber L. Barton kept of the moneys received for Barton Brothers, was hearsay evidence, and its reception fatal error. Conceding that Kimber L. Barton was a co-conspirator

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with the defendants below, and that his overt acts in the execution of the conspiracy were admissible against them, *the proof of those overt acts was still subject to the established rules of evidence.* Whether or not he or his firm received the sums of money which George A. Barton read from the book from the defendants, or either of them; whether or not he correctly entered in that book what he or his firm received,—were questions of fact which were decisive in the trial of this action. If George A. Barton had testified that Kimber L. Barton had told him that Kimber, or his firm, had received the moneys entered in that book, that testimony would have been hearsay. The mere fact that those amounts were written in the book by a person other than the witness does not change their character. *Written hearsay is not more competent than oral hearsay.* Before the contents of that book could become admissible evidence against the defendants, competent proof that the moneys there entered were rceived from the defendants, or one of them, and that Kimber L. Barton correctly wrote down in that book the amounts which he, or his firm, so received was indispensable. Even if the concession were made, and it is not, that Kimber's statements were admissions of all the conspirators, and hence of the defendants, still the book was incompetent because there was no evidence in the case that Kimber ever said or admitted that he had correctly entered in the book, or in the memoranda, the amount of moneys which he, or his firm, had received, and George A. Barton did not testify that those moneys were correctly entered. The fact is, however, that those entries were not acts in

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execution of the conspiracy. The making of those entries did nothing toward the accomplishment of the purpose of the conspiracy. This purpose had or had not been accomplished before the entries were made; hence these entries were not admissible, either as overt acts, or admissions of a conspirator, nor as independent testimony of verified writings. They were nothing but the unverified, and hence incompetent, evidence of that which Kimber L. Barton happened to write.

"The chief reason for the rule which excludes hearsay testimony is that its obedience subjects, while its disregard relieves, the parties whose statements are offered, from the cross-examination of opposing parties. The right of cross-examination is the great safeguard against fraud, false statements, and half truths resulting from statements of parts and omissions of other parts of conversations and transactions, which are frequently more misleading and dangerous than direct falsehoods. It furnishes the cardinal and most effective means to discover and disclose the whole truth in all judicial investigations, and, under the English and American systems of jurisprudence, the opportunity to exercise the right of cross-examination is a condition precedent to the reception of the direct evidence of the witness. *Heath* vs. *Waters,* 46 Mich., 457, 471; *Sperry* vs. *Moore,* 42 Mich., 353, 361; 4 N. W., 13. If the unsworn written statements of witnesses may be received in evidence upon the testimony of a third party that the witnesses told him they were true, then the witnesses who know the facts may make their written statements thereof, and tell one who knows

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them not that those statements are true, and the accused may be deprived of the privilege of being confronted, by, and of all opportunity to cross-examine, the real witnesses against them, for, as in the case at bar, they may be conveniently absent and the witness who produces their written statements may know nothing, but that they told him they were true.

"No rule of law is more salutary, or more indispensable to the security of the life, liberty and property of the citizen, than that which prohibits the repetition of the written or oral statements of absent persons to determine issues between litigants, and commands that only after due notice, after opportunity for cross-examination of the very parties whose statements are offered, and then only under the solemnity of an oath or affirmation shall their stories be evidence. Disregard this rule, and the most sacred rights of persons and property are at the mercy of the whimsical and pernicious gossip of the reckless, the irresponsible, and the vicious.

"*Queen* vs. *Hepburn,* 7 Cranch., 290, 295; 3 L. Ed., 348, 349;

"*Lake County* vs. *Keene Five Cents Sav. Bank,* 47 C. C. A., 464, 470; 108 Fed., 505, 510;

"*Resurrection Gold Min. Co.* vs. *Fortune Gold Mine Co.,* 64 C. C. A., 180, 186, 188; 129 Fed., 668, 674, 676;

"*National Masonic Acci. Asso.* vs. *Shryock,* 20 C. C. A., 3, 7; 36 U. S. App., 658; 73 Fed., 774, 777.

"In the case in hand one of the most important, if not the most important, fact in

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issue, was permitted to be proved to the jury by the unverified written statement of one who was either a stranger or a criminal, and who was permitted to be absent from the trial, so that the defendants were deprived of all opportunity to cross-examine him on this crucial question, and of the right to be confronted with one of the principal witnesses against them. A conviction in this case ought never to be permitted to stand upon such evidence."

The same view as to the admissibility of books not kept by the witness under examination, without the laying of any proper foundation for their introduction, has been taken by the Supreme Court of California in the case of *People* vs. *Blackman,* 127 Cal., 248, in which the Court says:

"Objections were made to the introduction of the books of the corporation; that the evidence was mere hearsay and was incompetent; that it was not made to appear that the defendant had ever seen or knew of the entries offered and the evidence was incompetent to establish any fact against him.

"A great many entries made in a great many books were offered and received over the objection of defendant. It appeared that some of the entries were in the handwriting of defendant and others were not. They were introduced, not only to show the receipt of money by the defendant, but also to show forced balances, and thereby to raise the presumption of guilt. The bookkeeper was not sworn as a witness, but

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they were merely shown to be books kept by the company. Bolton, the bookkeeper, at about the time the shortage was discovered, had committed suicide. The position of the learned judge of the trial court was stated by him: 'This is one of the books of the company. He is charged by the by-laws and the custom of the company with the keeping of the books. This book was presumably in his custody and under his control. I don't care who kept it. If there is anything wrong about it that is for the defense.' As a matter of course, this view is not insisted upon here. The presumption of innocence would overcome all the presumptions of knowledge and control, if they existed, and it was for the prosecution to show that the defendant was responsible for the condition of the books, and in a criminal proceeding it is not enough that it was his duty to know of their contents, and that in a civil action they would be competent evidence against him on that ground. He cannot be held for the crime of embezzlement because he has negligently performed his duty as secretary of the corporation, but such consequence might result under the rulings of the court. Most of the books were in the handwriting of Bolton. It was not shown that defendant examined them to see that they were correct, or, save by the presumption mentioned, that he knew anything about them. Books kept by the collectors were also introduced without any evidence as to their correctness, and that defendant ever saw them, and the same is true as to the books of the bank showing what deposits were made.

"The books were certainly not admissible

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as shop-books. The receipt of such books in evidence is an exception to the general rule, and they are admitted for a limited purpose only. This case is clearly not within the exception (1 *Greenleaf on Evidence,* Sec., 120b).

"Aside from shop-books kept by one of the parties to an action, 'regular entries made in the course of business' are sometimes received (1 *Greenleaf on Evidence,* Sec., 120). Such entries must be made in pursuance of some system which is a part of the business, should be nearly contemporaneous with the event, and made by one who knew the fact and had no interest in making a false entry. In short, the motive for making the entries must be solely to record the truth and not to misrepresent. The illustrations given by Greenleaf are entries made by 'one sending orders or bills, by a notary sending protests, a cashier sending notices of non-payment, a marine inspector certifying to a vessel's condition, an attorney keeping a book of proceedings, an asylum officer keeping a weather record, records of baptism or marriage by priest or minister.' In all these cases the record was made only because it was deemed important to preserve in perpetual memory what actually occurred. There was no inducement to make a false record, but, on the contrary, false entries in most of the cases would be misleading and injurious.

"It must be kept in view that, after all, such evidence is hearsay and secondary, and is receivable only when better evidence cannot be had, and in the special cases which come with the rule. Being entries

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made in due course of business does not make them primary evidence.

"There is much plausibility in the contention that they are admissible, as against an employee, to show what amount of money was received by the corporation, and when it was received, provided, of course, there is nothing which tends to impeach the record as truthful. In this case one purpose for which the books were offered was to show that defendant did not keep correct books, but that they were falsified for the purpose of enabling the defendant to perpetrate the crime, or for the purpose of concealment. Under such circumstances they cannot be received as regular entries made in the course of business. The presumption of correctness is destroyed, and they are not offered as proof of the facts recited.

"If there was evidence that the entries were made by the defendant or under his direction, or with his knowledge, they would most undoubtedly be competent and important evidence against him. They are clearly inadmissible, except as admissions, or as acts done in furtherance of the crime charged against him. His knowledge and complicity in falsifying the books must first be shown. The presumption of innocence with which the law clothes the defendant is sufficient to overcome the presumption which might prevail in a civil case, that he knew because it was his duty to know. As before stated, he is not to be punished criminally for negligently performing his duty."

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Of course, the testimony of this witness, together with that of the witness whose evidence and the rulings of the trial court thereon we have just previously discussed, was inadmissible also upon all of the grounds which we have previously stated in our discussion of the so-called Eastern Conspiracy evidence.

(8) The trial court also erred in permitting the exhibition of photographs of J. B. and J. J. McNamara by the prosecution.

(Rep's. Trans., p. 3159.)

If identification of either of the McNamaras had been necessary there is an appropriate proceeding provided for in section 1567 of the Penal Code which makes provision that "when it is necessary to have a person im-
" prisoned in the State prison brought before
" any Court, or a person imprisoned in a
" County jail brought before a Court sitting in
" another county, an order for that purpose
" may be made by the Court and executed by
" the Sheriff of the county where it is made."

In *People* vs. *Chin Hane,* 108 Cal., 602, the Supreme Court has said that there is no authority for permitting the exhibition or inspection by the jury of a photograph of an absent witness.

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(9) The trial Judge was guilty of misconduct in commenting upon the testimony of the witness Walter L. Smith. The proceedings in that regard were as follows:

> "Q. After having seen James B. Brice on August 7, 1910, when did you next see him?
>
> "A. I saw him in the term of court here regarding the blowing up of the Times, whenever that occurred.
>
> "MR. McKENZIE—Now, we will ask that answer go out as not being responsive.
>
> "MR. NOEL—The witness did the best to make the answer.
>
> "MR. McKENZIE—No, he did the best he could to hurt somebody. He didn't answer the question.
>
> "MR. KEYES—I submit counsel has no right to make that remark, and we ask that he be reprimanded. The witness is trying to make proper answers and he has no right to make such an aspersion.
>
> "THE COURT—*No, Mr. McKenzie, the witness answered to the best of his apparent ability, without any effort to evade it.*"
>
> (Rep's. Trans., p. 3419, line 14, to 3420, line 1.)

This is only one of many instances in which the Court commented upon the manner in which witnesses were testifying. By making this comment he impliedly told the jury that the witness in question was telling the truth

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to the best of his ability. It was for the jury to determine whether or not the witness answered to the best of his apparent ability and without any attempt at evasion.

(10) The witness Mrs. A. J. Hull on her direct examination was permitted to give testimony which was obviously hearsay. She was asked to state what the International Association of Bridge & Structural Iron Workers was, and the Court overruled an objection made by defendant's counsel to the question. She was also permitted to testify that the Association consisted of different unions of iron workers throughout the United States and Canada. This witness was also permitted to testify that the Bridgemen's Magazine was the official organ of the Association.

(Rep's. Trans., p. 3460, lines 15-17.)

She was also permitted to testify that the expense of the publication of this magazine was paid by the International Association of Bridge & Structural Iron Workers.

(Rep's. Trans., 3454, lines 4-7.)

This testimony, in common with that of various other employees of this Association, was given without the laying of any proper foundation. It was, of course, subject to the

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objection that applies to all of the so-called Eastern Conspiracy testimony.

(11) The trial judge, over the objection of the defendant, permitted the prosecution while the witness Mrs. A. J. Hull was testifying to introduce in evidence numerous letters alleged to have been received by J. J. McNamara from alleged co-conspirators together with carbon copies of the replies alleged to have been written by McNamara.

(Rep's. Trans., p. 3471-3535.)

In addition to the objection relating to all the Eastern Conspiracy evidence previously discussed, the carbon copies were clearly inadmissible. The originals should first have been produced or proof should have been made as to their loss or as to the inability of the prosecution to procure them.

(Code of Civil Procedure, Sec. 1937.)

In *State* vs. *Teasdale,* 120 Mo. App., 692, 97 S. W., 995, the Court held that a carbon copy of a letter was not admissible in evidence where no effort had been made to produce the original at the trial. In support of its ruling the Court cited *State* vs. *Lentz,* 184 Mo., 223, 83 S. W., 970, and *Traver* vs. *Hicks,* 131 Mo., 181, 32 S. W., 1145.

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(12) The Court erroneously admitted in evidence over the objection of the defendant the check-book of the International Association of Bridge & Structural Iron Workers.

(Rep's. Trans., p. 3507 *et seq.*)

This was clearly inadmissible under the rule which excludes *res inter alios.*

(13) The Court also erroneously admitted in evidence, over the objection of defendant, numerous checks and entries marked "E. F.," the initials being alleged to signify "Emergency Fund."

(Rep's. Trans., p. 3523-3535.)

These checks and stub entries are also part of the documentary evidence relating to the so-called Eastern Conspiracy.

(14) The Court erred in permitting the witness Mrs. William H. Faust to identify the handwriting of Eugene Clancy and others when no proper foundation had been laid.

(Rep's. Trans., 3570-3613.)

This witness, for example, testified that she had never known Clancy prior to October 1, 1910, and yet she was permitted to identify a letter alleged to have been written by him in June of that year.

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(15) The Court permitted the same witness to identify the handwriting of Mrs. Frank K. Painter, the wife of one of the alleged conspirators, without any proper foundation having been laid. It was not contended that the witness was qualified to testify under the provisions of section 1943 of the Code of Civil Procedure as to the handwriting of Mrs. Painter, but the prosecution contended that Mr. Painter told her in the presence of his wife that the latter wrote his letters for him.

(Rep's. Trans., 3598.)

How such a statement could possibly have given the witness such knowledge as to the handwriting of Mrs. Painter as would enable her to identify it, is beyond our comprehension. This is merely a sample of many erroneous rulings made by the trial Court in permitting the stenographic assistants of J. J. McNamara to identify letters received from persons in widely separated quarters of the country.

THE CROSS-EXAMINATION OF MRS. FAUST.

(16) Not only did the trial Court arbitrarily and wrongfully curb and restrict the cross-examination of the witness, Mrs. Faust, but the Court commented upon the evidence

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and proceeded to white-wash the District Attorney in the presence of the jury.

This witness, like many others produced by the prosecution, had testified very glibly and without hesitation on direct examination, but, when cross-examined by counsel for the defendant, developed into a witness of the "I don't remember" character with which every trial lawyer of any extended experience is familiar. It is difficult in the course of an argument to convey by mere reference to the transcript any adequate idea of the unjust and unfair manner in which the trial Judge restrained the defendant's counsel in the cross-examination of this witness. We have already contended that all of her testimony, like the entire Eastern Conspiracy evidence, was utterly irrelevant. But be that as it may, even if it should be held that this defendant is bound by and is answerable for the crimes of persons whom he never knew and with whom he never associated,—he nevertheless, like every man on trial for his life, had the fundamental right to cross-examine the witnesses who testified against him. We have already called the attention of the Court to the fact that Mrs. Faust was permitted on her direct examination to identify the handwriting of numerous persons alleged by the prosecution to have been members of the

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so-called Eastern Conspiracy. In order to qualify her to testify as to the handwriting of these persons the prosecution had merely asked the questions, "Do you know his handwriting?" and "Have you ever seen him write?" The authorities seem to hold that this is sufficient to establish *prima facie* the knowledge of the witness of the handwriting in question. But it is obviously testimony of a very unsatisfactory character,—testimony the value of which may be utterly destroyed by cross-examination. For example, suppose a witness testifies that he knows the handwriting of another. On cross-examination it develops that he has never seen him write and has never seen writings purporting to be his upon which he has acted or been charged. In the face of such admissions on cross-examination the previous statement of such a witness that he knew the handwriting, while possibly of technical sufficiency to have qualified him to testify on direct-examination, becomes utterly worthless. These observations will illustrate the highly erroneous and the highly prejudicial nature of the rulings made by the trial Judge on the cross-examination of this witness.

This witness, for instance, had testified, among other things, that she knew the handwriting of one Cooley. On cross-examination,

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counsel for the defense attempted a searching inquiry as to how she gained her knowledge of Cooley's handwriting, but was blocked in his inquiry by repeated objections of the District Attorney which were erroneously sustained by the Court. To give or convey any adequate idea of the utter disregard displayed for the rights of the defendant to cross-examine an adverse witness, is impossible without setting forth certain portions of the record verbatim. We submit the following as an example:

"Q. When did you see him write?

"A. I saw him write so many times I don't remember just the date.

"Q. You don't remember the date. Well, can you give me an idea of the dates?

"A. No, sir.

"Q. Can you give us an idea of to whom the letters were addressed?

"A. He never wrote letters in front of me.

"Q. No. What did he write?

"A. He wrote his expense accounts, and he wrote telegrams and handed them to me, and reports for the magazine.

"Q. Yes; did you see him write?

"A. I did.

"Q. Expense accounts?

"A. I did.

"Q. Did he sit right down at your desk and write expense accounts?

"A. Yes, sir.

"Q. And did he sit down and write telegrams?

"A. Yes, sir.

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"Q. Did he have a stenographer there?
"A. No, sir.
"Q. To whom he dictated?
"A. No, sir.
"Q. Didn't use a stenographer while he was in the office?
"A. He did some time, but not for that.
"Q. Now, can you recall any particular telegram?
"A. I cannot.
"Q. No, and can you recall how he held his pen?
"MR. KEYES—That is objected to as frivolous, immaterial, not proper cross-examination.
"THE COURT—Objection sustained.
"MR. McKENZIE—He may have held it different ways; he may have held it through one—
"THE COURT—Well, sustained.
"MR. McKENZIE—Do you know what hand he held it in?
"MR. KEYES—Same objection on that ground—frivolous and immaterial.
"THE COURT—Sustained.
"MR. McKENZIE—Frivolous or immaterial, identifying a person, and we are not even allowed to show which way he wrote them?
"Q. Do you know which hand P. A. Cooley wrote with?
"A. I do.
"MR. KEYES—Same objection.
"THE COURT—Sustained.
"MR. McKENZIE—Do you know the contents of anything that he wrote upon any of these occasions?
"A. In substance, I do.
"Q. Do you know any of the contents or

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how he formed his letters? Did you ever make a study of them?

"MR. KEYES—Object to that as immaterial and irrelevant, and not proper cross-examination.

"THE COURT—Sustained.

"MR. McKENZIE—When did you first see E. A. Clancy?

"A. 1911.

"Q. 1911. You didn't see him prior to that October 1, 1910, did you?

"A. I don't remember,—no, not that I remember of. I may have, but I don't remember seeing him before that.

"Q. Well, when did you first see Mr. Clancy, to the best of your recollection?

"A. 1911.

"Q. 1911. What year?

"A. 1911.

"Q. What month, I meant.

"A. I don't remember.

"Q. You don't remember. Can you state within six months when it was?

"A. No, sir.

"Q. Did you see him write upon the first occasion?

"A. Yes, sir.

"Q. Who was present?

"A. The other girl in the office.

"Q. What other girl?

"A. Mrs. Wallace.

"Q. Mrs. Wallace; what date was that, in 1911, do you think?

"A. Yes, sir.

"Q. Who else was present?

"A. I don't remember.

"Q. What time was it?

"A. I don't remember.

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"Q. What did he write?

"A. He wrote a telegram to his wife.

"Q. To his wife; what was the contents of it?

"MR. KEYES—Objected to as immaterial.

"THE COURT—You might say if you know; do you remember what he wrote to her?

"A. I don't remember the exact letter, but I know it was written to his wife and signed Gene.

"MR. McKENZIE—And signed Gene. And how long was the telegram, how many words?

"A. Ten words.

"Q. Ten words. Is that the only time that you ever saw him write?

"A. No, sir.

"Q. In your presence?

"A. No, sir.

"Q. When did you next see him write?

"A. I guess the same day; I don't remember.

"Q. Same day; what did he write?

"A. I guess another telegram.

"Q. Another telegram. Was this to his wife, also?

"A. No, sir.

"Q. Who was it to?

"A. I don't know, if it was to Mr. Tveitmoe or not.

"Q. You don't know whether it was to Mr. Tveitmoe or not?

"A. No, sir. He wrote one to Mr. Tveitmoe, but I don't know if it was on that day or not.

"Q. Well, yes; well, now, to show you

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there are no hard feelings I will ask you the contents of that telegram?

"A. I don't remember.

"Q. You don't remember. I thought you didn't.

"MR. NOEL—Now, I move the statement be stricken out.

"MR. KEYES—We move to strike out the remark made by counsel and ask the court to instruct him to refrain from making any more such remarks. He gets an answer from this witness and he has no right to cast such reflections upon her testimony.

MR. McKENZIE—What other times did you see him write?

"A. Several other times.

"Q. Well, state the next occasion?

"A. I don't remember.

"Q. You don't remember when was the next time? after the one—

"A. I don't remember.

"Q. You can't remember any other occasions for that, can you?

"A. I remember of seeing him write often after that, but I don't remember what days of the month.

"Q. You don't remember the circumstances, do you?

"A. I do.

"Q. Yes. Well, what were the circumstances? Another report?

"A. No, sir.

"Q. What was it?

"A. Telegrams or expenses of his.

"Q. Were you in charge of the expense account?

"A. I was not.

"Q. What were you in charge of?

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"A. The stenographer and the membership number department.

"Q. The membership number, and what other department?

"A. That is all.

"Q. That is all, the membership number. Did you see the name of Matthew A. Schmidt contained in the roll of members?

"A. I don't remember.

"Q. You don't remember that?

"A. No.

"Q. Of course, if you had seeen that name you would remember it, wouldn't you?

"A. I don't remember any of the names of them.

"Q. You don't remember. Your memory is a little deficient about that, isn't it? I will ask you if you didn't testify this morning as follows, on page 3562: 'Q. At the time you were employed there, Mrs. Faust, please name the officers of the association as near as you can recall them?

"A. Frank M. Ryan, President; John J. McNamara, Secretary-Treasurer; Eugene A. Clancy, Vice-President; John T. Butler, Second Vice-President; Herbert S. Hockin, member of the executive board, Michael Young and Charles N. Beum, a member of the executive board. There is one other member of the executive board.' You didn't remember Mr. Cooley's name this morning, did you?

"A. I couldn't recall it at that moment.

"Q. I know, but you could recall his handwriting, is that right?

"MR. KEYES—She has testified she did.

"MR. McKENZIE—Now, leave me alone.

"MR. KEYES—I will make an objection,

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that she has testified to Cooley's handwriting, and I object to the question asked by the counsel as argumentative, not proper cross-examination.

"THE COURT—Sustained.

"MR. McKENZIE—You didn't remember his name this morning, did you?

"MR. KEYES—That is objected to as already asked and answered.

"A. I did.

"MR. McKENZIE—But you didn't repeat it to this jury, did you?

"MR. KEYES—The same objection to that question; not the best evidence.

"THE COURT—Sustained.

"MR. McKENZIE—Were you talked to at noon time, with respect to the name of this member of the executive board?

"A. I was not.

"Q. Were you talked to by a member of the District Attorney's office at noon time?

"A. Not about Mr. Cooley.

"Q. About what?

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

"THE COURT—Sustained.

"A. About my expenses.

"Mr. McKENZIE—Isn't it a fact you discussed this case before coming into court and during the noon recess?

"A. I did not.

"MR. KEYES—Objected to on the same ground, not cross-examination, irrelevant.

"MR. McKENZIE—Were you at the District Attorney's office at the noon hour?

"A. I was.

"MR. KEYES—The same objection.

"THE COURT—Sustained.

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"MR. McKENZIE—Did you discuss the contents of any of these letters?

"A. No, sir.

"THE COURT—Mr. McKenzie, I sustained an objection to that question.

"MR. McKENZIE—This is a different question. If your Honor sustains objections to all that line of questioning, I will desist and save an exception. I have a right to ask a question.

"THE COURT—*The District Attorney has a right to talk to a witness without having an inference drawn from that fact.*

"MR. McKENZIE—I certainly can go into this lady's interest. She went to the District Attorney, she didn't talk to us. This witness doesn't belong to the District Attorney. She belongs to this court just as much to us as to these gentlemen. We have a right to ask whether she has been influenced or whether anything has been said to her, either by these gentlemen or anybody else, whom she has come in contact with.

"THE COURT—Well, I will sustain the objection, and you may save the exception."

(Rep's. Trans., p. 3620, line 8, down to top of page 3628, line 2.)

The witness had testified that she had seen Cooley write, but counsel for the defendant was not allowed to ask her whether she could recall how he held his pen or even to ask what hand he held it in. As a matter of fact, Cooley wrote with his left hand, a peculiarity that

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would almost certainly have been observed by a witness who had seen him writing on frequent occasions. The question was absolutely proper for the purpose of testing the memory and credibility of the witness. Yet the Court sustained an objection of the prosecution on the ground that the question was *frivolous*. Apparently any question which might embarrass a witness for the prosecution was regarded as frivolous. The rights of the defendant on trial for his life were of no concern. Witnesses were to be allowed to give testimony of the most damaging character on a mere *prima facie* showing of their knowledge, and when defendant's counsel sought to bring out the details of their alleged knowledge, his questions were denounced by the District Attorney, with the implied sanction of the Court, as being *frivolous*. We do not believe that this Court is prepared to hold that the right of cross-examination is a mere frivolity.

After this witness had been repeatedly shielded from proper questions by the rulings of the Court, the defendant's counsel with absolute propriety proceeded to question her as to her conversations at the District Attorney's office during the noon recess, at a time when she was a witness under actual examination,

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with her testimony uncompleted. The Court not only sustained objections to that line of questioning, but proceeded to state that "the District Attorney has a right to talk to a witness without having an inference drawn from that fact."

Why? Since when has that been the law? Since when have district attorneys in California been clothed with the divinity that doth hedge a king? Suppose that the District Attorney, for example, had taken the witness into his office during the noon recess and had said to her, "Now, you made a fool of yourself while you were under cross-examination this morning; you will have to do better than that"; and then should proceed to tell the witness what answers she should make to questions and what testimony she should or should not give,—would the jury have no right to draw any inference from such facts? If the District Attorney had offered a witness employment if he would testify in a certain manner (in this case, indeed, the District Attorney had procured employment for some of the witnesses for the prosecution),—would not the defendant have a right to show that fact by cross-examination, and would not the jury have a right to draw an inference from that fact? The trial Judge was in effect telling the jury that they could

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draw no inference from the fact that the District Attorney had interviewed a witness. It was for the jury, with all the evidence before it, to draw or not to draw, an inference from the fact. The action of a trial Court in commending a District Attorney for improper practice was very severely censured by the District Court of Appeal of the First Appellate District in the very recent case of *People* vs. *Pitisci,* decided on February 23rd of this year and reported in 22 Cal. App. Decs., 401. In that case, which was a prosecution for murder, a letter addressed to the deceased, and purporting to have been written by her husband, was offered in evidence by the District Attorney. When the letter was first offered in evidence, objection was made on behalf of the defendant that it was hearsay, whereupon the trial Court upon its own motion read the letter, and then expressed doubt as to its admissibility. Thereupon the District Attorney withdrew his offer to put the letter in evidence, but later in the course of the trial he made another effort to get the letter in evidence, and notwithstanding the fact that the Court had previously read the same, stated its contents to the Court in the presence and hearing of the jury. When the defendant objected to this procedure, the trial Judge stated that

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the District Attorney *"had a perfect right to make his offer."* It will be noted that the trial Judge in the *Pitisci* case did not by any means go to the same length in shielding and commending the District Attorney as did the trial Judge in the case at bar. Yet the Court says:

> "The evidence sought to be shown by the letter was clearly incompetent and the trial Court finally so ruled. The effect of the action of the District Attorney in stating the contents of the letter was to anticipate an adverse ruling and thereby indirectly to get before the jury that which he was not permitted by the law to put directly in evidence. Counsel for the defendant promptly objected to this procedure; but the trial Judge, instead of condemning it, commended the District Attorney by assuring him that he had a perfect right to make his offer, notwithstanding the fact that the Court was already fully informed of the contents of the letter. In view of the attitude of the trial Court, it would have been useless to request that the jury be admonished not to pay any heed to the statement of the District Attorney."

Of course, the remark of the trial Judge in this case was not only an erroneous statement of the law, but an invasion of the province of the jury, who are made by the Constitution of this State, the exclusive judges of the facts in criminal cases. As we shall discuss more

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thoroughly, in a subsequent portion of this brief, the law applicable to the subject of the numerous comments made by the Court during the progress of this trial, we shall do no more at present than to quote the language of the Supreme Court of this State in *McMinn* vs. *Whelan,* 27 Cal., 319:

> "From the high and authoritative position of a Judge presiding at a trial before a jury, his influence with them is of vast extent, and he has it within his power, by words or actions, or both, to materially prejudice the rights and interests of one or the other of the parties. By words or conduct he may on the one hand support the character or testimony of a witness, or on the other may destroy the same, in the estimation of the jury; and thus his personal and official influence is exerted to the unfair advantage of one of the parties, with a corresponding detriment to the cause of the other."

During the further cross-examination of the same witness (ps. 3633-3643) the Court still further impeded cross-examination by sustaining objections to questions that were absolutely and obviously proper for the purpose of testing the memory or the credibility of the witness. The discussion of each of these rulings in detail would require more space than we have at our command, as the other errors committed at the

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trial are legion. The following instances may serve as examples:

The witness testified that she never saw Frank K. Painter write, but that she had seen his handwriting at the headquarters of the International Association of Bridge & Structural Iron Workers. Counsel for the defendant asked her on cross-examination, "How do you know it is his right; did somebody tell you?" An objection by the prosecution to this question was sustained by the Court.

Later the same witness was asked by counsel for the defendant, "Did you talk to Walter "Drew, the attorney for the National Erectors' "Association, during the recess, just fifteen "minutes ago?" To this question also the Court sustained an objection.

The foregoing instances and excerpts from the records are sufficient to show that *the defendant was absolutely deprived of his right to cross-examine this witness.* His counsel were not permitted to thoroughly question her as to her knowledge of the handwriting of the persons, whose writing she had already testified that she knew. On two occasions when she was asked obviously proper questions as to whether she had discussed her testimony with representatives of the prosecution, an objection was sustained and she was not compelled to

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answer the question. In other words, the defendant was not permitted to test her memory, to investigate her credibility, or to show her bias or interest. If a judgment after a trial where proceedings of this character occurred is to be allowed to stand, we might as well regard the entire Bill of Rights as a dead letter. Of what avail to a defendant in a criminal case is the Constitutional right to be confronted by the witnesses against him, unless he also has the right to cross-examine the witnesses with whom he is confronted?

(17) During the testimony of the witness Patrick J. Dugan, the witness was asked, "State whether the Brown-Ketchum Iron Works at that time was running 'open' or 'closed shop' if you know?" This question was objected to by counsel for the defendant as being incompetent, irrelevant and immaterial and on the ground that no proper foundation had been laid. The Court overruled the objection and the witness answered, "Open shop."

(Rep's. Trans., p. 3701.)

The testimony adduced by the question was clearly incompetent and hearsay. The witness Dugan was not a member of the Brown-Ketchum Iron Works or an officer of the company, and he could not possibly have had any

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first hand knowledge of their affairs. He could have had only the information of other persons. This ruling is merely typical of the disregard paid throughout the entire trial to the fundamental rules of evidence.

(18) The witness Dugan testified on his direct examination that in January of 1906 he visited, in company with J. J. McNamara and Eugene Clancy, a cathedral which was in course of construction in Indianapolis. He was then asked what was said on that occasion by McNamara. Counsel for the defendant objected upon the ground that no foundation had been laid and that no proof had been made of a conspiracy and that the question was incompetent, irrelevant and immaterial. The Court overruled the objection, and the witness testified that McNamara had made a proposition to him to blow up the building with dynamite. The practice of admitting declarations of co-conspirators in advance of any proof of the conspiracy was condemned in *People* vs. *Compton,* 123 Cal., 408, as being in direct violation of sub-division 6 of section 1870 of the Code of Civil Procedure. While the Court held that this section was not mandatory it declares that departure from the orderly mode of proof is to be resorted to only in extreme cases.

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NARRATIVE STATEMENTS BY CONSPIRATORS.

(19) The trial Court over the repeated objections of counsel for the defendant permitted testimony to be given as to statements made by various members of the Eastern Conspiracy which were not and could not have been declarations in furtherance of the Conspiracy, but which were mere narratives of past events. Indeed, the major portion of the crimes of violence alleged to have been committed in the Eastern part of the United States in furtherance of the so-called conspiracy were established merely by this method. We shall not endeavor to give every instance in which testimony of this character was admitted over the objection of the defendant. It will be sufficient if we set forth a goodly number of typical instances.

(a) The witness Dugan, over the objection of the defendant, was permitted to give the following testimony:

> "MR. NOEL—Mr. Dugan, you knew Herbert S. Hockin, did you?
> "A. Yes, sir.
> "Q. I will ask you if you, at any time, had any conversation with Herbert S. Hockin respecting anything that occurred at Detroit?
> "MR. McKENZIE—We object to this as

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being incompetent, irrelevant and immaterial, as hearsay, no foundation.

"MR. NOEL—I asked him if he had such conversation, is all.

"THE COURT—Overruled.

"A. Yes, sir.

"MR. NOEL—And where and when?

"A. In the American Central Life Building.

"Q. At Indianapolis?

"A. At Indianapolis, in 1907.

"Q. Who was present beside you and Mr. Hockin, if anyone?

"A. Well, they were numerous, about 25 or 30 of us.

"Q. Now, what was said by Hockin?

"MR. McKENZIE—Same objection, irrelevant, incompetent, immaterial, no foundation, hearsay.

"THE COURT—Overruled.

"A. Well, when do you mean? At that particular time in September?

"MR. NOEL—Well, at the time we are now talking about.

"A. Well, this was in September. I had one conversation with him, it was at a caucus in 1907, and he came to me and wanted me to vote for him as a member—

"Q. Don't state conclusions, don't say what he wanted; state what he said to you?

"A. He wanted me to vote for him as a member of the executive board.

"Q. And state what, if anything, he said further than that on the same subject?

"A. I told him that I would not, that he had a good position as custodian of the Elks Temple in Detroit;—I didn't think he needed it.

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"Q. What did he say?

"A. He told me that he had lost his position up there on account of the explosion in Detroit, and that he ought to be rewarded for it.

"Q. And what explosion did he refer to, did he state?

"A. The Russell Wheel & Foundry Company.

"Q. About what date—you have stated September, 1907. State whether you heard him have similar conversations with anyone else?

"A. Yes, sir.

"Q. With about how many people?

"A. Oh, at that time—

"MR. McKENZIE—Pardon me. Have you finished with that conversation?

"MR. NOEL—No, that is the same conversation, at the same place.

"A. At that time there were 25 or 30 there.

"Q. Now, if you had any prior conversation with Mr. Hockin respecting matters at Detroit, state when it was.

"MR. McKENZIE—Just a minute. We ask that the last answer with respect to the other conversation, go out, on the ground that it is the declaration of a co-conspirator, not made in the presence of his alleged accomplices; of the narration of some previous event; it is incompetent, irrelevant and immaterial, and hearsay, and not binding upon this defendant.

"THE COURT—Overruled.

"MR. McKENZIE—Not done in furtherance of the conspiracy.

"MR. COGHLAN—Not done to aid and assist the conspiracy.

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"MR. McKENZIE—Everything said during the course of ten years of this alleged conspiracy is surely not admissible.

"MR. KEYES—The Court has overruled the objection, Mr. Noel.

"THE COURT—Mr. McKenzie, under the rule which you invoked, I am not able to discuss these matters with you, so all I can do is hear your objection and rule on them, that is as far as the Court can do.

"MR. McKENZIE—Being ruled against so frequently, we just put in the general objection to the whole testimony.

"MR. COGHLAN—Our contention is, and I think your Honor sees it, that these conversations could not have aided and assisted the conspiracy. That is the only character of conversation that can be allowed in evidence.

"THE COURT—Well, I will endeavor to cover all these matters in the instructions to the jury, if the case should go to the jury.

"MR. McKENZIE—That doesn't cure the prejudice of this kind of testimony.

"THE COURT—I can't tell the nature—

"MR. NOEL—We will try very carefully not to trespass on the rights of the defendant.

"THE COURT—I can't tell what the answer of this witness is going to be.

"MR. McKENZIE—Well, after this testimony has come in and your Honor sees the nature of the answer to it, and it isn't of any—

"THE COURT—It may be connected up with other matters, I don't know.

"MR. NOEL—We promise your Honor that they will be. We will be very careful not to trespass on your Honor.

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"THE COURT—I am assuming, when I make these rulings, it will be connected up. If not, I will strike it out. I will not strike it out now.

"MR. COGHLAN—Of course, we have to make our objection, to save the point.

"MR. NOEL—Now, Mr. Dugan, state whether you had any prior conversation, prior to the one you have just related with Hockin, respecting matters at Detroit and any expense made at Detroit.

"MR. McKENZIE—Now, we object to this as being leading and suggestive of the answer; being incompetent, irrelevant and immaterial, and hearsay, and no foundation.

"THE COURT—Overruled.

"A. Not before—afterwards, in January, 1908.

"MR. NOEL—In 1908.

"MR. McKENZIE—We ask that the answer go out, as not being responsive.

"MR. NOEL—He said, not before. Did you have a conversation with Mr. Hockin in January, 1908?

"A. Yes, sir.

"Q. Respecting matters at Detroit?

"A. Yes, sir.

"Q. Who was present besides yourself and Hockin?

"A. W. J. McGirr.

"Q. Mr. McNamara not present?

"A. In and out.

"Q. Was he present at the time of this conversation, I am asking you?

"A. Yes, sir.

"Q. Now, what was said at that time?

"MR. McKENZIE—The same objection.

"THE COURT—Overruled.

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"MR. NOEL—And what were you talking about, and what was said?

"A. While we were waiting for the stenographer to write up this report, we got to discussing the Detroit explosion and Hockin told me that he had either spent $265 or $285 on the explosion—he first got to laughing about the firemen, how foolish the firemen was in Detroit, that when they seen the fuse burning that they thought it was powder. They run up and they were trying to stamp it out—and then he told me—I don't know whether it was $265 or $285 that he spent on the explosion, and he told me that the local paid for it, and that the International reimbursed him. I told him I thought that was going a little too deep in it. I thought if anything like that should come off, the local should take care of it. He said, Why? I said, Why, there was just a trick pulled off in Indianapolis, it only cost $25. I showed him the receipt for the trick in Indianapolis. I said, if local 22 can pull off a trick for $25, I think local 25 should.

"Q. What was said, if anything, about anything in Indianapolis, about what it was?

"A. It was wrecking a building.

"Q. What was said there?

"A. Well, he just asked me what it was. I told him wrecking a building.

"Q. And did he say whose building?

"A. Yes, sir.

"Q. Whose did you tell him it was?

"A. Conrad-Bender.

"Q. Tell the jury what you told him about it.

"A. I just told him that the Executive

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Board told me—the local Executive Board—

"MR. McKENZIE—We object to this as being hearsay, and about thirteen degrees removed.

"MR. NOEL—I don't want you to tell what anybody else told you. What did you say to Hockin where the building was, or how it was done, anything of that character?

"A. No, I just told him that the local Executive Board had pulled off a job in Indianapolis for $25. If local 22 could pull off a job for $25, that local 25 ought to be able to pull off one.

"MR. McKENZIE—We will ask that the answer—

"MR. NOEL—I ask you to tell the jury at that time whether at the time you were talking about it, at the time of the depredation on the Conrad-Bender—whether the Conrad-Bender was running a closed or open shop?

"MR. McKENZIE—We object to that as being incompetent, irrelevant and immaterial; hearsay, no foundation; leading the witness.

"THE COURT—Overruled.

"MR. McKENZIE—We ought to be entitled to get it from the witness.

"MR. NOEL—Answer the question.

"A. Open shop.

"MR. McKENZIE—Now, we ask that the entire conversation just testified to go out, on all of the grounds heretofore interposed, as a basis for the objection.

"THE COURT—Motion denied.

"MR. NOEL—I call your attention to the month of October, 1907. I will ask

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you if there was any conversation with J. J. McNamara about any checks drawn to Webb?

"A. Yes, sir.

"Q. What was the conversation?

"MR. McKENZIE—Same objection.

"THE COURT—Well, who was present, the time and place and persons present.

"A. J. T. Butler.

"MR. NOEL—Who was present besides yourself and McNamara?

"A. J. T. Butler.

"Q. Where was the conversation?

"A. In McNamara's office.

"Q. Indianapolis, Indiana?

"A. Yes, sir.

"Q. Can you fix the date any closer than I have fixed it in the question?

"A. No, I can't. It is there on that—in the book. It was the day we got the audit—while we were waiting for the stenographer to make up the typewritten report.

"Q. Now, tell the jury what the conversation was?

"A. Why, there was a bill there of $200—there was an expense of $200 they sent to Frank C. Webb in New York. I asked what that was for. We got into quite an argument about it, and he allowed I was getting too damned wise.

"Q. Don't state what he allowed. Just state what he said.

"A. He said I was getting too damned wise, I shouldn't be questioning them bills the way I was. I told him that was what I was there for.

"Q. After the officers of the International Association of Bridge & Structural Iron Workers moved to Indianapolis, how

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frequently were you around to those offices, which we refer to as headquarters?

"A. In and out every day or two; not over two days at the most.

"Q. I will ask you if you were over at times when there were meetings of the Executive Board?

"A. Yes, sir.

"Q. And were you before the board at any time?

"A. Yes, sir.

"Q. State where the board met and under what circumstances?

"A. Well, they met issue to a call of F. M. Ryan and they met in the American Central Life Building.

"Q. What part of the building?

"A. In—well, they had a room there, regular Executive Board room.

"Q. And state whether at the times of the meetings the doors were open or closed?

"A. Closed.

"Q. And when the meeting was—any other people were present but the Executive Board?

"A. No, just as they were called in.

"Q. I will ask you if you ever had any conversation with J. J. McNamara about any incident of Ryan's in New York?

"A. Yes, sir.

"Q. And when and where was that conversation?

"A. McNamara's office.

"Q. And about when?

"A. I think it was along in May.

"Q. Of what year?

"A. 1907.

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"Q. And who was present besides yourself and McNamara?

"A. Just us two.

"Q. Now, state what the conversation was?

"MR. WOOLWINE—Talk out, Mr. Dugan, so the jury can hear you.

"A. When I come into the office McNamara was reading a letter, and I stopped a few minutes to wait for him to get done with the letter. He turned around. He said, 'My God, this is funny.' I says, 'What is that?' He says, 'Here is a letter I just got from Ryan that he said Jerome, the District Attorney, had had Ryan up before him and told him he better cut out this dynamiting, that they had the goods on him.' I asked him where it was—I said, 'What was it?' He said, 'The American Can Company.'

"MR. McKENZIE—Now, just a moment. We ask that this conversation with respect to the Can Company go out as being incompetent, irrelevant and immaterial.

"MR. NOEL—I will ask one question: Do you know whether—

"MR. McKENZIE—Just a minute until I get a ruling.

"THE COURT—I will not strike it out at present, if they connect it up.

"MR. NOEL—Do you know whether the American Can Company was then running a open shop or closed shop?

"MR. McKENZIE—Now, we object to this as calling for hearsay testimony.

"A. I don't know.

"Q. You don't know. Now, Mr. Witness, I call—

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"THE COURT—Is that all there is about that?

"MR. NOEL—Yes, that is all there is about that.

"THE COURT—Motion to strike out will be granted.

"MR. NOEL—Later evidence will show numerous depredations in New York.

"MR. McKENZIE—Do you mean that is a depredation on the part of the District Attorney?

"MR. NOEL—Mr. Witness—

"MR. McKENZIE—Will your Honor instruct the jury to the extent of that ruling, with respect to disregarding that?

"THE COURT—No, I will instruct them all at one time with regard to those matters. Stricken out.

"MR. NOEL—I will ask you to state, Mr. Witness, if you had a conversation with McNamara in April, 1907, which you now remember?

"THE COURT—As this is a long case, I will give the jury the general instruction now, where evidence is offered and the Court strikes it out, you will not take that evidence into consideration in arriving at any conclusion which you may arrive at at the close of this case. I call your attention to that now, and I will instruct you in the written instructions which I will hand you if the case comes to you for consideration.

"MR. NOEL—Read the question.

"(Question read.)

"A. Yes, I had a conversation with him in April, 1907.

"Q. And where was the conversation?

"A. In his office.

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"Q. Who was present

"A. Just himself and me.

"Q. State what the conversation was as near as you can remember.

"A. Well, at that time I went over to his office and he had a photographer there; he wanted to know how many non-union jobs there were around, and I told him there were not many, and he says, 'Well, Ryan has employed this man to go over all the country taking photographs of non-union jobs, and,' he said, 'any non-union jobs that there is in your locality,' he says, 'I want you to cite them to this man so he will go and take photographs.'

"Q. Now, at that time or at any other time, in 1907, state whether you had any conversation with McNamara concerning any engine on any traction line.

"A. Yes, sir.

"Q. With respect to which he gave you instructions?

"MR. McKENZIE—We object to this as being incompetent, irrelevant and immaterial.

"MR. NOEL—I am asking if he had such conversation.

"A. Yes, sir.

"Q. Now, when and where?

"A. McNamara's office.

"Q. And who was present?

"A. J. J. McNamara and myself.

"Q. Now, state what that conversation was.

"MR. McKENZIE—The same objection.

"THE COURT—Overruled.

"A. Why, he called me before him on Monday morning—it was on Monday morn-

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ing, and I come over, and he asked me when I had taken a trip south. Iasked him where. He said towards Louisville. I told him I had never taken a trip that way. He told me he went to Louisville on Sunday—went to Louisville and over to Cincinnati, and that the Central States Bridge Company had a string of bridges from Indianapolis to Louisville. He says, they had their engines on cribbing. He said, 'Now, you go down there,' he said, 'and set that cribbing afire and ditch them engines, or dynamite them.'

"Q. I will ask you if you ever had any conversation with Mr. McNamara at Anderson, Indiana?

"A. Yes, sir.

"Q. When?

"A. Well, I don't just remember what date; it was on Sunday. I don't remember what date.

"Q. What year?

"A. 1907.

"Q. Can you tell about what month?

"A. No, I could not.

"Q. What was the occasion of your being at Anderson?

"A. We went up there to organize a local union.

"Q. And state who was present at this conversation, if any one, besides yourself?

"A. J. J. McNamara.

"Q. J. J. McNamara and yourself?

"A. Yes, sir.

"Q. Now state—

"A. Let me get you right. We didn't organize this local in Anderson; we organized it in Muncie, and came back to Anderson.

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"Q. Came back to Anderson on the way from Muncie?

"A. Yes, sir.

"Q. In Muncie what did you and McNamara do; where did you go?

"A. Went to the shops—it was either car shops or where they store their cars, or their—where it was the shops of the Indiana Traction Company, and there was a big job of iron work—

"MR. McKENZIE—We object to that as being incompetent.

"MR. NOEL—I asked him what he did.

"A. There was a job of iron work being erected there, and we went all over the job; looked it over; tried to find out who the contractor was, and we found out that the Indiana Bridge Company was doing it, and we left there and got on the car.

"Q. Now, state whether the Indiana Bridge Company at that time was running an open shop or a closed shop?

"MR. McKENZIE—We object to that as being hearsay.

"THE COURT—If you know.

"A. Open shop.

"MR. NOEL—Now, state what McNamara said to you about it, if anything, about this job at Anderson.

"MR. McKENZIE—The same objection.

"THE COURT—Overruled.

"A. Why, I was sitting in the seat ahead of McNamara, about half asleep, and he leaned over—he was sitting behind me—he reached over and punched me, and I kind of waked up and looked back at him. He said, 'Come over here, I want to tell you something.' I went around and sat in the seat

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with him, and he said, 'Don't you know,' he says, 'that it will be a good place to go up there,' he says, 'and put a shot in there?' I says, 'What for?' 'Well,' he says, 'let people know we are alive.' I said, 'Well, that wouldn't do that new local that just organized any good.' He said, 'Well, I will get some dynamite—nobody will know, and you slip up there some night and dynamite that place.'

(Rep's. Trans., p. 3722, line 1, down to 3736, line 22.)

(b) The witness Frank Eckhoff, a portion of whose testimony we have set forth in a previous portion of this brief, testified, it will be remembered, that J. B. McNamara suggested to him the dynamiting of certain work being constructed by the Riter-Conley Company at Cincinnati, Ohio. After the explosion which he described had been set off, he testified that he had a conversation with J. B. McNamara in regard to the explosion. Over the objection of the defendant he was allowed to testify that McNamara showed him a newspaper with the remark, "We have some money coming now," and that later on McNamara gave him $70.00 and made the statement that he had secured the money from J. J. McNamara.

(ps. 4043-4044.)

He was also allowed to testify over objection by defendant's counsel that McNamara told

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him that certain nitroglycerin was to be used for the purpose of blowing up non-union jobs and that J. J. McNamara and also the Executive Board of the Iron Workers' Union knew of his operations.

(ps. 4044-4045.)

(c) Eckhoff was also permitted over objection to testify to a conversation had with J. B. McNamara at Cincinnati, Ohio, with respect to the bridge at Beaver, Pennsylvania. The witness stated that McNamara told him that he was going to time a train which crossed that bridge daily, and place a bomb upon the train so that the bomb would go off at the time when the train was crossing the bridge. He also testified that McNamara stated that "that would learn them to give this work to Organized Labor."

(p. 4052.)

(d) The Court also permitted the same witness, over the objection of the defendant, to testify to a conversation with J. B. McNamara in which the latter stated that J. J. McNamara wanted the witness to go to Indianapolis for the purpose of shadowing Miss Mary Dye, his former stenographer, who, J. B. McNamara stated, "had opened his brother's private mail and 'knew too much.' "

(Rep's. Trans., p. 4056-4058.)

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(e) Eckhoff was also permitted to testify to a conversation had at Harrison, Ohio, between himself and J. B. McNamara, in which the latter, following the receipt of a letter from his brother, stated that he was going out to the Coast and later that he was going to Los Angeles.

(f) The witness Davis, another of the dynamiters, was permitted to testify to a conversation alleged to have been held between himself and Frank Webb in New York in 1907, in which Webb said: "The International Association have sent $200.00 in here for to dynamite that job at Harrison, N. J.," and that Webb further said that Mike Gibbon was going to do that with another party, but they had got to quarreling among themselves and that one seemed to be afraid of the other, and that the old man, meaning President Frank Ryan, wanted the job done.

(g) Over the objection of counsel for the defendant the witness Davis was permitted to testify in regard to a conversation held with Frank Webb in New York in 1908 with reference to the projected dynamiting of the Blackwell Island bridge as follows: "He told me he had heard from J. J. McNamara and as they were a little bit short of funds that he thought $950.00 was all they could pay for destroying that bridge, and I told him I want-

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ed $1500.00 anyway. He suggested that I get a room down near the job and look it over and observe the habits of the watchman, and he thought he could get $1500.00 from McNamara, or more money."

(Rep's. Trans., p. 4111.)

(h) Over repeated objections by counsel for the defendant on the ground that the testimony was hearsay, the witness Davis was allowed to testify to a conversation had with Tunnings and Dugan in regard to the so-called jack-knife bridge at Pelham Bay, New York, in which Dugan stated that Billy Green "wants us to destroy it—saw the guys off or burn the cables off with acid and to try to drop it in the river, but not to use no explosive of any kind."

(Rep's. Trans., ps. 4120-4121.)

(i) The Court permitted the witness Clark, over the objection of the defendant, to testify to a conversation with Herbert S. Hockin in 1909, in which Hockin, referring to an explosion which the witness had produced on a bridge at Dayton, Ohio, stated, "Ryan is kicking about it. Spent a good bunch of money and there wasn't much damage done." According to the witness, Hockin stated that Ryan had gone through Dayton on an observation car and that the train went over this bridge, and that Ryan had seen that the derrick was working in

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good order and thought that it was a large sum of money to pay for the production of so little damage.

(Rep's. Trans., ps. 4371-4373.)

(j) The Court denied a motion made by counsel for the defendant to strike out testimony given by the witness Ortie E. McManigal to the effect that in Detroit in May, 1907, he had a conversation with Herbert S. Hockin, in which the latter said that he "wanted a gang to get together and go over to one of the non-union jobs that was about two blocks from where we were working and watch those fellows when they were through work and either catch them leaving the job or catch them as they were getting on the street car, or get on the street car with them and as they were getting off the street car, why jump on to them, and beat them up."

(Rep's. Trans., p. 5521.)

(k) Over the objection of counsel for the defendant, and in the face of numerous motions to strike out, the Court permitted the witness Ortie E. McManigal to give the following testimony with reference to a conversation held between himself and J. B. McNamara:

"Q. What did he say?
"A. He said that his name was J. B. McNamara, that he was a brother of J. J.

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McNamara, Secretary-Treasurer of the International Bridge & Structural Iron Workers.

"Q. And did he say or did he state to you as to what his connection with that association was, if anything?

"A. He wasn't connected with the Bridge & Structural Iron Workers, that he was a typographical man, printer.

"Q. Now, did he tell you at that time anything about Beaver?

"A. Yes, sir.

"Q. Pennsylvania; and what did he say?

"A. He said that he and Hockin had been down to Beaver and looked over the situation there, that in—one time him and Hockin had got arrested down there and that they had 20 quarts of glycerin laying down along the river bed at the time they got arrested—that he, himself, had just came from Beaver and around Antiquity.

"Q. By the way, did he say that he was arrested?

"A. Yes, sir.

"Q. Did he state what was done at that time?

"A. They were taken to the police station and they put up a pretty good talk to the Chief of Police there, and were released without any charge.

"Q. And where was their glycerin at the time?

"A. Laying down at the river.

"Q. Did he tell you anything about that?

"A. He told me it was laying down along the river, maybe 100 feet from the place where they were arrested.

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"Q. Did he tell you what the occasion was of his arrest?

"A. They was sitting in this—little park there, and there was a man and woman had a family quarrel and the police arrested them and come along and picked up J. B. McNamara and Hockin also, and took them into the station.

"MR. McKENZIE—I move that the whole incident be stricken out, unless this man and woman are conspirators of some kind. We have the sins of so many on our shoulders now—

"THE COURT—Part of the statement is material, and part is not.

"MR. WOOLWINE—Did J. B. McNamara at the time you were in the room there with him tell you anything as to what caused him to take this name?

"A. No, he didn't.

"Q. Or how he happened to select this name?

"A. He selected the name from a friend of his'n, whose name was Brice. His middle initial was J. Barnabas McNamara, and he used the 'B' for Brice.

"Q. Now, did he say anything to you at that time as to his new invention?

"A. Yes, sir.

"Q. Now, what was that? What was said?

"A. He tried to demonstrate to me at that time this new device that he had of a clock and a battery, by using a lead pencil as the battery and his watch as being the clock, and I didn't get the theory of it at that time. I had never seen anything like it before or heard of it, either. He said it was a great thing, that he had tried it out—

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he and Hockin had tried it out at Steubenville, Ohio. They had six explosions there, five of them went off and one of them didn't go off, and he went back and got it, and the reason it didn't go off was the first ones, he laid it straight—the battery up straight and by the jars of the other explosions it toppled it over and it throwed one of the pieces of brass on the board out so that when the alarm went off it didn't make a connection, and after that he laid the batteries down flat on the board. That made it more equally balanced there; and he also told me he had tried it out at Indianapolis on the Von Spreckelsen jobs and he had three explosions, and these three explosions came off two or three miles apart, and they came off within a minute of each other, the time they should come off, and he also told me what he and Hockin tried in Cincinnati, Ohio.

"MR. McKENZIE—Just a moment. We object to this on the ground it is purely a narrative; not done in furtherance of the conspiracy, therefore it is incompetent, irrelevant and immaterial.

"THE COURT—Overruled.

"A. That they had—Hockin and he had tried it out. The glycerin and one of these infernal machines, set it in some material that was being constructed by the McClintic-Marshall Company, I believe. Set it in some girders, and the explosion was to come off at 12 o'clock, noon time. That he and Hockin were up on the hills somewheres close, a mile from where the explosion occurred. Hockin had out his watch and there was a little rumbling sound and he said, 'There it goes.' J. B. said, 'No, I

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will tell you when it goes.' He had it set by his time, and when his watch pointed directly to 12 o'clock there was an explosion. 'There,' he said, 'that is it.'

"MR. McKENZIE—Pardon me. What city was this in?

"A. Cincinnati, Ohio.

"MR. WOOLWINE—Did he have any conversation with you with reference to other persons being sent from Chicago to Indianapolis to do this work?

"A. Yes, sir.

"Q. What was said?

"A. He told me in regard to Von Spreckelsen's job in Indianapolis, that the Building Trades Council in Indianapolis was trying to cause this man Von Spreckelsen a great deal of trouble, on account of him working open shop. That they had sent to Chicago and got two strong arm men to come down there, and 'they were paid $500 a piece, and they were around Indianapolis about two weeks, and they had covered no ground—that is, they hadn't done anything, and one of the members of the Building Trades Council met McNamara on the street one day, and he says, 'Mc,' he says, 'haven't you got a man you can put on this job for you?' He said, 'I don't know, I will find one.' And before he had time then to report to the Building Trades Council again the explosion took place and J. B. McNamara told me that he did the job.

"Q. Did you have any conversation with McNamara at that time—J. B. McNamara, as to any occurrence at Green Bay?

"A. Yes, sir. He told me that he had been up to Green Bay, Wisconsin, also.

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"Q. What did he say he had done there, if anything?

"A. He set an explosion in some material on cars that were being used for the bridge that was going on.

"MR. McKENZIE—Move to strike that out on the same grounds heretofore urged to the last motion.

"THE COURT—Denied.

"MR. WOOLWINE—Did he tell you whether the explosion went off. You stated that he set them.

"A. He told me he set them. I don't remember whether he told me they went off or not.

"Q. Now, did you have any further conversation with J. B. McNamara at that time?

"A. Yes, sir, he was a little uneasy at that time about agoing out the next day with us to meet this man that we were going to meet.

"Q. Now, did he say that to you?

"A. He said, 'I don't care about going out there tomorrow to meet this fellow.' I said, 'Why, what is the matter with him?' He said, 'We bought some stuff of him before.' I said, 'How much?' 'Well,' he said, 'one time Hockin and I bought—' I think he said 30 quarts, another time they had bought 40 quarts of glycerin.

"Q. Did you say anything in answer to that?

"A. I asked him what was his idea of backing out. Well, he said, 'He was afraid the men might be suspicious—would recognize him coming there quite often. Probably ask him what he was using this for.'

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"Q. Now, did you have any further conversation that you can recall, at that time

"A. He told me of his experience of being down around Antiquity, that Jones and Laughlin was putting up some large shops there, and I think the Pittsburg Construction Company was doing this work. He said they were well guarded around there; that they had what was called the Pennsylvania Cossacks, the Pennsylvania Sheriffs there, mounted. He said, 'They are damned rough guys down there. They are on horseback and they run right through the house after you, if they ever get started.'

Rep's. Trans., ps. 5622, line 1, down to 5627, line 11.)

(l) The Court, over the objection of the defendant, permitted the witness McManigal to testify that he had a conversation with J. B. McNamara at Indianapolis prior to the time that the latter left for the Coast, in which J. B. McNamara said that "he was going out to the Coast and give them a damned good cleaning up."

(Rep's. Trans., p. 5772.)

(m) The Court erroneously permitted the witness McManigal to testify that he had a conversation with Hockin in Chicago in September, 1910, in which Hockin said that he had seen a letter in J. J. McNamara's office signed "J. B.," which came from the Coast and

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which said "it is straining on one's nerves around here getting soup." Counsel for the defendant moved to strike out all of this conversation and the motion was denied.

(Rep's. Trans., ps. 5844-5846.)

NARRATIVE STATEMENTS OF CO-CONSPIRATORS ARE INADMISSIBLE.

The foregoing thirteen instances that we have set forth are by no means the only instances in which the trial Court permitted Davis, McManigal and others to testify to conversations had with their alleged co-conspirators which consisted of nothing more than a narration of past events. We have already argued at considerable length the question of the Eastern Conspiracy evidence and we have contended that this evidence was inadmissible for any purpose. But even if evidence of the Eastern Conspiracy was admissible, there is certainly no rule of law which allows the acts and declarations of co-conspirators to be established by hearsay testimony. As was said by Judge Sanborn, in the course of his opinion in *Thomas* vs. *U. S. (Supra):* "Conceding that Kimber L. Barton was a co-conspirator with the defendants below, and that his overt acts in the execution of the conspiracy were admissible against them, the proof of those overt acts was still subject to the established rules of evi-

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dence." The acts and declarations of co-conspirators are admissible against the defendant on trial only where such acts and declarations were done and made in furtherance of the common object. A mere narration by one of the Conspirators as to things that have been done in the past is not a declaration made in furtherance of the Conspiracy and is therefore inadmissible. It is subject to the general rule which excludes hearsay evidence. Some of the testimony hereinabove set forth was hearsay of the most palpable kind, as, for examaple, the last instance quoted, in which McManigal was allowed to testify that Hockin had told him that he had seen in J. J. McNamara's office a postal card written from the Coast by J. B. McNamara. We have never heard of a ruling more palpably and flagrantly erroneous and prejudicial. It was clearly an attempt to connect J. B. McNamara with the destruction of the Times Building by hearsay testimony.

None of the evidence hereinabove set forth and referred to, consisting as it does of purely narrative statements made out of the presence of the defendant, was binding upon him. The authorities to this effect are voluminous. In *12 Cyc.* 438, the rule is stated as follows:

> "Declarations and statements uttered during the pendency of the plot, which are only narrative or anticipatory, are inadmissible except as against the declarant or as

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against a conspirator in whose presence they were made."

In *People* vs. *Irwin*, 77 Cal. 504, it is said: "No declarations except those made during the pendency of the conspiracy and in furtherance of its objects can be used against a co-conspirator. *Declarations showing past acts,* or expressing merely the opinion or desire of the conspirator making them, are not binding upon any one except himself, or those in whose presence they are made." The same rule is expressed in *People* vs. *Aleck*, 61 Cal. 138. The greatest of all writers on the law of evidence says:

> "And here also care must be taken that the acts and declarations, thus admitted, be only those which were made during the pendency of the criminal enterprise and in furtherance of its objects. If they took place at a subsequent period, and are therefore merely narrative of past occurrences, they are, as we have just seen, to be rejected."
>
> (*Greenleaf on Evidence,* sec. 111.)

In the *Anarchists' Case,* 12 N. E., 865, the Court, in the course of a very elaborate discussion of the law of conspiracy, says, at page 980:

> "It is undoubtedly the law that if a conspiracy is established, only those declarations of each member which are in furtherance of the common design can be introduced in evidence against the other mem-

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bers. Declarations that are merely narrative as to what has been done or will be done are incompetent, and should not be admitted except as against the defendant making them, or in whose presence they are made."

The case of *Samples* vs. *People* (Ill.), 13 N. E. 536, was a prosecution for the statutory offense of attempting to produce an abortion. A witness was permitted to testify, over objection, that she had a conversation with one of the defendants at her house, in which he stated that he had procured the medicine for the purpose of producing the miscarriage, and that his co-defendant had promised to pay for the medicine if he would procure it. The Court reversed the judgment of conviction for the error in admitting such testimony, and in the course of its opinion says:

"It will have been observed that it is not pretended that Uriah was, at the time that he is alleged to have made the statement testified to by this witness, doing any act tending to produce an abortion, or to cause anyone else to do so. He was not purchasing medicine, directing medicine to be taken, or even carrying medicine for that purpose. His remarks were directed to a stranger, in nowise personally interested in the subject, and were simply and purely a narrative of something that he said had been done. 'It is an established rule,' says *Phillips on Evidence* (Vol. 1, Cow. H. & E. notes), 205, 'that, where several persons

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are proved to combine together for an illegal purpose, any act done by one of the party in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party. It follows, therefore, that any writings or verbal expressions, being acts in themselves, or accompanying and explaining other acts, and so being part of the *res gestae*, and which are brought home to one conspirator, are evidence against the other conspirators, provided it sufficiently appears that they were used in furtherance of the common design.' And the author afterwards, at page 208 of the same volume, adds: 'But where words or writings are not acts in themselves, nor part of the *res gestae,* but a *mere relator's narrative of some part of the transaction, or as to the share which other persons have had in the execution of a common design, the evidence is not within the principle above mentioned;* it altogether depends on the credit of the narrator, who is not before the Court, and it cannot, therefore, be received.' To the same effect is *2 Russ. Crimes* (7th Amer. Ed.) 696; *1 Greenl. Ev.* (7th Ed.) 111; *Best, Ev.* (1st Amer. Ed., from 6th Lond. Ed.) 508; *Patton* vs. *State,* 6 Ohio St., 470."

In the case of *Bennett* vs. *State* (Ark.), 36 S. W. 947, which was a prosecution for the forgery of a deed, where there was evidence that a conspiracy had been formed to commit the forgery, the Court permitted a witness to testify that one of the co-conspirators had told

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him that the appellant "had promised to make a deed which would clear him." The Court says: "The conversation between Watkins and Blalock, in the absence of the defendant, in which the former told the latter that appellant had proposed to make a deed which would arrange the timber trouble, was inadmissible, not having been something done or said in furtherance of the common design to forge the deed."

In *Woods* vs. *State*, (Texas) 60 S. W. 244, where the defendant was indicted as an accessory after the fact to the theft of cattle in that he had assisted the principal to escape, it was held that it was not permissible for the State to show that the principal told the witness that the horse he was riding prior to the offense belonged to the defendant, since the testimony was hearsay and the declaration was not in furtherance of the conspiracy.

The same doctrine is pronounced in *Bowen* vs. *State*, 47 Tex. Cr. Reps. 137, 82 S. W. 520.

In *State* vs. *McGee*, 81 Iowa 17, 46 N. W. 764, it was held that where on trial for murder the theory of the prosecution is that the defendant, together with his co-defendants, conspired to commit the crime, the declarations of the co-defendants made in the absence of the defendant, and in furtherance of the conspiracy, are admissible against him, but the declaration of a co-defendant made two days be-

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fore the commission of the crime in a conversation with a neighbor to the effect that the deceased "will not be there next winter and don't you forget it," is not a declaration in furtherance of the conspiracy and is inadmissible. The Court says in part:

> "We practically call attention to the testimony of King and Burk. King says that, after he had advised McGee to move the hay so that Kelso nor any other person could steal it, McGee said: 'He will not be here next winter, and don't you forget it.' The rule as to what statements of a co-conspirator may be admitted in evidence is stated in the textbooks, and in many adjudicated cases. Mr. Greenleaf says: 'Every act and declaration of each member of the confederacy in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all, and is therefore original evidence against each of them,' 1 Ev., sec. 111. *State* vs. *Nash*, 7 Iowa 346, approved the rule as given by Mr. Greenleaf. Other authorities equally direct and certain use such expressions as that 'the acts or statements must be in the prosecution of the criminal conspiracy,' or 'in furtherance of the objects of the conspiracy.' *People* vs. *Stanley*, 47 Cal. 113; *State* vs. *George*, *supra; Rex* vs. *Hardy*, 24 State Tr. 199; *2 Starkie, Ev.* (2d Ed.) 326; *Card* vs. *State*, *supra; State* vs. *Glidden*, (Conn.) 8 Atl. Rep. 890; *Spies* vs. *People*, (Ill.) 12 N. E. Rep. 865; *Goins* vs. *State*, (Ohio) 21 N. E. Rep. 476; *People* vs. *Kerr*,

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6 N. Y. Supp. 674. The authorities are, so far as we are advised, in accord with the rule stated. Is, then, the statement of John McGee, Sr., within the rule? It seems to us clearly not. The statement was not made in an attempt to further or prosecute the plans of the conspiracy. It was a statement made in a conversation with King, in which John McGee, Sr., had no purpose to aid or carry forward the designs of the confederacy. It is not the rule that when a conspiracy is formed all admissions, acts, or declarations of a conspirator may be put in evidence against the others, but only such as are in furtherance of their plans. The statement of Cooper to George Burk, it seems to us, is of the same character. At the time of making the statement, Cooper was not engaged in the work of the conspiracy, and the remark was not to aid it."

In *State* vs. *Walker*, 124 Iowa, 414, 100 N. W. 354, it was held in a prosecution for murder that a declaration by an alleged co-conspirator that he had a grievance against the deceased and had hired the defendant to do him an injury, was not an admission in furtherance of the unlawful plan, but a mere narrative of a fact, and was not an admission against the defendant. To the same effect are: *Stewart* vs. *State*, 26 Ala. 44; *Gillum* vs. *State*, 62 Miss. 547; *Browning* vs. *State*, 30 Miss. 656; *People* vs. *Gorham*, 16 Hun. 93; *Rufer* vs. *State*, 25 Ohio State 464; *State* vs. *Simons* (S. C.), 4 Strobh. 266.

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For the improper admission in evidence of a declaration of a co-conspirator (a ruling, by the way, far less erroneous and not a hundredth part so prejudicial as any one of the foregoing rulings admitting evidence of narrative statements of co-conspirators in this case), the Supreme Court of this State reversed the conviction in *People* vs. *Smith*, 151 Cal. 619. The defendant in that case was charged with the crime of murder and was convicted of manslaughter. It was claimed by the prosecution that the murder was committed pursuant to a conspiracy entered into between the defendant and his brother, Fred Smith. While the affray in which the deceased lost his life was in progress, and between the firing of the first and second shots at the deceased by the defendant, the brother, in response to an inquiry by a bystander, remarked, "I knew he was going to get it." Evidence of this statement was admitted over the objection of the defendant. Justice Lorigan, who delivered the opinion of the Court, says:

> "The theory of the prosecution on the trial of the case was that after McCann had used the language to Fred Smith when he first came in the saloon concerning his mother and sister, the latter sought the defendant and a conspiracy was entered into between them to kill McCann, and in defense of this ruling of the trial Court it is insisted by respondent that there was evidence in the

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case tending to show such conspiracy; that it was still existent and its object had not been finally accomplished when the declaration was made, as the second shot had not then been fired by defendant; that as Fred Smith was a conspirator with defendant when this declaration was made by him, and was made pending the conspiracy and in furtherance of its design, it was admissible evidence against his co-conspirator, the defendant.

"We cannot agree with the position of respondent, and are of the opinion this evidence is inadmissible.

"We do not discuss the claim made by appellant that there was no evidence in the case supporting the theory of a conspiracy. It was insisted on the trial that there was, and evidence was introduced which, it is asserted now, supported that claim. Whether there was or was not a conspiracy entered into between these brothers having for its object the killing of McCann is a question of fact to be determined by a jury from the evidence, under appropriate instructions from the Court, and as the question immediately under consideration does not involve any inquiry as to whether there was or was not sufficient proof of the conspiracy, that question is left where it properly belongs upon a new trial,—namely, to the jury. For the purposes of present consideration, if it should be conceded there was sufficient proof of a conspiracy, still we do not think that this declaration of Fred Smith was admissible. The rule allowing statements or declarations of one conspirator to be given in evidence as against his co-conspirator requires not only that the conspiracy

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be pending and its object not consummated when the statements or declarations are made, but also that such statements, in order to be admissible, must be in aid and furtherance of the common purpose or design of the conspiracy.

The rule is stated in *Cyclopedia of Law and Procedure* (vol. 8, p. 680): 'Acts or declarations of a conspirator cannot be admitted as against a co-conspirator, unless such acts were performed or declarations made in aid or execution of the conspiracy.'

"And as to the admission of such statements or declarations, it is said in *People* vs. *Irvin,* 77 Cal. 494, 504, (20 Pac. 56, 59): 'No declarations except those made "during the pendency of the conspiracy and in furtherance of its objects" can be used against a co-conspirator. Declarations showing past acts, or expressing merely the opinion or desire of the conspirator making them, are not binding upon any one except himself or those in whose presence they are made.' (Citing cases.)

"Now examining the declaration of Fred Smith admitted in evidence in the light of the principle declared in these authorities, it is readily observable that such declaration was in no manner in aid or execution of the asserted conspiracy, or in any way in furtherance of its objects. A declaration, statement, or act of a conspirator, to be admissible as in 'furtherance' of the conspiracy, must, as the word 'furtherance,' *ex vi termini*, imports, be an act, statement, or declaration which in some measure, or to some extent, aids or assists towards the consummation of the object of the conspiracy. How can it be claimed that the declaration in

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question was of this character? When this declaration was made by Fred Smith the conflict between his brother and McCann was practically on, and he had fled from the scene to a place of safety. Certainly, it cannot be pretended that at the time he answered the inquiry of the storekeeper he was doing anything in aid of the killing of McCann or which tended to effect that object. His declaration that he knew that the deceased was 'going to get it' was simply a statement of his belief or opinion on the subject. It was not made at a time when Fred Smith was aiding in furthering the object of the asserted conspiracy, nor was it a declaration in any manner in aid or furtherance of the alleged conspiracy, and as any declaration made by him could only be admissible if it were, such declaration was inadmissible when it was not."

Of the many additional cases which might be cited, we will call the attention of the Court to but one more. In *State* vs. *Gilmore*, 151 Iowa 618, 132 N. W. 53, 35 L. R. A. (N. S.) 1084, it is held that upon the trial of one for homicide through an abortion which was alleged to have been the result of a conspiracy between the accused and the victim, declarations of the latter, in the absence of the accused, which purport to be a recital of what the accused did and said during the commission of the crime will not be admissible in evidence against the accused. See also: *State* vs. *Podor*, 135 N. W. 421; *State* vs. *Allen*, 34 Mont. 403,

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87 Pac. 177; *State* vs. *Moeller*, 20 N. Dakota, 114, 126 N. W. 568.

After the citation of these numerous authorities no further argument should be necessary. We have set forth thirteen instances in which the trial Court over the repeated objections of counsel for the defendant admitted in evidence statements of alleged co-conspirators which were mere narratives of past events. In fact, these hearsay statements were the only evidence by which the prosecution sought to establish many of the overt acts of the Eastern dynamiters alleged to have been committed in furtherance of the conspiracy. Such statements under the elementary rule pronounced by Greenleaf, by the Supreme Court of this State, and by all of the other authorities which we have quoted, were not binding upon the defendant. That they were highly prejudicial to him is apparent. In the foregoing decisions which we have quoted, convictions were reversed because of the error of a trial Judge in admitting one hearsay and narrative statement of a co-conspirator, which sometimes consisted of only a few words spoken in a casual conversation. How much more should this conviction be reversed when the same error was committed repeatedly, and when the incompetent and prejudicial testimony so admitted covers hundreds of pages of record?

* * *

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(20) DICTAPHONE CONVERSATIONS—The witness Anastacia Moran was erroneously permitted over the objection of the defendant to testify as to letters which she took from the dictaphone.

(Rep's. Trans., ps. 3846-3851.)

No proper foundation was laid for the admission of this testimony.

(*Abbott on Facts*, 842.)

* * *

(21) EVIDENCE OF CLOCK-WORK BOMB—The Court was guilty of manifest error in permitting the witness Morehart to testify that he saw in the office of the Chief of Police at Peoria, Illinois, in August, 1910, a certain clock-work bomb.

(Rep's. Trans., p. 4218.)

Absolutely no foundation was laid for the introduction of any such testimony. It was never shown that the said bomb had ever been used by the defendant or by any of the alleged co-conspirators, and, furthermore, such evidence could not in any manner be binding upon the defendant on trial. If it was alleged that the bomb in question was one used or designed to be used by some of the Eastern dynamiters, the proper method of proving that fact, if such

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were otherwise relevant, would be by producing the person who originally found the instrument or the person who made and could identify it.

* * *

(22) The Court erred in permitting the District Attorney to introduce in evidence three infernal machines alleged to have been in the possession of the witness McManigal, and in permitting the witness to illustrate the working of the same.

(Rep's. Trans., 5838-5840.)

It was not alleged that these machines had ever been used in the commission of any crime, and they were therefore no part of the *res gestae*. The case was certainly not one of those provided for in section 1954 of the Code of Civil Procedure in which material objections may be exhibited to the jury.

* * *

(23) RESTRICTION OF THE CROSS-EXAMINATION OF McMANIGAL—We have already pointed out at some length the unreasonable and unlawful restrictions placed by the Court upon the cross-examination of the witness Mrs. Faust. Far graver errors, however, were committed by the Court in restricting cross-examination of more important witnesses produced by the State. Objections to proper

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questions tending to impeach or discredit these witnesses were sustained repeatedly by the trial Judge. We shall first note the most striking of these erroneous rulings and we shall then proceed to discuss the law applicable thereto.

The witness McManigal had turned State's evidence. He was admittedly an accomplice in the commission of the numerous offenses concerning which he testified upon his direct examination. Under the most elementary rules of law it was the duty of the jury to receive his testimony with caution. Under the express provisions of section 1111 of the Penal Code a conviction could not be had upon his uncorroborated testimony, and the corroboration of an accomplice is not sufficient if it merely shows the commission of the offense or the circumstances thereof. The law relative to accomplices is very elaborately discussed in the able opinion of Justice Henshaw in *People* vs. *Coffey,* 161 Cal., 433. In view of these facts and in view of the express provisions of the law of this State, defendant should have been allowed the very greatest latitude in the cross-examination of this witness. Any question pertinent to his motives or to his interest should have been allowed. The trial Court, however, pursued the contrary course. On the cross-examination of McManigal it developed

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that he had received considerable sums of money from the prosecution while residing in Los Angeles, and at other times. It further appeared that he had never received any punishment for any of the multitudinous crimes that he had committed. After he had testified as to the receipt of the money, the following proceedings occurred:

> "Q. Now, have you been working at this place, Universal City, before coming to Los Angeles upon this occasion?
>
> "A. I started to work, yes sir; I had worked out there.
>
> "Q. You had worked out there. Now, Mr. McManigal, isn't it a matter of fact that you testified here now purely in consideration of protection that has been given you by the District Attorney's office, in order that you might be brought here to this trial to testify in this trial?
>
> "MR. KEYES—We object to that on the ground it is improper cross-examination, immaterial and incompetent.
>
> "MR. COGHLAN—I think it is perfectly proper.
>
> "THE COURT—Yes, it is proper to inquire into the motives of a witness.
>
> "A. No, sir, I haven't been promised anything.
>
> "MR. COGHLAN—I didn't ask that question.
>
> "A. Nor any protection.
>
> "Q. Haven't you been given protection by the District Attorney when you have committed crimes in this County?
>
> "A. No, sir.

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"Q. Weren't you accused at this place that you have named to us, Universal City, and didn't you telephone to the District Attorney or to the Sheriff and inform them that you were, and weren't you relieved of your difficulty by them?

"MR. KEYES—Objected to as not proper cross-examination.

"A. No, sir.

"MR. WOOLWINE—It is not only an improper statement, but something wholly false.

"MR. COGHLAN—Well, I don't believe it is wholly false. We will bring the records to prove it.

"MR. McKENZIE—You withdraw your objection and we will prove it.

"MR. WOOLWINE—Throwing slurs upon this witness.

"MR. COGHLAN—We are throwing no slurs; we will bring out the truth.

"THE COURT—Never mind now. You will neither one of you be questioning this witness if you keep addressing your remarks to each other.

"MR. HARRIMAN—He wasn't slurring him.

"THE COURT—I am not speaking to you, Mr. Harriman; I am speaking to these gentlemen talking to each other.

"MR. COGHLAN—It is true, your Honor. I will observe that just as closely as I can.

"Q. Now, isn't it a matter of fact that your job out there at Universal City was procured for you by the prosecution in this case, either through Mr. McLaren or somebody else?

"A. I don't know anything about it.

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"Q. You don't know anything about that?

"A. No, sir.

"Q. How did you come to get that work?

"A. I went out there to the Universal Studio.

"Q. At whose suggestion?

"MR. WOOLWINE—Wait a moment, and let him finish.

"A. Suggested what?

"MR. COGHLAN—Who suggested that you go out there?

"A. I suggested myself.

"Q. Oh, you went out there of your own volition?

"A. Yes, sir.

"Q. Nobody told you to go out there?

"A. No, sir.

"Q. Nobody suggested it to you?

"A. No, sir.

"Q. Nobody connected with the prosecution said you can get a job out there?

"MR. WOOLWINE—Objected to on the ground it has been asked and answered.

"THE COURT—Sustained.

"MR. COGHLAN—You answer that question.

"THE COURT—Objection sustained.

"MR. COGHLAN—Now, then, you were about to say you went out there, go ahead.

"A. And met Mr. Bernstein, who was then manager of Universal Film Company.

"Q. Yes.

"A. And asked him for a job at the Universal ranch, he sent me out to the ranch.

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"Q. What name did you give him?
"A. Walter Earl.
"Q. Walter Earl?
"A. Yes sir.
"Q. Did you give him any references?
"A. No, sir.
"Q. Did you refer him to Mr. McLaren?
"A. No sir.
"Q. You did not?
"A. No sir.
"Q. Did you refer him to the District Attorney's office?
"A. No sir.
"Q. Did you refer him to anyone connected with the prosecution?
"A. No sir.
"Q. Did he know who you were?
"A. I told him who I was.
"Q. And didn't you refer him to the prosecution then and there?
"A. No sir.
"Q. Do you know whether or not Mr. McLaren ever went there and put in a word for you, so that you secured that job?
"A. I don't; no sir.
"Q. You do not?
"A. No sir.
"Q. Don't you know that he did?
"A. No, I don't.
"Q. You don't. Now, how long did you work there?
"A. From the 5th of January, 1914, until about the 7th of December, 1914.
"Q. Yes. Now, isn't it a matter of fact, that the cause of your leaving there was that you were discharged by the superintendent, Mr. Walter Carrigan, who searched your place and found a lot of revolvers there,

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found a lot of money stolen from the company, found articles in your trunk that belonged to other people, and didn't you seek and find protection from conviction for the crimes that you had there committed, at the hands of the District Attorney's office?

"MR. WOOLWINE—If your Honor please, is counsel going to be permitted—

"THE COURT—Well, if you are going to object, why, make your objection.

"MR. WOOLWINE—Objected to on the ground it is incompetent, irrelevant and immaterial, no foundation, and not proper cross-examination.

"THE COURT—Objection sustained."

(Rep's. Trans., p. 5926, line 13, to p. 5930, line 6.)

In other words, the Court refused to allow the defendant to show by the cross-examination of this witness that the District Attorney of Los Angeles County had protected him and had given him immunity for the crime of larceny. The previous question to which an objection was sustained, namely, the question as to whether anyone connected with the prosecution had told the witness that he could get a job at Universal City was entirely proper. If the District Attorney's office had aided the witness even to the extent of telling him where he could procure employment, that was a circumstance which the jury had a right to con-

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sider in determining his motives and the weight to be accorded to his testimony.

During the course of his cross-examination, McManigal was asked the question, "Where are you living?" This question was objected to by the District Attorney on the ground that it was immaterial and not proper cross-examination. The Court sustained the objection. In every other case, either civil or criminal, in which any of the writers of this brief have ever participated, it has always been the custom to procure the address of the witness as soon as he has been sworn and stated his name. Of at least fifteen witnesses who followed McManigal to the stand the first question asked was, "Where do you live?" In fact, so far as we can determine from an examination of the transcript, this question was the first, or one of the first questions, asked of every other witness produced by the prosecution at the trial of this case. If such question was not asked it was undoubtedly purely an oversight on the part of the District Attorney, but for some reason the prosecution evidently desired to keep the residence of McManigal secret, and when the defense asked him an obviously proper question, the prosecution was quick with an objection which the Court sustained. It is an

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elementary rule that such a question is permissible.

40 *Cyc.*, 2418.

Among other things it goes to the question of the identity of the witness, and may, in certain cases, throw an important light upon the question of his motives, interest or bias. Suppose, for the sake of an example, that the witness McManigal had been residing at the home of some one in the employ of or interested in the prosecution. Such fact would be a circumstance which the jury would undoubtedly have a right to consider as affecting the interest of the witness and the weight to be accorded to his testimony. No reason was assigned by the prosecution why the question could not be answered, the sole objection being, that it was immaterial and not cross-examination. We can see no reason for the ruling of the Court, and no case has ever come under our observation in which such a ruling has been made.

The same witness on cross-examination was also asked, "During the time that you were "going about from State to State and from "City to City causing these explosions you car-"ried a revolver, did you? A. Yes, sir.

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"Q. And for what reason did you carry a "revolver?"

(Rep's. Trans., p. 5967.)

This question was objected to as immaterial, improper cross-examination, irrelevant and incompetent, and the Court sustained the objection.

* * *

(24) THE CROSS-EXAMINATION OF ASHWORTH: The prosecution placed on the stand one F. D. Ashworth, a dentist, residing in the Mission District in San Francisco, in the same block in which the house of Mrs. Belle Lavin, where the defendant lodged part of the time when he was in San Francisco was located. This witness testified that in company with Mrs. Ingersoll he saw Schmidt and McNamara at Mrs. Lavin's house, in the last part of August, or the first part of September, 1910. He testified that McNamara was the man who was introduced to him upon that occasion under the name of Brice. He also identified the defendant. On cross-examination of this witness the following proceedings occurred:

> "When were you first talked to by the prosecution about the testimony that you could give here today, Doctor? When were you first approached?

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"A. Today.

"Q. No, I mean with respect to coming down to Los Angeles?

"A. Oh, I had a subpoena served on me about two months ago.

"Q. Prior to that, had you talked to anybody that purported to represent the prosecution in this case?

"A. I don't know.

"Q. Didn't you talk to somebody last spring along in April?

"A. Oh, yes; there was some man up to see me; I don't know who was there.

"Q. Did you state at that time that if you came down here you would want to be compensated at the rate of $25 per day?

"MR. KEYES—That is objected to as immaterial, irrelevant and incompetent, not cross-examination.

"THE COURT—Sustained.

"MR. McKENZIE—Well, I will ask you what compensation you are receiving for coming down here, Doctor?

"A. Not any as I know of yet.

"Q. You expect some?

"A. I expect my expenses.

"Q. Is that all?

"A. Yes sir.

"Q. I will ask you whether or not you demanded $25 a day to come here and testify?

"MR. KEYES—That is objected to as not proper cross-examination, immaterial and irrelevant.

"THE COURT—Sustained."

(Rep's. Trans., p. 6399, line 16, down to p. 6400, line 14.)

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(25) RESTRICTION OF THE CROSS-EXAMINATION OF MRS. INGERSOLL: In the foregoing pages we have set forth the substance of the testimony of Mrs. Ingersoll, at whose house J. B. McNamara was alleged to have resided in the summer of 1910, prior to the destruction of the Times Building. This woman was an important witness for the prosecution. It was the contention of the defense that she was in the employ of the prosecution and of William J. Burns. On numerous instances the Court sustained objections to proper questions asked of her on cross-examination.

This witness had given testimony before the Grand Jury which returned the indictment against the defendant. Counsel for the defendant sought to cross-examine her as to statements made before the Grand Jury which were at variance with the testimony which she gave at the trial. The Court refused to permit such questions to be answered. The proceedings in that regard are as follows:

> "You testified in this case before the Grand Jury, did you not, Mrs. Ingersoll?
> "A. Yes sir.
> "Q. You said yes, did you?
> "A. Yes sir.
> "Q. And you didn't, when you testified there, say anything about this conversation that you have related to us as occurring

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over the telephone between you and Mr. Schmidt there?

"MR. KEYES—That is objected to as improper cross-examination.

"A. They never asked me the question.

"MR. COGHLAN—Well, you didn't as a matter of fact?

"A. I don't remember now. If they asked me, I would have told it.

"Q. You don't remember, but you remember now you did have that conversation after this lapse of years?

"A. Yes sir.

"Q. Now, as I understand you, Schmidt came over there almost immediately, did he, within 30 minutes afterwards—after a telephone message, came within a few minutes after you had received Mr. Brice, you had had conversation with Mr. Brice in which he said, "I want to rent a room from you," haven't you?

"A. Yes sir.

"Q. And you had shown him this room that you have described to the jury, and no other words passed between you and Mr. Brice; is that so?

"A. None that I recall.

"Q. Now, you would recall them if any other words passed between you, wouldn't you? You have a good memory? If there were any other words upon that important occasion, an occasion rendered important by subsequent events?

"A. If I was to think of some other, it might come to me. I don't recall my memory right now.

"Q. You have had opportunity of thinking it over for five years. Can you now say anything else transpired between you by

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way of conversation that you have not related?

"A. I don't remember.

"MR. WOOLWINE—Objected to upon the ground it has been asked and answered.

"MR. COGHLAN—You don't remember?

"A. No.

"Q. Now, reading from page 592, and from a part of page 593 from the Grand Jury testimony, I will ask you if you testified as follows, in response to that question, line 26: 'Q. When he first came there and took a room who was the first person that he met, that you know of afterwards? A. This fellow, Schmitty, came over there soon afterwards, perhaps an hour or a couple of hours afterwards. Q. Schmitty came over a couple of hours afterwards? A. Yes sir.' That is what you testified to before the Grand Jury, isn't it Mrs. Ingersoll?

"A. Well, I don't remember just how long it was. How does a person know the time?

"THE COURT—Just one question now. The only question now is, did you testify so before the Grand Jury?

"A. I don't remember what I testified to.

"MR. COGHLAN—Would you like to see the transcript?

"A. I can take your word.

"MR. COGHLAN—Counsel is also reading a copy of the same testimony.

"MR. KEYES—I would like to show the witness the testimony with relation to that telephone call.

"MR. COGHLAN—Just a moment now.

"THE COURT—Oh, no, Mr. Keyes, just a moment.

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"MR. COGHLAN—Just allow me to cross-examine.

"MR. KEYES—I only want to be fair and show her her testimony with regard to the telephone call you asked her about.

"MR. COGHLAN—There is no doubt about your fairness.

"MR. KEYES—Then you show it to her. I just as soon have you show it to her.

"MR. COGHLAN—I would only be too delighted. I begin at this question, line 26, and read it and then you answer down to here, the answer 'Yes.'

"A. Yes.

"Q. That is the testimony to which I refer.

"MR. KEYES—Give her a chance to look at it.

"MR. COGHLAN—Read it, if you desire.

"A. 'When he first came there and took a room, who was the first person that he met that you know of afterwards? This fellow Schmitty came there soon afterwards.' I said 'Soon afterwards' but how soon—'perhaps in an hour or a couple of hours afterwards. Schmitty came over a couple of hours afterwards. Do you know where Schmitty lived?'

"Q. The last question I didn't ask you. I simply referred to that. Now, you have stated here, as I remember your testimony, that Schmitty rang you up and said that he had been instrumental in directing Mr. Brice to come to your place, is that the gist of the conversation?

"A. Yes sir.

"Q. You didn't make any statement of

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that kind before the Grand Jury, that I can find here.

"MR. KEYES—Just a moment, please. I object to the asking of that question, if the Court please, and I want to cite counsel to the same question which he asked a while ago, which is incorrect, the statement that he asked—

"MR. COGHLAN—Now, just a minute. We are cross-examining this witness.

"MR. KEYES—I want to make my objection.

"MR. COGHLAN—This is an important witness for the prosecution, and if counsel is afraid of these questions—

"MR. KEYES—No, no, I'm not afraid.

"MR. COGHLAN—he can come back on his re-direct examination.

"THE COURT—One counsel at a time.

"MR. COGHLAN—We are not going to be interrupted after this fashion, if the Court please, if we can help it. I appeal to your Honor for fair play in this trial. I think my deportment deserves that at the Court's hands and at counsel's.

"MR. KEYES—So do I. I make an objection—

"MR. COGHLAN—I want a chance to cross-examine this witness.

"MR. KEYES—You will get a chance; I am making an objection, if your Honor please, that this is not proper, and is not fair, in view of the previous question counsel asked along the same line. Now he asked—

"THE COURT—Let the reporter read the question.

"(Last question read.)

"MR. KEYES—I move to strike out that

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question, if the Court please, on the ground it is improper, and not proper cross-examination.

"THE COURT—Yes.

"MR. COGHLAN—Did you make any such statement as that, at the time you testified before the Grand Jury in 1910?

"MR. KEYES—We make the objection to that it is incompetent, irrelevant and immaterial; not cross-examination; not the best evidence.

"MR. COGHLAN—I now proffer her testimony in order to ascertain whether she did; let her ascertain.

"MR. KEYES—Let her read the testimony.

"MR. COGHLAN—Will your Honor rule on the question?

"THE COURT—Objection sustained."

(Rep's. Trans., p. 6426, line 10, to 6430, line 25.)

It will be remembered that Mrs. Ingersoll on her direct examination had identified a certain card on which was written a telephone number and the words, "ask for Brice." With relation to this incident counsel for the defendant sought to interrogate the witness on cross-examination and the following proceedings occurred:

"Now, I ask you again, and I refer you to the testimony that you gave before the Grand Jury, have you ever testified before about that incident before the Grand Jury?

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"MR. KEYES—We make the same objection, and we ask the Court to instruct counsel not to ask those questions? It is not a proper question, and counsel knows it.

"MR. COGHLAN—I have a perfect knowledge of the law on that subject and I believe I have a right to ask it.

"THE COURT—Objection sustained.

"MR. COGHLAN—Yes, your Honor.

"Q. Now, I will ask you if you didn't testify as follows with relation—

"MR. WOOLWINE—What page?

"MR. COGHLAN—Wait until I am finished, and I will give you the page very gladly. With relation to the incident of Mr. Brice's leaving your house, and leaving with you some memorandum or card, beginning on page 591, at about line 26: 'Q. How long did he stay there? A. He stayed there from the 4th to the 14th. Q. Stayed for two weeks, and stayed— A. and stayed 10 days. Q. When he left your house on the 14th, did he tell you where he was going? A. He said he was going to Alameda, I think; across the bay. Q. Did he leave you a telephone address? A. Yes. Q. Did he write it himself? A. Yes. Q. In your presence? A. Yes. Q. I show you a piece of cardboard, I will ask you if you recognize that as the memorandum that he gave you. A. Yes, this is the one. Of course, this was not on there—' referring to something—

"MR. KEYES—'Of course, this was on there.'

"MR. COGHLAN—(Reading) 'Was on there, and I saw him write this, "ask for Brice."' You mean, I presume, that the writing was on there at that time?

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"A. The pencil writing—

"MR. KEYES—We object to what she meant. The answer has not been finished.

"MR. COGHLAN—'But the telephone was already written on the cardboard with ink. You saw him write that? A. I saw him write that "ask for Brice." Q. Do you know what number that is? A. That is the number of the Argonaut Hotel.' That is the way you testified with respect to this matter, isn't it, before the Grand Jury?

"MR. KEYES—Just a moment. We object upon the ground it is not inconsistent with her testimony, and does not tend to impeach her; irrelevant and immaterial.

"MR. COGHLAN—That is all that you referred to?

"MR. KEYES—Just a moment.

"MR. COGHLAN—Before the Grand Jury in this case, is it not?

"MR. KEYES—We make the same objection.

"THE COURT—Objection sustained.

"MR. COGHLAN—I will ask you if you testified with respect to that incident as follows, on page 597: 'Q. What did he say was his reason for going to the Argonaut when he had part of his week's room rent paid at your place? A. He didn't give me an excuse. He said he was going out of town, across the bay for a few days, and that when he came back he would come to my house, but instead of that he gave me the Argonaut Hotel phone number.' Did you testify so before the Grand Jury in this case?

"MR. KEYES—We make the same objection, incompetent, irrelevant and immaterial. It doesn't tend to impeach the wit-

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ness; not inconsistent with her testimony at the present time.

"THE COURT—Sustained.

"MR. COGHLAN—I think it throws some light on the testimony of the witness, and is not intending any more than to do that. I want to test what she testified as a test to her memory, which I am entitled to in this case. I have a right to ascertain, I respectfully submit, what she failed to remember before that august body which returned this indictment. I have a right to bring out whether or not she made statements there, which she now, for the first time adds to her testimony before this jury.

"MR. KEYES—Why don't you do it?

"MR. COGHLAN—I am doing it.

"MR. KEYES—I understood the Court to sustain the objection.

"MR. COGHLAN—I don't think this time on this last objection.

"THE COURT—Yes, I did, on the ground it didn't tend to impeach her testimony, and was not inconsistent with her present testimony.

"MR. COGHLAN—It is a matter of fact, upon the occasion of his leaving there, when he left this card with you, that he gave you this card for your personal reference? Didn't he?

"A. He told me if anyone called up, and he also said if Schmitty called up to tell him to call that number.

"Q. Didn't he state to you that if any girl or woman called up?

"A. He said, 'If anybody calls up.'

"Q. Didn't he used the word 'woman' or 'girl'?

"A. No, I don't think he did.

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"Q. You don't think he did?

"A. I am not positive. I don't remember.

"Q. Have you ever told anybody about this—I mean, any body of men examining into the matter that is now before us that he ever left that card there for Mr. Schmidt?

"MR. KEYES—That is objected to as improper cross-examination, irrelevant and immaterial.

"MR. COGHLAN—I submit that it is proper, your Honor.

"THE COURT—Sustained."

(Rep's. Trans., p. 6434, line 1, to p. 6437, line 14.)

On cross-examination Mrs. Ingersoll testified that she had received certain money from the prosecution for "expenses." She further testified, "I certainly think that I will be entitled to something for this." She was then asked, "Are you now testifying in the hope of receiving some reward or some compensation in this case as a witness?" This question was objected to as immaterial, incompetent and not proper cross-examination, and the Court sustained the objection.

(Rep's. Trans., p. 6445.)

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She was also asked, "Now, Mrs. Ingersoll, are you working at this time?" An objection to this question was also sustained.

(Rep's. Trans., p. 6446.)

After the witness had testified that she had previously appeared as a witness in the McNamara cases, she was asked by counsel for the defendant, "How much did you get the last time you were here?" This was objected to as immaterial and not cross-examination, and the Court sustained the objection.

(Rep's. Trans., p. 6449.)

She was then asked, "You know all the members of the District Attorney's office, don't you?" To this question the same objection and the same ruling were made.

(Rep's. Trans., ps. 6449-6450.)

The witness testified that she had been subpoenaed some two or three months before the trial started. She was asked, "And you have been a witness ever since that time and in the pay of the prosecution, haven't you?" The Court also sustained an objection to this question.

(Rep's. Trans., p. 6451.)

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The witness was further asked if it was not a fact that she had been employed as a detective in the case under the name of Orlena Scullin. An objection to this question was made upon the ground that it was assuming something not in evidence, contrary to the evidence and improper cross-examination. This objection also was sustained.

(Rep's. Trans., ps. 6453-6454.)

(26) RESTRICTION OF THE CROSS-EXAMINATION OF McCALL: The witness Bruce McCall, an employee of the Giant Powder Company, from whom it was alleged that Schmidt, Caplan and McNamara procured the powder afterwards used in the destruction of the Times Building, had identified the defendant Schmidt positively as one of the men who came to the office of the company in quest of explosives. He was thus an extremely important witness for the prosecution. On cross-examination of this witness the defendant sought to show that the Giant Powder Company had failed to comply with the provisions of section 375a of the Penal Code, which provides as follows:

> "It is the duty of each and every person, association, joint-stock company, and corporation, manufacturing, storing, selling, transferring, disposing of, or in any manner

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dealing in, or with, or using, or giving out nitroglycerin, dynamite, vigorite, hercules powder, giant powder, or other high explosive, by whatever name known, to keep at all times an accurate journal, or book or record, in which must be entered, from time to time, as it is made, each and every sale, delivery, transfer, gift, or other disposition made by such person, firm, association, joint-stock company, or corporation, in the course of business or otherwise, of any quantity of such explosive substance. Such journal or record book must show, in a legible handwriting, to be entered therein at the time, a complete history of each transaction, stating the name and quantity of the explosive sold, delivered, given away, transferred, or otherwise disposed of; the name, place of residence, or business of the purchaser, or transferee; the name of the individual to whom delivered, with his or her address, with a description of such individual sufficient for identification. Such journal or record-book must be kept by the person, firm, association, joint-stock company, or corporation so selling, delivering, or otherwise disposing of such explosive substance, or substances, in his or their principal office or place of business at all times subject to the inspection and examination of the peace-officers, or other police authorities of the State, county or municipality where the same is situated, on proper demand made therefor. Any failure or neglect to keep such book, or to make the proper entries therein at the time of the transaction, as herein provided, or to exhibit the same to the peace-officers or other police authorities on demand, is deemed a misdemeanor and

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punishable accordingly. In addition to such punishment, and as a cumulative penalty, such person, firm, association, joint-stock company, or corporation so offending, shall forfeit, for each offense, the sum of two hundred and fifty dollars, to be recovered in any court of competent jurisdiction. The party instituting an action for such forfeiture shall not be entitled to dismiss the same without consent of the court before which the suit has been instituted. Nor shall any judgment recovered be settled, satisfied, or discharged, save by order of such court, after full payment into court, and all moneys so collected must be paid to the party bringing the suit."

The defendant by means of this inquiry obviously sought to show that either the witness himself or the company by which he was employed had been threatened with prosecution for the violation of this section, and that the testimony of the witness was influenced by such threat. That the inquiry was a proper one is a matter too plain to admit of argument.

The Court, however, refused to permit this inquiry.

(Rep's. Trans., ps. 6606-6607.)

The Court also refused to permit similar inquiries to be made of the witness John H. Baker (ps. 6918-6919). Mr. Coghlan, one of the defendant's counsel, stated in this behalf:

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"We submit that we are entitled to find out "whether or not the members of this company "are stretching their testimony favorably to the "prosecution by reason of the fact that they "have been in fear from the beginning of this "thing, of the penalty of the law which pro-"vides that they must keep a journal or a rec-"ord, or they are guilty of a misdemeanor." The Court in sustaining the objection made the following comment: "If they have violated "the law it is your duty in the City of San "Francisco to prosecute them."

* * *

(27) The witness Meserve, a confessed employee of the Burns Detective Agency, who was hired by Burns to spy upon the defendant in New York, gave testimony which under the plain provisions of the Code it was the duty of the jury to view with caution. On the cross-examination of this witness counsel for the defendant sought to show that he had made statements to a Mrs. Bowles to the effect that he expected to receive a portion of a reward of $5,000 which had been offered for the apprehension of the defendant. The Court refused to permit this inquiry.

(Rep's. Trans., ps. 7097-7098.)

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THE DEFENDANT DEPRIVED OF THE RIGHT OF CROSS-EXAMINATION.

We have set forth in considerable detail, although with the utmost possible brevity, the instances in which the trial Judge impeded and restricted the cross-examination by the defendant of witnesses for the prosecution. The aggregate result of these rulings was simply to deprive the defendant of his right of cross-examination. Every one of the questions asked by the defendant's counsel were absolutely proper. Not only were they proper, but it was of the very highest importance to the defendant that the witnesses should be allowed to answer such questions. They all had a most vital bearing upon the interest, bias and credibility of important witnesses for the prosecution. If McManigal had been given employment at the instance of the prosecution and had been protected by the District Attorney when he had committed a crime at Universal City, if Mrs. Ingersoll was an operative in the employ of the prosecution and was testifying in the hope of receiving pecuniary compensation, if Ashworth had demanded money as a condition precedent to testifying, if McCall and Baker were testifying under a threat of prosecution, if Meserve expected to receive a reward,—these were facts which the defendant

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was certainly entitled to show on the cross-examination of these witnesses. The excerpts from the proceedings, on the cross-examination of these witnesses, speak for themselves. No argument should be necessary upon the subject. The Court, under the most elementary rules relating to the cross-examination of witnesses for the purpose of showing bias and interest, should have permitted the questions to be answered.

People vs. *Furtado,* 57 Cal., 345;
People vs. *Worthington,* 105 Cal., 166;
People vs. *Nihell,* 144 Cal., 200;
People vs. *Lee Ah Chuck,* 66 Cal., 662;
People vs. *Anderson,* 105 Cal., 32;
Hartman vs. *Rogers,* 69 Cal., 643;
People vs. *Wasson,* 65 Cal., 538;
People vs. *Gillis,* 97 Cal., 542;
People vs. *Mitchell,* 5 Cal. App., 45.

A case very strongly in point is *People* vs. *Schmitz,* 7 Cal. App., 330. In that case the defendant, who was Mayor of the City and County of San Francisco, was charged in the indictment with the crime of extortion. Abraham Ruef, the former political boss of San Francisco, who was the co-defendant and an alleged co-conspirator, was called to the stand as a witness for the prosecution. The trial

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Judge refused to permit him to answer certain proper questions put to him upon cross-examination. Concerning these rulings, Justice Cooper, who wrote the opinion of the Court, says:

> "The prosecution, under the claim that it was rebuttal, called for the first time the witness Ruef, who was allowed under defendant's objection and exception, to testify that about January or February, 1906, he gave to defendant at one time, $2,500 and at another $1,500 in currency, at the same time stating to defendant that it was part of the money he, the witness, had received from the French restaurants as a fee under his agreement with them, and that if defendant would receive it he would be glad to pay it to him, and that defendant did receive it. The evidence could not possibly have been rebuttal except for the purpose of contradicting the statement elicited from defendant on cross-examination; and as we have already held that such cross-examination was erroneous, it is not necessary to discuss the question in this regard further. The defendant's counsel asked many questions of the witness Ruef in cross-examination, to which objections were sustained, only a few of which we will notice, as they are enough to illustrate the view we entertain of the ruling.
>
> "The witness admitted that he had stated to the prosecution that if he should testify to the facts in all their details, as they are, the larger part of them would, in his judgment, be favorable to the defendant. Coun-

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sel for the defendant then asked the question: 'Well, what were those facts, state them now in detail in relation to this case?' The Court sustained the objection of the prosecution to this question. The witness testified that he had had many conversations with Mr. Burns, a detective in the employ of the prosecution, and with Mr. Heney, a deputy district attorney, as to his testimony, and as to leniency being shown him in case he should testify fully as to the facts. The attorney for the defendant then asked: 'Did you at any conversation with these gentlemen tell them that you would not stand for anything except complete immunity?' The Court sustained the objection of the District Attorney to this question upon the ground that it was irrelevant, incompetent and immaterial and no foundation had been laid. The witness had in the first place pleaded not guilty to the indictment in this case, but afterward withdrew his plea, and entered a plea of 'guilty.' Defendant's counsel, after eliciting such facts from the witness, asked him the following questions (referring to his plea of 'not guilty'):

"'Q. Was that true?'

"'Q. What do you mean then, Mr. Ruef, by that statement that you were not guilty of this charge?'

"'Q. Mr. Ruef, why, if you were not guilty in this case, as you stated, did you change your plea after you had your conversation with Mr. Burns, in which he told you he would do all he could for you to secure leniency in these indictments?'

"To each of the above questions the Court sustained objections made by the District

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Attorney upon the ground that they were not proper cross-examination.

"The attention of this witness was called to a verified answer filed by him in November, 1906, in a civil suit which had been brought against him by the District Attorney, in which he swore he had not committed any felony or any crime in any way in connection with the matters alleged in the complaint which had been filed against him. Defendant's counsel then, with the answer before them, asked the witness several questions as to portions of the answer, and as to why, after swearing that he had not committed any crime, he afterward entered a plea of guilty as to the same matter. The Court again sustained the objection of the District Attorney to each and every such question as not proper cross-examination.

"The witness was asked as to the time of paying or giving to the defendant the money in currency as testified to by him, and defendant's counsel then asked the following question: 'Q. Did you have, prior to that time, any conversation with defendant in relation to any division, or giving him any part of any fee which you received from the French restaurant-keepers?' The Court, under the objection of the prosecution, refused to permit the witness to answer. Other questions were:

"'Q. Mr. Ruef, did you go to the French restaurant-keepers, or did they come to you?'

"'Q. Did you tell the defendant in any conversation that you had ever threatened any restaurant-keeper, that if they did not

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pay you any money their licenses would be held up?'

"'Q. Now I will ask you this, Mr. Ruef, if you are not now giving your testimony under the expectation of immunity —complete immunity?'

"The Court refused to permit any of these questions to be answered, and held that they were not proper cross-examination.

"These rulings were erroneous and highly prejudicial to defendant. The witness Ruef was jointly accused of the alleged crime for which the defendant was being tried. Not only this, but he had confessed it and pleaded guilty to it. He was the party who made the contract with the proprietors of the French restaurants, and who received the money from them. After having done all these things, and after having confessed himself guilty of a felony, he turned and took the witness stand against one who had been his friend—at least his political friend. He not only confessed himself a criminal, but went upon the stand to assist in convicting his co-defendant of the alleged crime of which he had pleaded guilty. His conduct had been such that under the plain provisions of the Penal Code his evidence was branded so that the defendant could not have been convicted upon it without corroborative testimony. Then was it not fair and just to defendant, in order to investigate and arrive at the truth, that the reasons, motives and surroundings of the witness should be laid bare. He had changed his plea of 'not guilty' to one of 'guilty,' and his attitude of friendship to defendant to that of a witness aiding and assisting the prosecution. If he had been promised com-

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plete immunity, did not the defendant have the right to lay the fact before the jury so that they might determine the weight to give his evidence? If he had, in another case, before any promise had been made to him, sworn to facts inconsistent with his present testimony, was that no concern of the defendant? The jury had the right to believe the witness Ruef, but the defendant had the right to investigate every motive, every statement, every act, and every thing that might in any reasonable way have influenced him in his testimony, and to have the jury know this before passing its judgment. In such cases it is elementary that the broadest scope should be allowed in the cross-examination of the witness. It is provided in the Code of Civil Procedure, section 1844, that the presumption that a witness speaks the truth may be 'repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty or integrity, or his motives, or by contradictory evidence, and the jury are the exclusive judges of his credibility' (see *People* vs. *Mitchell,* 5 Cal. App., 45, 89 Pac., 853). It is further laid down in the code (Civ. Code, sec. 2061) 'that the testimony of an accomplice ought to be viewed with distrust.'

"The Court allowed the prosecution a broad range in the cross-examination of the defendant, who is protected by the statute, and who had not confessed to having committed a crime; while, on the other hand, it narrowed and confined the cross-examination of the co-conspirator, who was not

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protected by the statute, and who had branded himself as a felon. Such is not the policy of the law."

The same principles which are laid down in the Schmitz case are highly applicable to the case at bar. Indeed, the rulings in the Schmitz case in restricting the cross-examination by counsel for the defendant were no more erroneous, and were not by any means so numerous, as those in the case at bar. The defendant had the fundamental right to show by cross-examination the interest, bias or prejudice of the witnesses. He had the right to investigate every motive, every statement, every act and every thing that might in any reasonable way have influenced them in their testimony. This right was denied him. The denial of this right was an error which could not be cured. The defendant was convicted upon the testimony of witnesses whose hostility, bias, motives, and financial cupidity he was not permitted to show.

(28) THE SCRAP OF CONVERSATION OVERHEARD BY MRS. INGERSOLL: Justice Patterson of the Supreme Court of California sometimes wrote an opinion in which he did not attempt to conceal his impatience at the commission of flagrant errors by trial judges. On such occasions his opin-

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ions make remarkably interesting reading. They have none of the judicial coldness about them. They are rather the work of an excellent lawyer who could not abide prejudice or incompetency. One of his characteristic beginnings is the opening paragraph in *People* vs. *Irwin,* 77 Cal., 494:

> "The record herein bristles all over with errors. It is another case in which an overzealous prosecution has led the Court into prejudicial errors, necessitating a reversal of the judgment.".

It is remarkable that in the present case the trial Judge committed one of the same errors denounced in *People* vs. *Irwin.* On her direct examination Mrs. Ingersoll was permitted to give the following testimony relative to a conversation which she alleged that she had overheard between Schmidt and McNamara:

> "Q. Did you ever at any time hear a conversation between them?
>
> "A. I overheard just a word or so; *I couldn't connect it, hardly; I didn't pay any attention what it was.*
>
> "Q. State anything to the jury you heard spoken by either of these men while you were there.
>
> "MR. COGHLAN—That is objected to upon the ground it is not competent, relevant or material, no foundation for it. She didn't hear any more than a word, and doesn't understand what it was, any more

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than we; they are not entitled to it, unless she relates the whole conversation, or an intelligible part of it.

"THE COURT—If you heard it you may state it.

"A. Well, I could hear them talking, and seemed as though that Brice was trying to get him to do it. I thought it was getting a job, something of the kind. I didn't know what it was. I thought it was printing business, you know, but it seems Schmitty didn't want to do what he wanted him to do at first. I thought it was all about printing business.

"THE COURT—No, just what you heard them say.

"A. I couldn't say just exactly the words, exactly.

"MR. KEYES—Did you hear anything about any job. Did you hear the word 'job' mentioned?

"MR. McKENZIE—Just a minute. We object to this as leading, as hearsay, incompetent, irrelevant and immaterial, and assign the asking of that question as misconduct.

"THE COURT—Objection overruled.

"A. Well, I don't know what about a job.

"THE COURT—You were asked if you heard them speak about a job.

"MR. McKENZIE—I submit the question has been answered.

"MR. KEYES—I understand you don't remember of hearing that word; is that it?

"A. Yes."

(Rep's. Trans., p. 6407, line 24, down to p. 6409, line 21.)

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This evidence was highly prejudicial in view of the fact that some of the Eastern dynamiters repeatedly referred to the explosions produced by them as "jobs." Its admission was utterly erroneous. The witness was unable to distinguish any other portion of the conversation. In the Irwin case the Court says:

> "One of the witnesses testified that while listening at a grating in the outside wall of the jail, he overheard a portion of a conversation between Prewett and the defendant while they were confined in jail; that the defendant overheard Irwin tell Prewett it would 'be better to let the old son-of-a-bitch leave.' There is nothing to show to whom he referred. The witness was unable to state or to understand anything that was said by either party to the conversation before or after the remark quoted. It was error to admit this scrap of conversation (*People* vs. *Keith,* 50 Cal., 139; *People* vs. *Ah Mee,* 48 Cal., 238)."

* * *

(29) THE ARRIVAL OF J. B. McNAMARA AT MRS. INGERSOLL'S HOUSE AFTER THE EXPLOSION: The Court over the objection of counsel for the defendant permitted the witness Mrs. Ingersoll to testify as to an episode that occurred at her house in San Francisco on the evening of October 1st, 1910. That was nearly twenty-four hours after

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the Times explosion. The testimony of the witness, together with the objections made and the rulings of the Court thereon, are as follows:

"Now, Mrs. Ingersoll, did you see Brice or J. B. McNamara from the time he left your house on the 14th of September, 1910, at any time after that? I will withdraw that question. When did you next see McNamara after he left your house on September 14, 1910?

"MR. McKENZIE—Now, we object to this question on the ground it is incompetent, irrelevant and immaterial, unless it is confined to prior to October 1, 1910. I object to the form of the question.

"THE COURT—Overruled.

"A. Well, I saw him the night of October 1st, about —

"MR. McKENZIE—Just a minute. We object to it as incompetent, irrelevant and immaterial.

"MR. KEYES—Showing association of these two people, if the Court please, Brice and the defendant.

"MR. COGHLAN—That is not the object at all.

"MR. KEYES—It is the object.

"MR. COGHLAN—No—

"MR. KEYES—Now, I know what my purpose is, if the Court please, and I have stated what my purpose is. Counsel has no right to make that assertion without knowing what he is talking about.

"MR. COGHLAN—What is your purpose?

"MR. KEYES—I told you my purpose,

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for the purpose of showing association of this defendant and J. B. McNamara.

"MR. COGHLAN—We can get along without getting angry, I hope.

"MR. KEYES—Now, what was the answer to that question?

(Question and answer read.)

"MR. KEYES—What time?

"A. Well, he phoned me before he came up.

"MR. McKENZIE—Well, now, we object to this and ask it go out on the ground as not responsive; we object to this entire incident upon the ground it is not competent, relevant or material, and no foundation.

"THE COURT—Overruled.

"MR. KEYES—What time did the defendant phone to you, Mrs. Ingersoll?

"MR. McKENZIE—We make the same objection, incompetent, irrelevant and immaterial.

"THE COURT—Overruled.

"A. He phoned about 11 o'clock on Saturday night, October 1st.

"MR. KEYES—And you had a convertion with him at that time, did you?

"A. Yes; he wanted to see if he could get a room.

"Q. State what he said to you?

"A. He asked me if he could get a room and I told him I didn't have any at all that night, it was too late, and anyway, I didn't have any room for him.

"MR. McKENZIE—Who is this? She made a mistake. She said the defendant. You didn't mean this defendant said that, did you?

"A. I mean J. B. Brice.

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"MR. McKENZIE—Yes.

"A. As I knew him at that time.

"MR. KEYES—His name now is J. B. McNamara?

"A. Yes.

"Q. Was that all the conversation you had with him over the phone on that occasion?

"A. Well, yes, that was all.

"MR. McKENZIE—Now, we move that be stricken out on the ground it is hearsay, incompetent, irrelevant and immaterial.

"THE COURT—Motion denied.

"MR. KEYES—Now, shortly after that phone call, did you see him?

"A. The door bell—

"MR. McKENZIE—Just a minute. We make the same objection, incompetent, irrelevant and immaterial, no foundation. Your Honor has made a ruling with respect to this after October 1st incident.

"THE COURT—Overruled. No, not covering this matter. I made a ruling covering other explosions and acts of the conspirators.

"MR. McKENZIE—Well, this is supposed to be the act of the conspirator, J. B. Brice.

"MR. KEYES—This is a co-defendant.

"MR. COGHLAN—We know what this incident is, if the Court please, and we are ready to offer authorities to show it is not admissible in evidence.

"MR. KEYES—The objection has been overruled, I believe.

(Question read.)

"A. Yes.

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"Q. At what time?

"MR. McKENZIE—Same objection; incompetent, irrelevant and immaterial.

"THE COURT—Overruled.

"A. A little later he came.

"MR. McKENZIE—We move to strike it out on the same grounds heretofore offered in the objection.

"THE COURT—Denied.

"MR. KEYES—And did he ring the door bell?

"A. Yes sir.

"MR. McKENZIE—Just a minute. We object to this as being incompetent, irrelevant and immaterial.

"MR. KEYES—Now, we stipulate that the objection may be—

"MR. McKENZIE—I will make my objection to each and every question and move to strike it out as to all this incident.

"MR. KEYES—Very well.

"THE COURT—Proceed.

"MR. KEYES—You say the doorbell rang?

"A. Yes sir.

"MR. McKENZIE—Just a minute; we move to strike that out on the same ground heretofore offered.

"THE COURT—Motion denied.

"MR. KEYES—What did you do?

"MR. McKENZIE—I object to it.

"A. I opened the door.

"Q. Who was it?

"A. It was J. B. Brice, as I knew him.

"Q. And did you have a conversation with him there?

"A. Yes.

"MR. McKENZIE—Now, just a minute—

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"MR. KEYES—Now, state what was said.

"MR. McKENZIE—We object as being incompetent, irrelevant and immaterial, and hearsay, no foundation.

"THE COURT—Proceed.

"A. And rather than have him talk in the hallway, where there were other people living, I asked him to step inside.

"MR. McKENZIE—We move to strike this out on the ground it is not responsive.

"MR. KEYES—You asked him to step inside, you say?

"A. And he stepped inside.

"MR. McKENZIE—Well, your Honor has not ruled on that.

"THE COURT—Those objections are all overruled, until we reach a point at which I think they ought to be sustained.

"MR. KEYES—All right; you asked him to step inside?

"A. Step inside, and I told him that he could go away, that I had no room for him that night.

"Q. Now, was he alone at that time?

"A. He was alone; yes sir.

"Q. Did he have anything with him?

"A. No sir.

"Q. Had no suit case?

"A. Had no suit case, no sir.

"Q. Now, state what he said to you at that time.

"MR. McKENZIE—Now, we make the same objection, incompetent, irrelevant and immaterial, and hearsay.

"THE COURT—Overruled.

"MR. KEYES—Go right ahead.

"A. He stated he wanted to stay there that night, because he didn't want to bother

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getting a room somewhere else; he said, any kind of accommodation would suit him, and I told him that I could not bother fixing a room at that time of night, and he would have to go, and he insisted on him taking the front room, just as it was, sleeping on the davenport, and told me that he would pay the house rent for a whole month, if I would let him stay there that night.

"MR. McKENZIE—I move to strike that out on the ground it is incompetent, irrelevant and immaterial hearsay, and no foundation.

"THE COURT—Overruled.

"MR. KEYES—Did you let him stay there at that time, Mrs. Ingersoll?

"MR. McKENZIE—Same objection.

"A. No, I did not let him stay; he left, and I told him to call the next day and I would get the room prepared for him. I was figuring on getting rid of him that night, and giving him the same answer tomorrow.

"MR. McKENZIE—We move to strike that out on the ground it is a conclusion of the witness.

"THE COURT—Yes, it will be stricken out.

"MR. KEYES—You say you told him at that time to call up tomorrow?

"A. Yes sir.

"Q. What time was he there on that evening?

"MR. McKENZIE—Same objection.

"A. That was 11 o'clock that night.

"MR. KEYES—11 o'clock?

"A. Between 11 and 12.

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"Q. That was on Saturday, the 1st of October?

"A. Yes sir.

"Q. Did he call up next day?

"A. Yes sir.

"MR. McKENZIE — Same objection. Would you kindly hesitate, until I object, madam, please?

"MR. KEYES—Well, I understood the Court to say that he was not going to rule on the objections.

"MR. McKENZIE—Well, I have a right to object; they cannot deny me that.

"MR. KEYES—We are not trying to deny you anything.

"MR. McKENZIE—Well, I have a right to get my objection in.

"MR. COGHLAN—You will do that, will you not, just hesitate a moment?

"MR. KEYES—Your objection finished?

"MR. McKENZIE—It is; proceed, Mr. Keyes.

"MR. KEYES—Now, you say he called up next day?

"A. Yes sir.

"Q. What time?

"A. Around 5 or 6 o'clock in the evening.

"Did you have a conversation with him then?

"A. Yes sir.

"Q. What was said?

"MR. McKENZIE—Now, we object as being incompetent, irrelevant and immaterial, no foundation, hearsay, and not binding on this defendant.

"THE COURT—Overruled.

"MR. KEYES—State the conversation.

"A. He didn't say anything more about

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a room; he just talked over the phone; he didn't say where he was rooming.

"MR. McKENZIE—We move to strike this out on the ground it is immaterial, incompetent and irrelevant.

"THE COURT—It will be stricken out.

"MR. KEYES—You remember what he did say, Mrs. Ingersoll?

"MR. McKENZIE—We offer the further objection it has already been asked and answered; incompetent, irrelevant and immaterial, no foundation, and hearsay.

"THE COURT—Overruled.

"A. Well, I don't really know what he did say, over the phone.

"MR. KEYES—You don't remember?

"A. No, nothing important."

(Rep's. Trans., p. 6413, line 14 to 6420, line 18.)

At the time that the conversation related in the foregoing testimony took place, the Times Building had been destroyed, and the deceased had come to his untimely end. If Schmidt and J. B. McNamara were co-conspirators, the object of their conspiracy had been accomplished. The conspiracy itself had become merged in the completed offense. The most that the foregoing evidence could possibly prove would be some guilty knowledge on the part of J. B. McNamara. It was utterly inadmissible against the defendant Schmidt. The authorities are uniform to the effect that

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the flight of a co-conspirator is not evidence of the guilt of the defendant on trial.

McKenzie vs. *State,* 32 Tex. Crim. Reps., 579;
Landers vs. *State,* 63 So. W., 557;
People vs. *Sharp,* 107 N. Y., 427, 14 N. E., 319;
State vs. *Barham,* 82 Mo., 67;
Mullins vs. *Com.,* 3 Ky. Law Reps., 686;
Smith vs. *People,* 38 Colo., 509, 88 Pac., 453.

This is the law in California. In *People* vs. *Stanley,* 47 Cal., 113, the Court says:

"It appeared in evidence at the trial that the defendant, and the three persons jointly indicted with him, were discovered by a policeman in the act of attempting to perpetrate the robbery; and that immediately after the attempt they proceeded to a saloon, where they were all soon afterwards arrested by the same and another policeman; that after leaving the saloon, and whilst being conducted to the jail, one of them (other than the defendant) broke away from the officer having him in charge, and attempted to escape by flight; but after a considerable chase, was re-captured. The evidence of the attempted escape was admitted against the objection of the defendant, and this ruling is assigned as error. In admitting the evidence, the Court below doubtless proceeded on the theory that the

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conspiracy to perpetrate the robbery having been proved, the flight of either one of the conspirators was admissible as a circumstance tending to prove the guilt of all. It is well settled that the flight of a person suspected of crime is a circumstance to be weighed by the jury, as tending, in some degree, to prove a consciousness of guilt, and is entitled to more or less weight, according to the circumstances of the particular case. Such evidence is received "not as a part of the *res gestae* of the criminal act itself, but as indicative of a guilty mind" (Roscoe Cr. Ev., 18). At most it is but a circumstance tending to establish a consciousness of guilt in the person fleeing; and it would be extending the principle to a great length to hold that the flight of one person tends to establish the guilt of another person. We have been referred to no case which goes to that extent.

"In *The State* vs. *Rand,* 33 N. H., 216, the defendant was tried as an accessory, before the conviction of the principal, on the charge that the principal had broken into and robbed a bank, and that the defendant was an accessory. The Court very properly held that for the purpose of proving the guilt of the principal, evidence of his concealment and flight, immediately after the perpetration of the crime, was admissible. But it was received solely to establish the guilt of the principal, and not the accessory.

"The rule is well settled that the acts of an accomplice are not evidence against the accused, unless they constitute a part of the *res gestae,* and occur during the pendency

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of the criminal enterprise, and are in furtherance of its objects (*People* v. *Moore*, 45 Cal., 19; 1 Greenl. Ev., sec. 111; 3 Phil. Ev., 396, note 234).

"The flight of the accomplice in this case occurred after the criminal enterprise had ended, and was not in furtherance of its object, nor a part of the *res gestae*."

The rule is uniform that acts and declarations of co-conspirators after the accomplishment of the criminal design are inadmissible against a defendant in a criminal case. We have cited only those authorities, however, which have a direct bearing upon the question of flight. In the next volume of this brief we shall discuss more thoroughly the law relative to the admissibility of the acts of co-conspirators occurring after the completion of the conspiracy, in connection with the admission in this case of certain evidence of a very startling character.

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