

New Jersey Court of Errors and Appeals.

THE STATE OF NEW JERSEY, <i>Defendant in Error,</i> vs. PASQUALE DELISO, <i>Plaintiff in Error.</i>	} On Error to Middlesex Oyer.
---	-------------------------------------

REPLY TO SUPPLEMENTAL BRIEF ON BEHALF OF THE STATE.

The instruction of the Court referred to in the State's supplemental brief was as follows:

"The testimony of the boy Domeinio and the brother Joseph is uncontradicted that there was a threat to kill, that Luigi was dragged from under the cot and pleaded for mercy and kissed the hand of his assailant and was shot. If you believe that, the guilty person was guilty of murder in the first degree."

This is as direct and positive as any proposition of law which the charge contains, and it is complete in itself.

Although the Judge had previously charged that intent to kill and deliberation and premeditation are essential to murder in the first degree, he here tells them that if the facts are as stated, the guilty person is guilty of murder in the first degree; in other words, that the

facts are conclusive evidence of the mental condition necessary to the crime.

The jury could get but one idea from this language, namely, that the facts recited (if found by the jury) necessarily made out a case of murder in the first degree and dispensed with any inquiry as to intent to kill or deliberation or premeditation. After such a charge it is not probable that the jury gave any attention at all to the question of intent or deliberation or premeditation. Its necessary effect was to withdraw these questions entirely from their consideration. The determination of the Court was thus substituted for that of the jury, not as to the credibility of the evidence (for that was expressly left to the jury, although they were reminded that the testimony was uncontradicted), but as to its effect—as to the inferences to be drawn from it.

That this was error cannot be denied, for no matter how clear the evidence may be, the specific intent to kill and deliberation and premeditation must always be found by the jury as *facts*, and are never questions of law. The cases cited on the part of the State do not sustain the proposition that they can ever be properly withdrawn from the jury. The remark in the Donnelly case was incidental only and not the basis of the decision. This court in fact approved the construction of the statute which had been adopted by the trial court in that case. Moreover, it would appear that the murder in the Donnelly case was committed in an attack made upon the deceased while in bed (2 *Dutcher*, 498, 499), in the course of an attempt at robbery.

In the *Graves* case, 16 *Vroom*, 347, no question was made in this court as to intent or deliberation. The murder was committed by lying in wait (p. 349, bottom), and in such case by the statute, the question of intent is eliminated.

In the *Sparf* case, 156 *U. S.* 51, the charge was that there was nothing to reduce the crime below the grade of murder. There was a confession and the murder was committed in pursuance of a conspiracy.

The question, moreover, was not as to the degree of murder and so dependent upon *intent*, but was between murder and manslaughter. A similar instruction was sustained in this court in *State v. Bectsa*, 42 *Vroom*, 322. But in each of these cases the Court declared only a conclusion of law from facts admitted or left to the jury. No inferences of fact were drawn by the Court.

Nor can it be said that the jury must necessarily have reached the same conclusion if the question had been submitted to them, and therefore the error was not prejudicial. This is only another way of saying that there was nothing to leave to the jury. But the responsibility of deciding as to the vital and distinctive features of the crime of murder in the first degree, is too grave to be assumed by any Judge or Court. It should be enough to say that it is not in our system committed to any Judge or Court.

This Court has repeatedly decided in civil cases, where the measure of proof required is a mere preponderance of the evidence, that the case can only be taken from the jury where not only facts are undisputed but the inferences from the facts also.

In a criminal case, and especially in a capital case, the reason for this rule is infinitely strengthened. No court would direct a verdict for the State in a case of murder in the first degree. In every criminal case each one of the twelve jurors must be convinced beyond a reasonable doubt or there can be no verdict of guilty. There is no presumption that the jury would not have had a reasonable doubt merely because the trial court or court of review may not think a doubt reasonable. A doubt as to the intent to kill which might have seemed reasonable to anyone of the jurors might have prevented the verdict arrived at in this case under the stress of this charge.

Where error has been committed the presumption is that it was injurious and reversal must follow, unless it is absolutely clear that no injury could have resulted.

As suggested in our original brief, there were circumstances in the case from which a doubt might reasonably be entertained whether the defendant, (if he was the guilty person), intended to take life.

The judgment therefore should be reversed.

ALFRED S. MARCH,

ALAN H. STRONG,

Of Counsel with Plaintiff in Error.

New Jersey Court of Errors and Appeals.

THE STATE,
vs.
PASQUALE DELISSIO.

SUPPLEMENTAL BRIEF.

This supplemental brief is designed to apply to the twenty-third Assignment of Error, which relates to the charge of the Court to the effect, that if the Jury believe that the attack was made after midnight, that there was a threat to kill, that Luigi was dragged from under the cot, and pleaded for mercy, and kissed the hand of the assailant and was shot, the perpetrator was guilty of murder in the first degree.

The dwelling house was broken into by night and the uncontradicted testimony is that the perpetrator of the deed said that the deceased must die, this at common law was burglary. "He that by night breaketh and entereth into a mansion house with intent to commit a felony," is Blackstones definition of that crime—4th Blackstone, 224.

Where under the proofs in a homicide case, the killing is shown to have been committed by lying in wait, and by a preconceived plan wilfully and deliberately to take life, it is not error to instruct the jury that if the respondent is guilty at all he is guilty of murder in the first degree.

People vs. Repke, 103 Mich. 459.

In *Williamson vs. State*, 130 Ala. 107 on a trial under an indictment for murder, when all the evidence in the case, including the testimony of the defendant, showed that the defendant was guilty of murder, and the evidence clearly showed a motive for the commission of

the deed that defendant acted upon such motive, that he determined on the killing beforehand and made preparation therefore; there was no justification or excuse for the killing; it is not error for the Court to instruct the jury at the request of its Solicitor that "if you believe all the evidence in this case beyond a reasonable doubt, you must convict the defendant."

In *Donnelly vs. State*, 2 *Dutch*. 617, the Court of Appeals said that the nature and character of the wound &c. indicated that the perpetrator could have had no other design than to take life, and any view of the Statute which might have been taken by the trial court could not have injuriously affected the defendant.

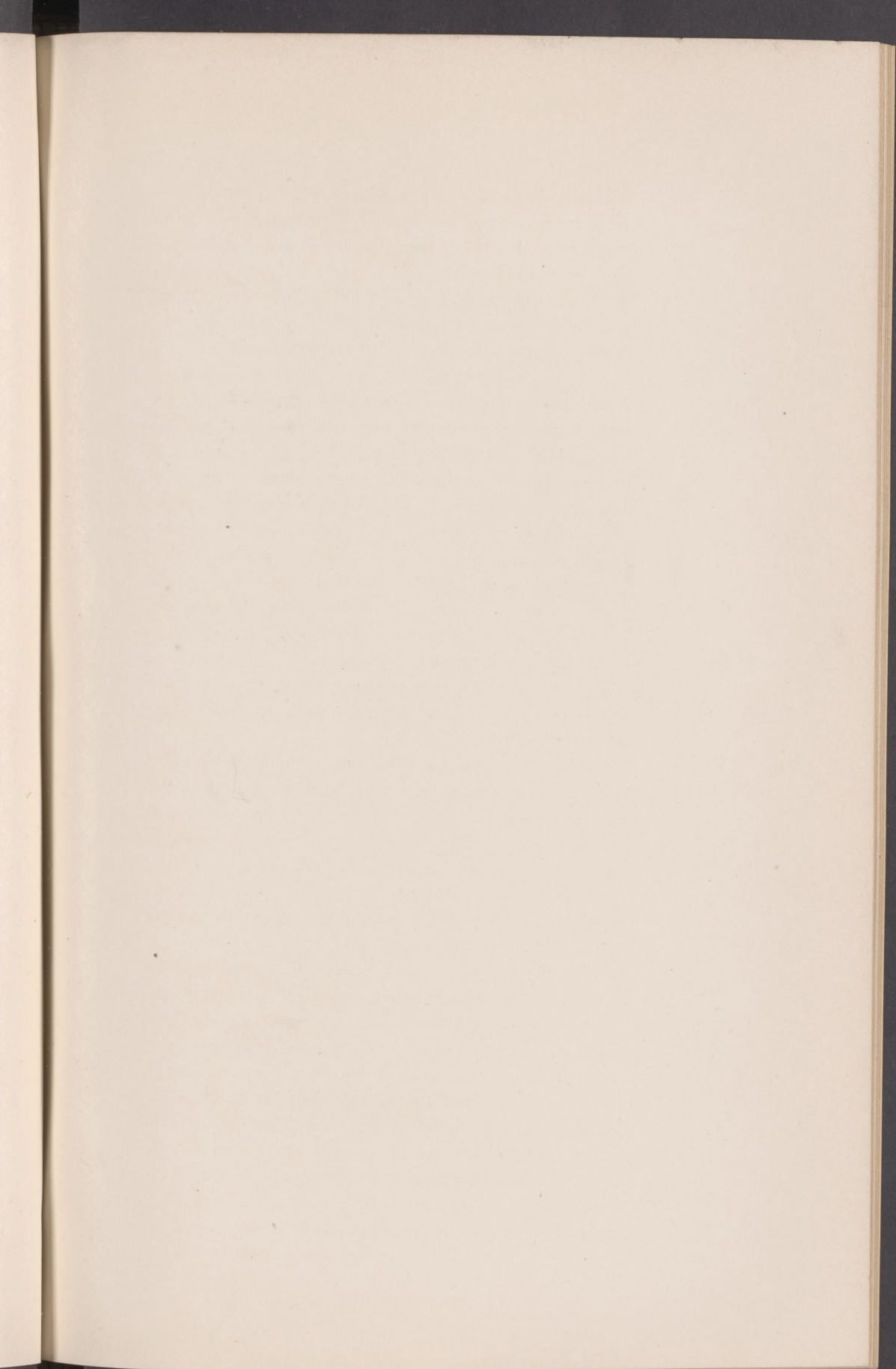
See charge of Mr. Justice Depue in *Graves vs State* 16 *Vr.* at 349 who said "The evidence beyond all controversy shows a killing of deceased with a deliberately formed purpose to kill, and consequently, the prisoner, if guilty at all, is guilty of murder in the first degree.

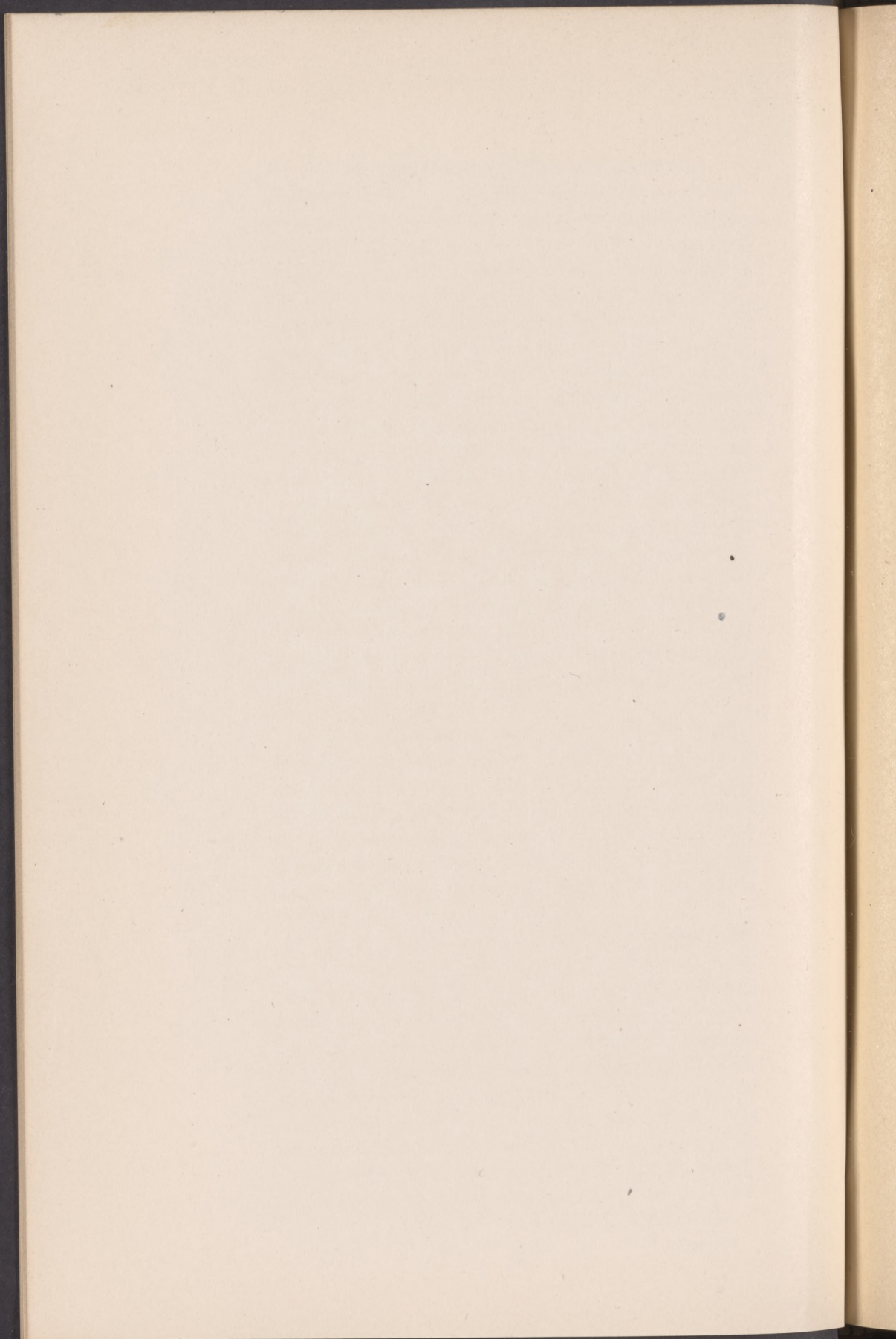
The case of *Sparfand Hansen vs. U. S.* 156 *U. S.* at p. 103 is a strong case favoring the instruction given by the trial Justice and contains citations from many cases in the subject.

In the case at Bar, the trial Justice correctly charged as to the constituents of murder in the first and second degrees, and informed the jury that to constitute murder in the first degree, the intent to take life must be clearly formed and deliberately executed, and then marshaled the testimony showing the presence of the intent to take life, and premeditation upon the part of the perpetrator of the deed.

The duty of the Court to leave this question to the jury to decide should be understood as referring to the right of the jury to decide the facts when the evidence admits of an issue of fact. When the evidence raises no issue, but points to only one alternative conclusion of murder in the first degree or not guilty at all, I can see no difference of duty either in Court or jury between trial for murder or for any other crime. The criticism of the instructions to the jury is altogether too unsubstantial to be worthy of countenance by a court administering law and justice in a case of serious crime.

GEORGE BERDINE,
Prosecutor.





NEW JERSEY COURT OF CHANCERY AND EQUITY

THE PLAINT

Comes now the Plaintiff,

and says,

That the Defendant,

doth hereby acknowledge that he is the owner of

the premises situated in the County of Hudson,

State of New Jersey, and known as

the premises of the County of Hudson,

State of New Jersey, and known as

the premises of the County of Hudson,

State of New Jersey, and known as

the premises of the County of Hudson,

State of New Jersey, and known as

the premises of the County of Hudson,

State of New Jersey, and known as

the premises of the County of Hudson,

State of New Jersey, and known as

the premises of the County of Hudson,

State of New Jersey, and known as

the premises of the County of Hudson,

State of New Jersey, and known as

the premises of the County of Hudson,

State of New Jersey, and known as

