

New Jersey Court of Errors and Appeals.

THE STATE OF NEW JERSEY,
Defendant in Error,

vs.

PAUL HERMAN,
Plaintiff in Error.

In Error.

Sur Indictment
for Murder.

BRIEF OF PETER BACKES, OF COUNSEL FOR PLAINTIFF IN ERROR.

Paul Herman was convicted of murder of one Michael Melnik, in the first degree, in the Middlesex Court of Oyer and Terminer, at the September Term, 1908, and was sentenced to death during the week commencing November 2d, 1908.

It is insisted, on behalf of the plaintiff in error, that justice has not been done. The plaintiff in error speaks the Russian language and is unfamiliar with the English tongue. The errors assigned and specified as cause for reversal were not made the subject of exceptions upon his trial by his counsel, and are now only available to the plaintiff in error under the one hundred and thirty-sixth section of the Criminal Procedure act (Rev. 1898), because they "have prejudiced him in maintaining his defense upon the merits."

The causes assigned for reversal are based upon the illegal admission of evidence and the charge to the jury, and therein, upon misstatements of the evidence, upon conclusions drawn which were for the jury, and upon erroneously expressed legal principles.

The homicide occurred at the home of the plaintiff in error, where he, with his wife and one Michael Harko, with his wife, resided together. There had been a child born to Mrs. Harko, and the occasion was made one of rejoicing by the friends of the family. A season of feasting, drinking and smoking continued for several days after the birth of the child, in which the plaintiff in error, the deceased and others, who were witnesses upon the trial, participated. On or about the 10th day of June last, the festivities came to a sudden conclusion by the homicide, and the apprehension and incarceration of the plaintiff in error and the witnesses to the occurrence. The versions of the plaintiff in error and the two witnesses, Mitro Burak and Mitro Kornora, as to the conditions under which the alleged homicide took place, differ. On the part of the State, the witnesses, Burak and Kornora, testified, to the evening spent in eating, drinking and smoking, that the occasion was not marred by any quarrels or disorder of any character; that all of those present, including the plaintiff in error and the deceased, were friendly, and that there was nothing to indicate the existence of any hostility, or even unfriendliness, on the part of anyone to any other.

That about eleven o'clock, all of them being under the influence of drink, as the plaintiff in error and the deceased, Burak and Kornora, had reached a point in the room in which they were near the door leading to the street, the deceased struck the plaintiff in error a blow in the face with his hand; that, instantly, the deceased placed his hands to his abdomen and blood ran through his fingers; that he was cut in the bowels and that they protruded through the wound. They denied seeing the plaintiff in error use a knife and inflict the wound upon

the deceased. They denied having held or choked the plaintiff in error at the time when he was struck the blow in the face by the deceased.

The defendant testified that as he was about to leave the room Burak detained him by taking hold of his shoulder, Kornora grasped him by the throat and choked him until he could scarcely breathe, and the deceased, Melnik, struck him a blow in the face and mouth with his fist; that he had, when assaulted, his hands in his trouser's pockets, and that in the left pocket was an ordinary pocket knife, closed, and when he was being choked, he opened the knife in his pocket, drew it out and struck out blindly and aimlessly, with the purpose of releasing himself from the assault. The knife reached Melnik and inflicted a wound in the abdomen. It is alleged that the wound perforated the intestines of Melnik and proved fatal. This was the substantial testimony in the case. The rest of the evidence related to incidental matters unnecessary to be here and now referred to or discussed.

FIRST CAUSE.

That the judges of the said Court of Oyer and Terminer, in and for the county of Middlesex, before whom, &c., at and upon the trial of the said issue, so joined upon the said indictment, allowed the prosecutor of the pleas to ask of the following witnesses, produced upon the part of the State, and the said witnesses to make answer thereto, as follows, and which testimony, so permitted to be given, being separately and respectively assigned as erroneous and cause for reversal:

(1) Of Isaac S. Vanderveer, photographer. Page 19.

"Q. In the portion of the town designated as the locality or as the residence and place where this murder was committed?

"A. Yes, sir.

"Q. What house ?

"A. Where the murder took place.

"Q. What front room ?

"A. The front room of the house where the murder took place.

"Q. The room wherein you were told that the crime was committed ?

"A. Yes, sir.

"Q. Go on and describe the rest of the photographs.

"A. *P 5* is looking into the kitchen; I stood in the room where the crime was committed, &c.; *P 6* is a view in the front room where the crime was committed, showing the spot where the crime was committed."

(2) Of Morgan F. Larson, surveyor. Page 20.

"Q. What is that map you have there, what does it represent ?

"A. The lower part of this map is a map of the vicinity of Houston and Bee street, in Roosevelt.

"Q. In this county ?

"A. Yes, sir; and it also shows the house where the murder was committed.

"Q. The house where the alleged crime was supposed to have been committed or took place ?

"A. Yes, sir; and the upper part of the map is a detailed drawing of the same building.

"Q. Tell us what they are in detail ?

"A. The ground floor of the house is divided into two rooms; one room being a front room, another a kitchen, and there are two bedrooms which I have marked here with closets and outlets, &c.; and the furniture in the front room, which was placed by the lady of the house, in the same position in which it was supposed to be, or in the way they were placed at the time the murder was committed.

"Q. Is that the way you have them indicated on the map ?

"A. Yes, sir.

"Q. I show you again *Exhibits P 5* and *P 6*; will you

indicate on these the door that the defendant was supposed to have backed up against?

"[Objected to.]

"Q. Show that door on the map?

"[Objected to and question withdrawn.]"

(3) Of Kate Melnik. Page 26.

"Q. Where were you on Wednesday night, the night of your husband's killing?

"A. I was in the house; in my house.

"Q. Did your husband (the deceased) and Paul Herman have any conversation about his (Herman's) wife?

"A. Yes; my husband said to Paul Herman, why he beat his wife so on Saturday.

"Q. Go on?

"A. Yes; Paul Herman said (after other words) that if somebody would say something, or say something to me, I would stab a knife into my brother or my father.

"Q. What was said, if anything, about Paul Herman's striking or hitting his wife?

"[Not answered.]

"Q. Did you see Paul Herman's wife after that?

"[Overruled.]

"Q. Did you see her?

"A. Yes, sir; I see her.

"Q. What was her condition as to her face or eyes?"

(4) Of Mitro Burak. Page 42.

"Q. Were you arrested as a witness in this case?

"A. Yes, sir.

"Q. Well, the next day after you was arrested, and while down in the Carteret jail, did you see Mrs. Herman (the wife of defendant)?

"A. We did not see them, but we heard them talking through the wall.

"Q. Was Herman, the defendant, in jail, too, while you were there?

"A. Yes, sir.

"Q. Was anything said by Paul Herman to his wife while there (at the jail) as to whether she had been there,

and that if he had gotten \$10 he could have run away instead of being caught?

"A. I did not know what the \$10 was needed for.

"Q. Was anything said about \$10?

"A. No, sir; I didn't hear anything about \$10."

(5) Of Charles Walling.

"Q. Did you see anyone when you came back?

"A. I seen Paul Herman's wife.

"Q. Did you see anything about her face, what her condition was?

"[No answer.]

"[Overruled.]

"Q. What did you say to Paul Herman with reference to who did the cutting?

"A. I asked him did he do it, and he said, 'Yes, I done it.'"

(6) Of Paul Herman, defendant.

"Q. Did you ever black your wife's eye?

"Q. When did you strike her like this [indicating]?

"A. On Saturday.

"Q. Was your wife's eye at any time blackened by anything you did?"

The trial of this cause in the court below appears to have been conducted with little reference to the prescribed rules as to the admission of evidence. The prosecutor was unobstructed in his method of conducting the examination of the State's witnesses by objection from the counsel assigned by the court for the defense, and unrestrained by the court.

At the outset of the trial, and before any proof had been made of the commission of any crime by any one, a photographer, who, at the request of the State, had made photographs of a building, and some of the interior, who had no knowledge of the crime alleged in the indictment; a surveyor, who had, at like request, made a map or drawing of the scene of the alleged crime, and who also

was wholly uninformed as to the charged offense, were permitted to testify, respectively, as above quoted.

The testimony of the photographer was that the house shown was the house where the murder took place; the room shown was the room where the murder took place, and that his *Exhibit P 6* showed the spot where the crime was committed.

The testimony of the surveyor was that the lower part of his map showed the house where the murder was committed, and that his delineation of the furniture in the front room, as to location, was obtained by the placing of the furniture in the room in the same position it was at the time of the murder, by the lady of the house.

All of this testimony is hearsay and incompetent, and should have been eliminated from the case. It was not so eradicated, and without objection of counsel, or the condemnation of the court, went before the jury.

It is also open to the objection that these witnesses were permitted to characterize the occurrences which they had been informed had taken place at the location shown, as murder. So that the jury were permitted to enter upon their duties in the case with the assertions of these people, who knew nothing about it, that the offense, if any, which the plaintiff in error had committed, was murder, and that he had committed the crime of murder at the place and upon the spot so shown. It prejudiced the defendant by the assumption of a condition which had not yet been shown to exist. The impression necessarily made upon the jury put the defendant to a disadvantage in the conduct of his cause. Instead of being protected by the presumption of innocence, and the rule placing the burden of proof upon the State, they were permitted ignorantly to accept this illegal characterization and could not but have been affected by it.

The questions by the prosecutor, in which he, too, characterized the crime as murder, were objectionable, not only because it was improper so to do, but as assuming a fact which had been neither admitted nor proved. These

questions should have been eradicated, but they were not; they went without objection or condemnation.

The testimony as to the alleged assault and battery by the defendant, upon his wife, about a week previous to the occurrence under examination, was incompetent as an attempt to show the commission of another crime by the defendant. That this evidence should have been rejected, and after admission stricken from the record, is settled by the adjudications of this court. It was unquestionably prejudicial.

Bullock v. State, 65 N. J. Law 557.

State v. Hendricks, 70 N. J. Law 41, and other cases.

SECOND CAUSE.

That the presiding judge, during the cross-examination of the defendant, who, at the requirement of the prosecutor, was opening the knife (alleged to have been used at the alleged crime) in his pocket, said, in the presence of the jury, "I think it is proper to state that he now opens it by the use of his knee." Page 83, line 17.

That the presiding judge, during the cross-examination of the defendant, who, at the requirement of the prosecutor, was opening the knife (alleged to have been used at the alleged crime) in his pocket, said, in the presence of the jury, "*I think it is proper to state that he now opens it by the use of his knee.*"

The plaintiff in error, upon his direct examination, had testified that, while being assaulted by the deceased, and the other two, having his hand in his pocket, in which was the knife, closed, he had opened the knife *in his pocket*, drawn it and struck out in self-defense. He had not testified as to the precise manner in which he had opened it. It had not been testified that when he opened the knife in his pocket on the day of the cutting, he had not used his leg or knee. On the contrary, it was natural and probable that he was obliged to do so, and there was

no other evidence in the case relating to the opening of the knife.

This remark of the court went to the credibility and weight of the defendant's testimony. It was as if the learned judge had said to the jury, that the plaintiff in error had previously testified that he had opened the knife in his pocket by the unaided use of his hand, without the use of his leg or knee or other lever, and that the fact that he, now, while on the witness stand, used his knee in aid of his hand, in opening the knife, was variant from his previous testimony as to the same fact, or was ineffective to show that he was able to so open it. It was a suggestion that the witness had made an untruthful statement upon a vital point in the case—his defense of self-defense—and was an impeachment of his veracity. The defendant was substantially prejudiced by this uncalled for and injurious judicial observation.

Underhill Crim. Ev., § 215, speaking of judicial remarks upon the demeanor or credibility of a witness during his examination, says: "The credibility and weight of evidence are for the jury exclusively. All judicial observations or remarks, upon the personal character of a witness, the nature, credibility or weight of his evidence, made during his examination, are improper, and furnish grounds for objection. It is immaterial that the judicial observations were inadvertently made, if the accused was substantially prejudiced."

The remark was not withdrawn, or retracted, nor was the jury instructed to disregard it.

Comment by the court, during the testimony of a witness, as not being legal evidence, nor given under the sanction of an oath, and impeaching the veracity of the witness, held error in *State v. Raymond*, 53 *N. J. L.* 260.

In *People v. Wood*, 126 *N. Y.* 249, it was held, "That the remarks of the trial judge as to the testimony offered was improper and prejudicial to the defense, as it tended to discredit the witness," &c.

State v. Philpot, 66 N. W. Rep. 730. Held, that "Remarks by the court (during the examination of a witness) were prejudicial, as the effect of the testimony was solely for the jury," &c.

In *State v. Lucas*, 24 Oreg. 168, it was held that a remark by the court that "it does not follow because a woman is lewd, it affects her veracity," was error. The court said, on page 174: "To say the least, this was an unfortunate remark, and while it was no doubt an honest expression of the court's opinion, it was certainly invading the province of the jury, who are the exclusive judges of the credibility of a witness, and was prejudicial error."

The Supreme Court of California in *McMinn v. Whelan*, 27 Cal. 319, said: "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 in his power by words or actions, or both, to materially prejudice the rights and interests of one or 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 hand he 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 other."

"To make a statement which tends to discredit the accused with the jury, and, generally, statements by the judge, in the presence of the jury that would constitute error if contained in the instructions are improper."

12 Cyc. 538.

State v. Clements, 15 Oreg. 244.

Hair v. Little, 28 Ala. 236.

Fuhrman v. Mayor, &c., 54 Ala. 263

Andreas v. Ketcham, 77 Ill. 377.

State v. Stowell, 60 Iowa 535.

THIRD CAUSE.

That the presiding trial judge charged the jury as follows, which is cause for reversal: "Dr. Suydam has testified as to the nature of the wound, and that the wound which he received on the 10th day of June was fatal in its nature, and was the cause of the death, so, if you believe this evidence, and I recall no contradiction, it would seem that the deceased was killed by being cut in the abdomen by a sharp instrument." Page 103, line 25.

The vice of this instruction consists in a misstatement of the evidence. Dr. Suydam, in truth and fact, did not so testify. Upon reading the medical testimony in the case, your honors will observe that it is derived from two witnesses, namely, Dr. Suydam, the witness mentioned in the charge, who performed the autopsy after the death of Melnik, and Dr. Wantoch, the physician who was called in and treated Melnik immediately after the cutting. And you will also discover that Melnik was removed to a hospital, where he lived for ten days thereafter.

What Dr. Suydam did testify was, that the death of Melnik was due to perforations of the intestines; and that the perforation of the intestines had been made "by some doctor or some physician taking stitches in the intestines." He was not asked, nor did he state, that the wound inflicted on the 10th day of June was fatal in its nature and the cause of death.

Dr. Wantoch testified: The wound was necessarily a fatal one. Page 64.

What was the cause of the death of Melnik was, under the evidence, a disputed question between the doctors, and there is no other evidence in the case corroborating either of them. Dr. Wantoch required an excuse for the death of the patient while under his treatment, and found it in a professional opinion, that the wound was fatal.

Dr. Suydam attributes it to the consequences of the unskillful treatment of some other "doctor or physician."

The fact was not established beyond a reasonable doubt, and the jury would not have been justified in finding the cause of death established by proofs of a satisfying and convincing character. They were not justified in finding, from this contradictory evidence, that death was due to the wound inflicted by the plaintiff in error.

The law relating to the misstatement of evidence is discussed under the sixth assignment.

FOURTH CAUSE.

That the learned trial judge charged the jury as follows, which is cause for reversal. Defining murder in the first degree, and instructing the jury as to the space of time requisite to intervene between the formation of a design to kill, and its execution, to constitute premeditation, he said: "A man may form an intent and instantly execute it with deliberation." Page 104, line 34.

The rule in New Jersey, upon this point, has been and is, perfectly settled by numerous adjudications by this court. And I am unable to find authority to support the charge of the learned judge as above quoted.

The jury were correctly instructed that to constitute the crime of murder in the first degree there must have been previously formed, in the mind, an intent to kill, and that such formed intent should be carried into execution. And the jury were further correctly instructed that "premeditation does not require a long space of time between the formation of the intent and its execution." But when he said to the jury that "a man may form an intent and *instantly* execute it with deliberation," he gave an instruction which was not only inconsistent with his other instruction, but contrary to the rule of law upon the question as it exists in this State.

It permitted the jury to infer that the blow struck by the plaintiff in error, if it was in the execution of an intent, formed *instantaneously* with the giving of the blow, was inflicted after sufficient deliberation to make his offense murder in the first degree. I do not so understand. It has been held by this court that the design must precede the killing by some appreciable space of time.

In *State v. Bonofiglio*, 67 N. J. L. 239, Chief Justice Gummere, speaking for this court, says (on page 244): "The presence of a specific intent to take life is not, standing alone, conclusive that the homicidal act was done with deliberation and premeditation." He quotes Earl, Chancellor, in *People v. Majone*, 91 N. Y. 211, as follows: "There must be not only an intention to kill, but there must be also a deliberate and premeditated design to kill; *such design must precede the killing by some appreciable space of time.*"

The charge of the trial court in the Bonofiglio case, discussed in the opinion of the Chief Justice, was as follows: "I instruct you that the distinguishing feature of the crime of murder in the first degree is the presence, in the party charged therewith, of an intent to take life. No particular length of time need intervene between the formation of the purpose to kill and its execution. * * * The law is, that whenever there is in committing homicide a specific intention to take life, there is, in the language of the statute, a willful, deliberate and premeditated killing, and the offense in that case is murder in the first degree."

My contention is that the charge of Justice Bergen, in the present case, is identical with the charge criticised by this court in the Bonofiglio Case.

In *State v. Zoanowicz*, 69 N. J. L. 627, the charge of the trial court, upon the subject of deliberation and premeditation, was made the subject

of an assignment of error. The court is familiar with the case, and I will not rehearse it. The criticised charge was taken from the Donnelly Case. The charge was held unobjectionable, because it embraced a correct statement of the law, in informing the jury that *some* length of time should intervene between the formation of the design and its execution. And Chancellor Magie said; "The quotation in the opinion from *People v. Magone, supra*, to the effect that, to constitute murder in the first degree, a design to kill must precede the killing by an appreciable space of time, was not designed to indicate that the careful definition of murder in the first degree, approved in the Donnelly Case, was defective in the time required for deliberation and premeditation, but rather to express the importance of that part of the definition which required that the design to kill must be fully and clearly conceived and purposely and deliberately executed. *The conception of such a design and its deliberate execution necessarily takes some appreciable time. * * ** Time sufficient to fully and clearly conceive the design to kill, and purposely and deliberately to execute it, satisfies our statute."

This principle was not satisfied by the charge under review; that the design to kill and its execution might be contemporaneous, "instantly." It excluded the idea of time for reflection and consideration upon the matter of choice to kill or not to kill, or for the formation of a definite purpose to kill. It amounts to a statement that the mere act of striking the blow might be regarded by the jury as a deliberate and premeditated act, and that the blow constituted murder in the first degree.

The charge under consideration is within the adjudication of the court in *State v. Deliso*, 69 *Atl. Rep.* 218.

Very clearly this portion of the charge was not only erroneous, but palpably prejudicial to the defendant.

FIFTH CAUSE.

That the said judge neglected to charge the jury and instruct them upon the law as to the crime of manslaughter, although there was evidence in the case which rendered such instructions necessary, and which would have justified the jury, if they believed him guilty of any crime, to have rendered a verdict of manslaughter; which is cause for reversal.

The evidence on the part of the State was, that the defendant, the deceased and others, who were witnesses upon the trial of the defendant, were jubilating over the birth of a child to one of them. That they had been feasting and drinking for two or three days; that on the evening of the alleged crime the defendant, the deceased and the witnesses had spent the evening together pleasantly; that there was no quarreling; that they were all friendly, and that this condition continued up to the moment of the cutting.

That the defendant, or the deceased, or both of them, were about to go out of a door leading to the street in front of the house in which they were when one of the witnesses placed his hand upon the defendant and spoke to him, and the deceased, at the same moment struck defendant in the face, and that immediately the deceased held his hands to his abdomen; that he was cut and bleeding. No one testified to seeing the blow struck. The defendant's narrative of the occurrence is, that he was held by one, choked by a second so that he could not breathe, and struck by the deceased in the face; and that in that position, with the knife he had himself opened in his pocket, he struck out blindly in self-defense.

Assuming that the cut inflicted by the defendant was the cause of death (which is not conceded nor proved), if that blow was struck by the defendant, upon a sudden transport of passion, or heat of blood, induced by the holding and the blow, which constituted a reasonable provocation, and without malice, and that it was not struck under circumstances constituting legal self-de-

fense, such act would, under the law of this State, as defined in *State v. Zollers*, 2 *Halst.* 220, &c., constitute the crime of manslaughter, and if the jury believed that those were the conditions, they would have been justified in a verdict for manslaughter. The deceased and his friends, Borak and Kornora, were the aggressors. Up to the moment of the blow by the defendant, there is no proof that he had been guilty of so much as an act of disorder, and the State's case shows him to have been in his own home, passing a pleasant evening when he became the victim of the assault by the deceased man and his friends.

It was not only the right of the defendant to have the jury charged, but also the duty of the court to have instructed them as to the law of manslaughter; because there was evidence upon which such charge could and should have been based. And this duty was not dependent upon the court's opinion as to the character of the testimony supporting this theory; the force of the testimony being wholly within the province of the jury.

The trial court assumed that the evidence showed the defendant guilty, if guilty at all, of murder in the first or second degree.

This was an unwarranted assumption, in the light of the evidence adduced, and however slight the evidence it was the duty of the court to have defined and given the law applicable thereto. This right was erroneously withheld from the defendant. The jury were not made aware of their right to convict of manslaughter, nor informed of the law relating to that crime as applied to the facts of the case, and this grade of the crime was excluded from their consideration. Such omission prejudiced the defendant in his defense, and constitutes ground for reversal.

Blashfield on Instructions to Juries, § 192 *et seq.*, lays down and cites authorities in support of them, the following propositions, viz.:

“Even though there is slight evidence that the offense committed may have been of a lower degree than the one charged, it is the duty of the court

to define such lower degree and to give the law applicable to such lower offense."

"Instruction on the lower grades of offenses should be given, although the only testimony tending to show a lower degree of crime, is that of the defendant himself."

"And although his testimony is at variance with that of every other witness."

"For the purpose of instructing the jury the defendant's testimony occupies the same footing as that of any other witness."

State v. Banks, 73 Mo. 595, Sherwood, C. J., holds:

"The question arises whether the instruction should not also have been given touching the lower grades of homicide. The testimony of the witnesses, other than the defendant himself, showed very clearly a case of deliberate murder, but under our law a defendant in a criminal case is a competent witness, and his status when on the witness stand is the same as that of a party to a civil suit who becomes a witness for himself. He may in such a case testify as to intention, &c. The same rule should apply to criminal proceedings. The defendant had testified to facts which, if true, exonerated him from the charge of murder in the first degree and fixed his offense as a lower grade of homicide, and it belongs not to the judicial province to assume that his testimony is either improbable or untrue," &c.

SIXTH CAUSE.

That the said trial judge charged the jury as follows, which is cause for reversal: "The defendant says he had a knife in his pocket. Well, gentlemen, *if that knife was open in his pocket ready to be used*, and taking into consideration that it is an ordinary pocket knife, such as is usually carried closed, that would be a fact which you would be entitled to take into consideration as to when

the defendant formed an intent to kill, if he did." Page 105, line 5.

This charge was erroneous and prejudicial to the defendant. It was an assumption of a state of facts unsupported by any evidence in the case. The only evidence as to the knife, beyond the fact that a knife was used by the defendant, was that of the defendant himself, who testified that at the time when he was assaulted by the deceased and two others he stood with both hands in his pockets; that in his left pocket there was an ordinary pocket knife and that it was *closed*; that he was being held and choked and was struck by the deceased; that *he opened the knife in his pocket* with his left hand, withdrew it and struck out blindly to relieve himself from the situation. This statement as to the knife was undisputed; there was no attempt made by the State to show any different state of facts, and it must be accepted, so far as the knife is concerned, as a fact established by uncontradicted testimony that the knife was in his pocket, closed.

The court's instruction as to the law, based upon the assumed or suggested fact, may have been correct, but that makes no difference and does not relieve the criticised charge of its illegality and error, nor did it prevent the jury from regarding it as a fact in the case for their consideration in considering the whole case. That it was highly prejudicial to the defendant goes without saying.

The criticised words were not used by way of illustration. The trial judge did not say: "*If he had had that knife open in his pocket* ready for use, you would have the right to infer," &c. But having first said: "The defendant had that knife in his pocket," and the only evidence in the case being that it was closed, the court suggested to the jury that the statement of the plaintiff in error was probably untrue, and that another statement of fact, unsupported by proof, might be considered by the jury in determining the existence of an intent to kill, and the time when such intent was formed.

And I insist that this erroneous and prejudicial instruction was not cured, nor its effect upon the minds of

the jury eliminated by his language in the concluding sentences of the paragraph, or by any other instruction contained in the charge. He did not even submit the question of its existence to the jury. His subsequent language was inconsistent with the erroneous charge. Had there been evidence in the case making the fact of the knife being open or closed in the pocket a *disputed fact*, it would have been error for the court to have based a charge upon the assumption of the result of the conflicting evidence, or the truth of either statement, or its denial; it would have been an invasion of the jury's domain. This was a material fact, and a momentous one to the plaintiff in error. The assumption that *he had in his pocket a knife opened and ready to use*, implied his anticipation of the conflict, his preparation for the fight, his intention to use the knife; and in view of the probable consequences of its use, the assumption carried with it, if accepted, all of the elements of murder in the first degree. Is it necessary to argue its manifest prejudicial effect, when you find the jury so instructed, convicting him of murder in the first degree?

"Inconsistent instructions being misleading and erroneous, it is obvious that error, committed in giving an incorrect instruction, is not cured or rendered harmless by the giving of a correct instruction upon the same point, but inconsistent with it. In such a case it is impossible to say which instruction the jury has followed. The only remedy for an error of this sort is by an express withdrawal of the erroneous instructions, in addition to giving of other instructions which are correct."

Blashfield on Instructions to Juries, § 76.

"Instructions to the jury should be applicable to and limited by the evidence adduced in the case."

Blashfield on Instructions to Juries, § 86.

"It is erroneous to give instructions based on a state of facts which there is no evidence tending to prove." *Ibid.*

"Or which the undisputed evidence shows did not exist." *Ibid.*

“And it makes no difference that such instructions contain correct statements of the law.” *Ibid.*

“If the court misled the jury by directing their attention to a point on which there is no evidence, it is error.”

Snyder v. Wilt, 15 Pa. St. 59.

“The court should not mislead the jury by directing their attention to a point on which there is no testimony.”

“Undoubtedly, if the instructions were so worded as to lead the jury to infer the existence of a state of facts entirely at variance with the evidence, it would furnish a sufficient reason for setting aside the verdict.”

Caw v. People, 3 Neb. 357.

“An instruction ought not to be given, although it is a correct statement of the law in the abstract, which is not applicable to the facts which are in evidence.”

State v. Whittaker, 35 Kan. 731.

“An erroneous misstatement of the evidence upon a pivotal fact in the case will be ground for reversal. A misstatement of some substantial point of the testimony and calculated to mislead the jury.”

Blash. Instr. Juries, § 60.

SEVENTH CAUSE.

That the said trial judge charged the jury, which is cause for reversal: “So, when this defendant uses a knife and stabs a man in a vital part, *it is for you to say whether or not, from that act, you have a right to infer* that he intended by his act to take life; that when he drew that knife and stabbed the deceased, he had formed in his mind an intent to kill. If he had, it was murder.” Page, 106, line 10.

This charge is vague, obscure and involved. It is so obscure and confused as to mislead the jury. It is not only vague, but incorrect as a legal proposition.

It tells the jury that it is for them to say whether they have a right to infer, &c.

Eliminating from this instruction the verbiage which subjects it to this criticism and objection, the only inference which a jury could draw was, that, as a matter of law, the use of the knife by the plaintiff in error, inflicting a wound in a vital part, gave them a right to conclude that he had intended to take life, and that when he drew the knife and stabbed the deceased he had formed an intent to kill, and was guilty of murder.

“Instructions given the jury should not be vague, obscure or involved. They should not be so worded as to leave the jury to conjecture their meaning, for otherwise the jury might be misled. If an instruction is so obscure and confused that it is calculated to mislead the jury it will be ground for reversal.”

Blash. Instr. Juries, § 72.

The objections to this instruction, as erroneous in law, are too elemental to admit discussion, and I will not burden the court by citation of authorities. The infliction of the wound, under the evidence in the case, was consistent with the absence of an intent to take life, with the absence of a formed intent to kill. Many inferences were attributable to the act of the drawing and use of the knife under the evidence adduced.

It was consistent with facts in evidence justifying a conviction of murder in the second degree. It was consistent, under the case made by the State, that it was drawn in the heat of blood engendered by an unprovoked assault, and its use constituting manslaughter. It was consistent with the testimony of the defendant that it was drawn and used in necessary self-defense.

The instruction, in effect, advised the jury that the stabbing, of itself, constituted murder—in other words, that the use of a deadly weapon upon the vital part of another with fatal result, without regard to the circumstances attending the homicidal act, was evidence of the formation of a design to kill and was murder. Taking this instruction in connection with the previous erroneous

instruction as to deliberation and premeditation, it could only convey to the minds of the jury that the murder meant was murder in the first degree. It was misleading, it was confusing, it was prejudicial to the defendant, as the verdict shows.

EIGHTH CAUSE.

That the learned trial judge charged the jury, which is cause for reversal: "I charge you that, under the law of the State, it is your duty, when you render your verdict, if you find the defendant guilty, to declare the grade of the offense, either murder in the first degree or murder in the second degree." Page 106, line 33.

This assignment is discussed under the fifth charge, and its vice consists in the exclusion of the consideration by the jury of all grades of homicide, excepting murder in the first and second degrees.

NINTH CAUSE.

That the learned trial judge charged the jury, which is cause for reversal (instructing them upon the law of self-defense): "In order to justify one in taking the life of another, or what is called self-defense, *the party must be in danger of grievous bodily harm*. If a man is struck with the fist, and he has the opportunity to withdraw, it is his duty to withdraw, and he has no *right to take the life of another unless to protect his own life or to protect himself from serious bodily harm*."

This was clearly an erroneous statement of the law of self-defense. The rule of law was not stated with even substantial accuracy. As an abstract proposition it was calculated to mislead the jury. It was not cured by the succeeding portion of the charge upon this point. The charge, as a whole, upon self-defense, presents to the jury two rules; one erroneous, and the other correct. The effect was to confuse the jury. The instruction related

to a vital point in issue. The correct instruction did not cure the defect of the preceding erroneous charge.

1 *Brickwood Sacket Instr.*, § 173.

“The court should not use incorrect instructions and expect succeeding ones to cure the defect.”

“An erroneous instruction on a material point is not cured by a subsequent correct instruction on that point if the jury are left in doubt thereby which of the two is correct.”

Ballard v. State, 19 *Neb.* 609.

In *Steinmeyer v. People*, 95 *Ill.* 383, the trial court charged the jury that in order to find the defendant not guilty they must believe from the evidence either that the killing was done in necessary self-defense, or, &c. In the further giving of instructions on the same subject at the request of defendants the law was laid down correctly. Mr. Justice Craig (on page 390) says: “But that was not enough.” He adds, “that the jury may have disregarded the one and followed the other instruction, and it is impossible for a court to say which instruction controlled the deliberations of the jury. * * * If they followed the sixth instruction (the erroneous one, *supra*), as we may presume from the verdict they did, then they were misled and defendants denied the right of self-defense, which was secured to them by the law. We are of opinion that the instruction was calculated to deprive defendants of a fair trial before the jury, and for this reason the judgment will have to be reversed.”

In *Murray v. Com.*, 79 *Pa. St.* 311, Mr. Justice Paxson (on page 317) says: “The law of homicide, excusable on the ground of self-defense, was not correctly stated, &c., &c. It is not necessary that a man shall be in actual imminent peril of life or of great bodily harm before he may slay his assailant. It is sufficient, if in good faith he has a reasonable belief, founded upon the facts as they appear to him at the time, that he is in such imminent peril, even though

it should afterwards appear that he was mistaken. The law will not hold a man to absolute correctness of judgment under such trying circumstances. We do not regard this error cured by the general charge. An obscure answer may be aided in this manner, but not one that is palpably erroneous. The charge may have left the jury in doubt what the law really was."

After, and immediately following the erroneous instruction under consideration, the trial judge said: "So before you can excuse this defendant upon the ground of self-defense you must be satisfied that he had reason to apprehend serious or grievous bodily harm." &c. He did not say why; he did not correct his previous error; he did not say and explain to the jury that this apprehension was an omitted element from the rule he had laid down. It could not, intelligently, be regarded as explanatory of the instruction, nor could such an inference be likely to be drawn by the jury. It left them to understand that, to constitute self-defense, the plaintiff in error must have been in actual jeopardy of life or limb. They were not told that his apprehension of such injury was essential.

And in the conclusion of the charge upon this subject, namely: "Of course, if you say that his life was in danger from that slap in the face, regardless of his belief, or," &c., the trial judge singled out this particular fact, minimized the testimony that he was struck a blow in the face, by characterizing it as a slap in the face, and ignored and excluded from their consideration the remaining testimony, namely, that of the defendant, that the plaintiff in error was, at the time of the cutting, held and choked by two friends of the deceased. This, I insist, was calculated to prejudice the plaintiff in error in his defense of self-defense, and the very force and pertinence of such an intimation from the court will justify the granting of a new trial. There was a conflict of testimony upon this, a vital point in the case. The defendant's testimony was entitled to the same consideration by the jury as that of any other witness in the case.

“When there is a conflict in the evidence and vital point in the case, the rights of the parties cannot be preserved unless the jury are accurately instructed.”

1 *Brickwood Sackett Instructions*, § 191.

“An instruction which has a tendency to, and probably did, mislead the jury when taken singly, is erroneous, even though the instructions, when taken together, embrace the law of the case.” *Ib.*

“Where there is evidence tending to prove a fact having an important bearing upon the law of the case, though strongly contradicted, an instruction is erroneous which ignores the existence of such fact, and takes its consideration from the jury.”

Ibid., § 196.

The expression by the court as to the “slap in the face,” *supra*, was an expression of the opinion that the court did not believe that a slap in the face put the defendant in danger of his life, and was an indication of the opinion of the court as to the weight of evidence. This was improper. It was error; it was, as I have said, prejudicial error.

“But the expression in an instruction indicating an opinion as to the weight of evidence would be improper.”

1 *Brickwood Sackett Instructions*, § 194.

“Instructions which ignore material evidence or which are so drawn as to exclude such evidence from the consideration of the jury, are erroneous and should not be given. It makes no difference how weak the evidence is on the point in issue, it should not be withdrawn from the consideration of the jury.
* * * Such instruction is misleading and improper.”

Blashfield on Instructions to Juries, § 100.

“An instruction, which gathers a cluster of circumstances stated by the witnesses and presents them as proper to be considered in determining the defendant’s intent, making no mention of other cir-

cumstances, pointing in a different direction, held erroneous."

Ibid., § 101.

"Such instructions have repeatedly been condemned by this court as misleading in their character."

Coon v. People, 99 Ill. 368.

This improper and erroneous charge, unfairly illustrated, prejudiced the plaintiff in error in maintaining his defense upon the merits, and is cause for reversal.

TENTH CAUSE.

That the said trial judge permitted, which is cause for reversal, the testimony of Kate Melnik, Mitro Burak, Mitro Kornora, Michael Harko, Paul Herman, Joseph Borak and Kate Balenco, respectively, given in a foreign tongue, to be interpreted to the court and jury by an interpreter, who was not previously sworn as required by law.

The record of the proceedings at the trial discloses the examination of the witnesses named through an interpreter. It does not appear that the interpreter was first sworn to interpret truly. Assuming this to be true, and I have the right to so assume, the effect of such omission is to vitiate the entire proceedings. All the material facts in the case were filtered through this unsworn interpreter. Neither the court, counsel nor jury, all of whom speak the English language, can say that the alleged interpretation of questions and answers in the Russian language were or were not truly made and given, and it cannot be said that the verdict is based upon any legal evidence, and for this reason must be set aside.

ELEVENTH CAUSE.

That by law the said Paul Herman was entitled to a trial on the matter of fact put in issue by his plea of not guilty, and to every defense available under that plea, whereas, under the charge of the court, the only questions submitted to the jury were the degree of murder and self-defense, which is cause for reversal.

The consideration of this assignment is also embraced in the discussion of the fifth and seventh assignments.

TWELFTH CAUSE.

That the said charge, as a whole, and in each and every part of it, was illegal, and thereby defendant suffered manifest wrong and injury, which is cause for reversal.

The charge of the trial court, while it correctly states the rule of law relating to homicide in some respects, erroneously instructs the jury as to others. I think it may, taken as a whole, be fairly characterized as an argument for the conviction of the defendant, and that conviction of murder in the first degree. It begins with a flat statement that the death of Melnik was due to a wound inflicted by the plaintiff in error, while, in truth, the evidence upon this question was conflicting.

It correctly defines murder in the first degree, and then, inconsistently and incorrectly, deprives the plaintiff in error of his unquestioned right to the consideration of its most essential element, *i. e.*, premeditation and deliberation.

The instruction as to murder in the second degree begins and ends with a correct definition of that grade of homicide. But, from the charge upon the question of premeditation and deliberation, the consideration by the jury of that grade of the offense was eliminated. The argument and illustration relating to intent, which were summed up by the obnoxious declaration that a man

might form and instantly execute a design to kill with deliberation, in effect, relieved the jury from the consideration of murder in the second degree.

While the evidence is of a character to justify a conviction (if there should be a conviction) of manslaughter, it omits, wholly, instruction relative thereto, and ignores the right of the defendant to have the included and lesser grades of homicide considered by the jury. They were told in specific terms that their verdict must be guilty of murder in the first or second degree.

And in treating of the defense of the defendant, which was self-defense, it erroneously advises the jury that, unless he was in actual and imminent danger of death or bodily harm, he could not avail himself of this defense.

In charging the jury upon the subject of the knife in the defendant's pocket, it assumed a fact upon which there was no evidence in the case, and left the jury to draw an inference unfavorable to the defendant, based upon this misstated fact.

The testimony of the defendant as to the details of the cutting was not included in the charge, nor was the jury instructed as to the law which would control the jury, based upon such a state of facts, if they were believed.

It is true it told the jury that, if it misstated the facts, they were to correct them, and, in the usual way, that the facts were for them, *but* subject to the law, which the court might give them. The law, as given them, practically deprived the defendant of a fair consideration of the facts in evidence.

It told the jury what view or construction of the evidence would justify a verdict of guilty, but was utterly silent as to the view or construction of the evidence would entitle the defendant to acquittal, or a conviction of a lesser degree of homicide than murder in the first degree.

The verdict of the jury was guilty of murder in the first degree, and the legal presumption is that they regarded the charge of the court and applied the law as they were instructed. If those instructions were erro-

neous, as I have contended, it follows that the plaintiff in error has suffered prejudice in his defense upon the merits, and the verdict should be set aside.

THIRTEENTH CAUSE.

That the entire evidence in said cause, as a whole, did not show beyond a reasonable doubt that the said defendant, Paul Herman, was guilty of the crime of murder in the first degree, and did not justify said verdict. This is specified as cause for reversal.

The trial court properly instructed the jury that the defendant was entitled to the benefit of a reasonable doubt, and defined such doubt unobjectionably. It must be conceded that this doubt must exist in the minds of the jury, and they are presumed to have regarded the instructions of the court.

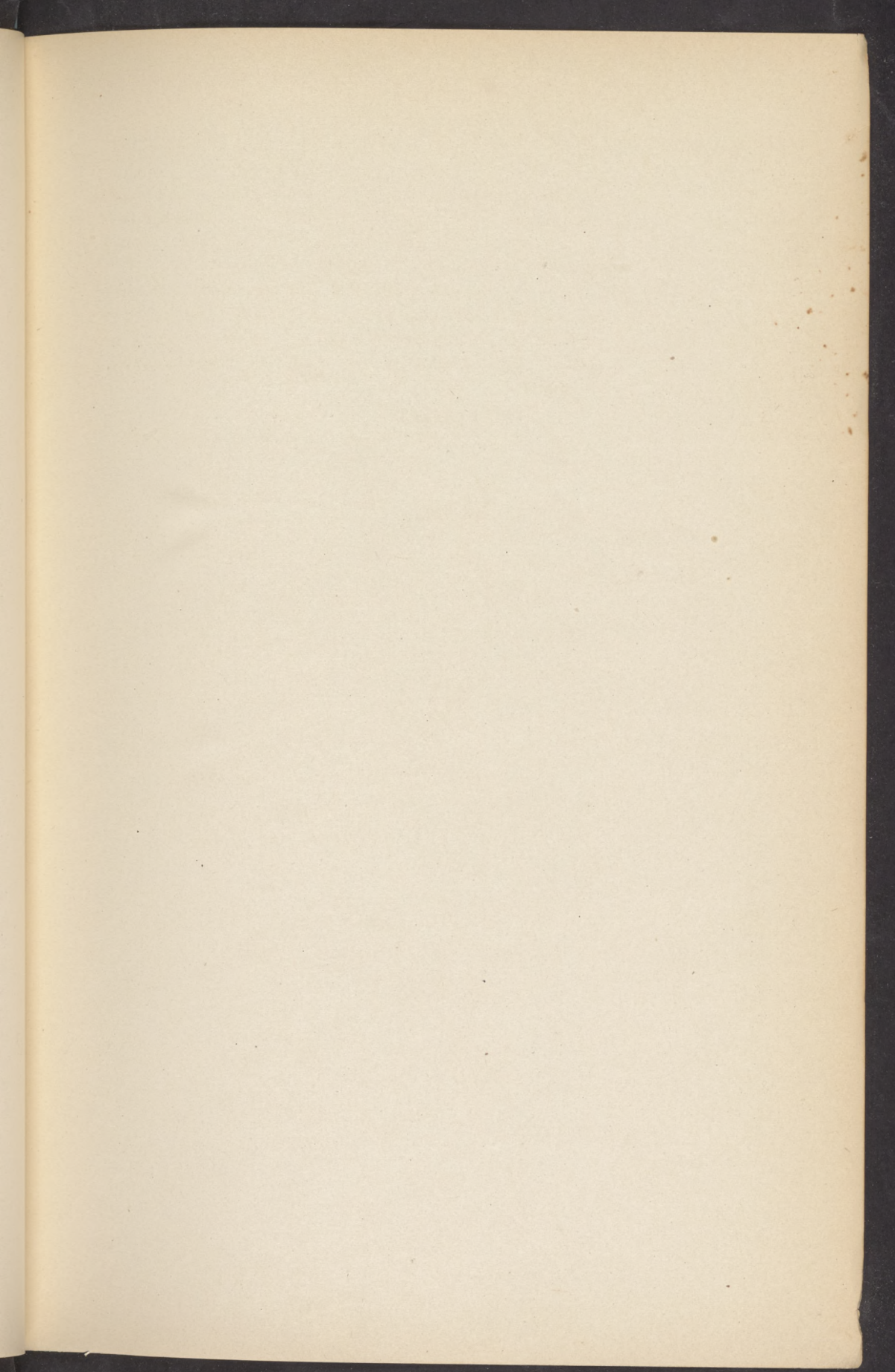
But I contend that this is a *presumption* merely. The fact of a verdict against a defendant in a criminal prosecution does not conclusively determine that such benefit has been accorded him by the jury. The arbitrary disregard by a jury of conditions which would give rise to doubts in the minds of men of average intelligence is not such a discharge of their duty, under the law, as to conclude the defendant, and deprive him of the objection that I have assigned.

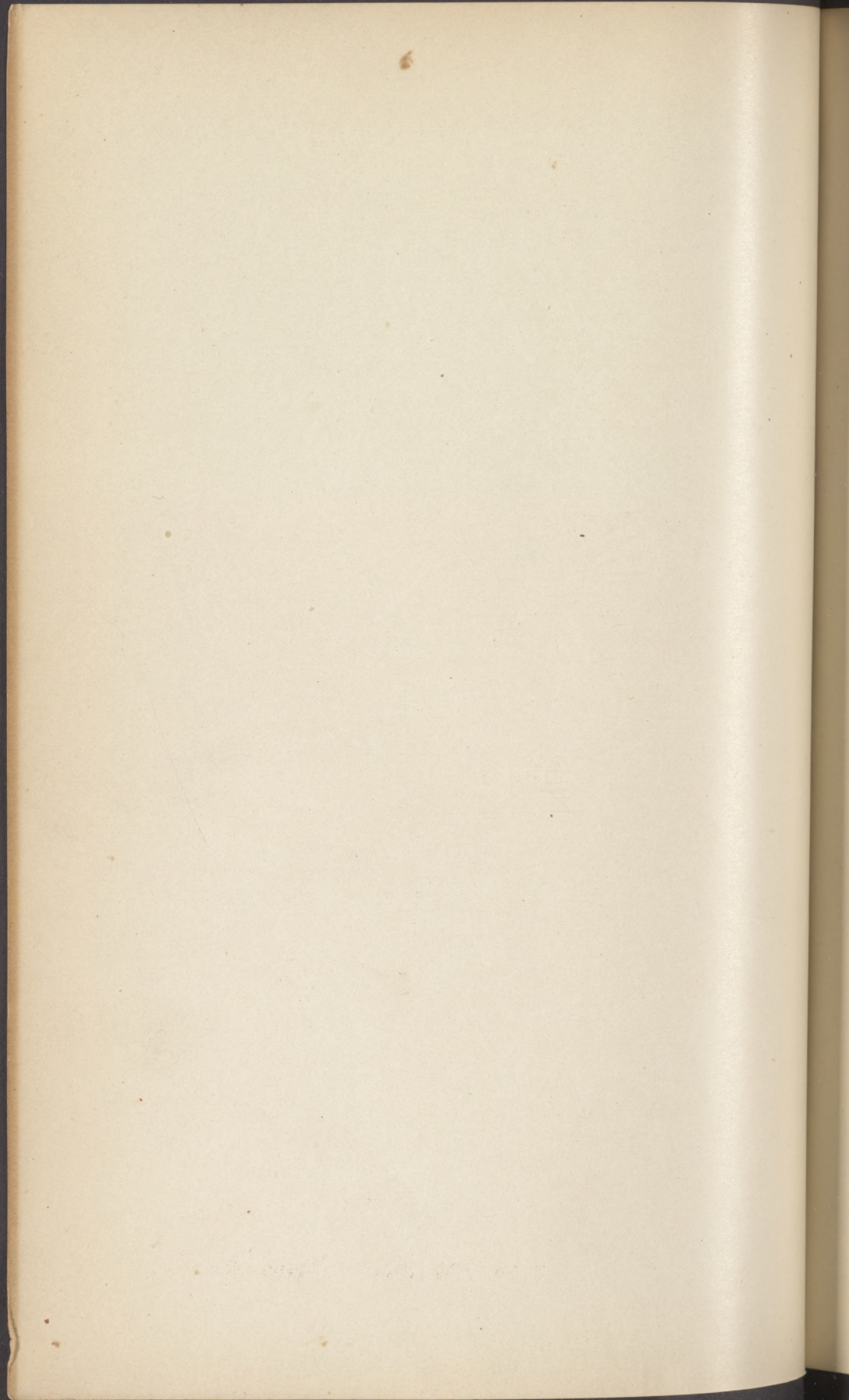
The evidence in this case (already referred to) was of a character as to make it a question whether the defendant was guilty at all, or, if guilty, whether of one or the other of the included grades of homicide. The jury had the evidence and the court had instructed them rightly and wrongly as to the law. They were misinformed; they were misled. The instructions were antagonistic, confused, vague and contradictory. And it cannot be said that these conditions did not give rise to doubts, or would not have impressed the man of average comprehension with the uncertainty of the duty they were called upon to perform. The verdict is not justified by the evidence

and the application of the law as laid down by the court, and it can only be explained by a misapprehension of their duty and the right of the defendant to the benefit of many most reasonable doubts.

It is respectfully submitted that the plaintiff in error has suffered manifest wrong and injury, and has been prejudiced, by the errors assigned, in maintaining his defense upon the merits, and that the judgment should be reversed.

PETER BACKES,
Of Counsel with Plaintiff in Error.





NEW JERSEY COURT OF ERRORS AND APPEALS

The State,
Plaintiff in Error.

vs.

Paul Herman,
Defendant in Error,

IN ERROR.

Brief of George Berdine,
Prosecutor, for the De-
fendant in Error.

There were no exceptions taken at the trial. Therefore, questions raised on this writ of error must be confined under the 136th Section of the Criminal Procedure Act (1898, page 915) to those which exhibit "manifest wrong and injury either in the admission or rejection of testimony, or in the charge of the court," suffered by the plaintiff in error. The train of circumstances which resulted in the verdict of murder in the first degree were briefly these: The wife of the plaintiff in error was related to the deceased (page 26, homicide the plaintiff in error blackened his wife's eyes; on the same evening deceased spoke to the plaintiff in error why he beat his wife, so on Saturday, and he responded by saying that she should do as I command her to do; that if somebody say something to me I would stab a knife into my brother or into my father (page 27, line 18); that on the day of the homicide deceased's

daughter went to the house of the plaintiff in error and the deceased finding her there struck her with a strap when the plaintiff in error rebuked deceased for striking his daughter (page 34, line 30); that deceased and plaintiff in error were friendly until deceased attempted to go home when the plaintiff in error put himself near the door and obstructed the deceased going out, whereupon the deceased with his open hand slapped the face of the plaintiff in error, and the plaintiff in error took a knife from his left hand pocket, opened it, and stabbed the deceased. (pp. 53, lines 5, &c., 41, line 5, &c., 65, line 20, &c., 66, line 1, &c.)

This was the evidence on behalf of the State. The plaintiff in error was convicted of wilful, deliberate and premeditated killing of deceased. The Presiding Justice clearly and forcibly expounded to the jury the state of mind which the perpetrator of murder in the first degree must have to commit that crime, and the State insists that the verdict of the jury under the charge conclusively settles that this crime was committed wilfully, deliberately and with malice aforethought, and that the lesser grades of criminal homicide, murder in the second degree or manslaughter, are eliminated from the case. The First Cause for Reversal is based upon the supposed erroneous character of certain evidence. The assignment contains no reasons or grounds for imputing prejudice to the plaintiff in error by the testimony. *Donnelly vs. State* 2 Dutch. 511 is an authority against the validity of an assignment of error re-

specting evidence which assigns no grounds against the testimony. No objection at the trial was taken to the testimony and if there was anything of peculiarly objectional nature in the testimony which hurt the plaintiff in error, it would seem that the learned counsel who tried the case below would have interposed some objection. The absence of such objection refutes the feeble criticism of the testimony.

The Second Cause for Reversal is based upon the statement made by the Presiding Justice that the plaintiff in error opened a knife by the use of his knees. The court stated the fact which happened in the courtroom. Everyone there saw the efforts of Herman to open the knife which could only be done by the use of the knees. The accuracy of the judicial statement is not and could not be disputed, and hence no prejudice or wrong accrued to the plaintiff in error by the statement. In *State vs. Raymond*, 24, Vr. 262, the Judge stated to the jury what he had been told on the train. The judicial statement was mere hearsay and was objected to, and the court held the objection was well taken.

The Third Cause for Reversal is not supported by Dr. Sudam's testimony. (See page 25, line 32, &c.)

"Q. How do you make it clear that this cut with the knife caused all that?

A. By the perforation of the intestine.

Q. And that naturally resulted fatal?

A. Yes, sir."

See Dr. Wantock's testimony, page 61.

The Fourth Cause of Error is based upon the statement of the Presiding Justice, "A man may form an intent and instantly execute it with deliberation." This is an opinion which is permissible for the Judge to express. It was not harmful to the defendant in error, and did not in the content mislead the jury or withdraw from their minds the importance and necessity for the killing to be wilful, deliberate and premeditated to be of the first degree. The Statute declares "Wilful, deliberate and premeditated killing" is murder in the first degree, and it seems to me that it is the killing which must be deliberate and premeditated, and not that the intention should be deliberated upon and meditated upon beforehand. In the Donnelly case, 2 Dutch, page 616, this court said, approvingly of the charge of the Judge in that case, "It is not necessary that the premeditation and deliberation should be for any specific period before the fatal act; that it is sufficient if they exist the moment before and at the infliction of the mortal blow," citing Chief Justice Hornblower's charge in the Spencer case in these words, "if the jury believe that there was a determination to kill, distinctly formed in the mind at any moment before or at the time the pistol was fired it was wilful, deliberate and premeditated killing, and therefore murder in the first degree." It is enough that the design to kill be fully conceived and purposely executed. The excerpt from the charge excepted to is in my judgment equivalent to the proposition from the Donnelly case above cited; at least, it is not necessarily at

variance with it. Therefore, the proposition of the Presiding Justice was correct, was within the landmark of the Donnelly case, that a man may form an intent and the act in execution of the intention may be a deliberate one

The Fifth, the Seventh, the Eighth and the Eleventh Causes for Reversal are intended to raise the question whether or not the omission of the Trial Justice to define manslaughter and his charge that the plaintiff in error, if guilty, was guilty of murder, were prejudicial errors against the plaintiff in error. At the trial the defences were self defence and intoxication. There was no request to submit the question of manslaughter to the jury. It is settled law in New Jersey that it is not error to omit to charge upon a pertinent proposition of law unless requested so to do.

Cole vs. Taylor, 2 Zab. 61.

Hetfield vs. Dow, 3 Dutch. 447.

Allen vs. Wanamaker, 2 Vr. 370.

The plaintiff in error could not have been prejudiced by the charge. The verdict of the jury conclusively determined that it was wilful, deliberate and premeditated killing. The factors in such a finding were cold blood, deliberation and premeditation, while those of manslaughter would have been hot blood, reasonable provocation and furor of mind. These latter ingredients would have constituted murder in the second degree; therefore, if this murder was committed with malice, with deliberation and premeditation, it could not be manslaughter. It seems to me,

therefore, that the question of manslaughter is, in this court, under the verdict of the jury, an academic rather than a practical question.

The case proven by the State was one of murder.

"If a man enters a contest dangerously armed and fights at unfair advantage, the killing of his antagonist, though there be mutual blows, will be murder."

2 Bish. Crim. Laws Sec. 717.

"Whenever it appears from the whole circumstances of the case that he who kills another on a sudden quarrel was master of his temper at the time, he is guilty of murder. If the actual furor of mind does not exist, or does not impel the arm, which inflicts the fatal blow, there is no excuse from passion to reduce the homicide to manslaughter." (Hawkins.)

See also *Jones vs. State*, 42 Vr. 543.

When the State rested there was no evidence which would have justified a verdict for less than murder in the second degree, and the rule approved in *Brown vs. State*, 33 Vr. 710, that a person sheltering himself under a plea of provocation must make out the circumstances of alleviation to the satisfaction of the court and jury, unless they arise out of the evidence produced against him, as the presumption of law deems all homicides to be malicious until the contrary is proved. See also *Zellers vs. State*, 2 Halst. 220.

The Sixth Cause for Reversal imputes misconception of the evidence at the trial by the Presiding Justice. Herman testified, on cross exami-

nation (see page 83), that the knife was in his pocket; that he put his hands in his pocket, opened the blade in his pocket and then struck wildly with it. Anyone who saw the plight of Herman on the witness stand trying to open his knife, will appreciate the pertinency of the trial Justice's comments and suggestions. It was perfectly apparent at the trial that Herman's efforts to open his knife did not make good his testimony in that respect.

The Ninth Cause for Reversal is based upon the charge of the court upon the question of self defence. The charge will be found on page 107, and will be found to be accurate and correct.

Brown vs. State, 33 Vr. 710.

Jones vs. State, 42 Vr. 546.

State vs. Mount, 44 Vr. 582.

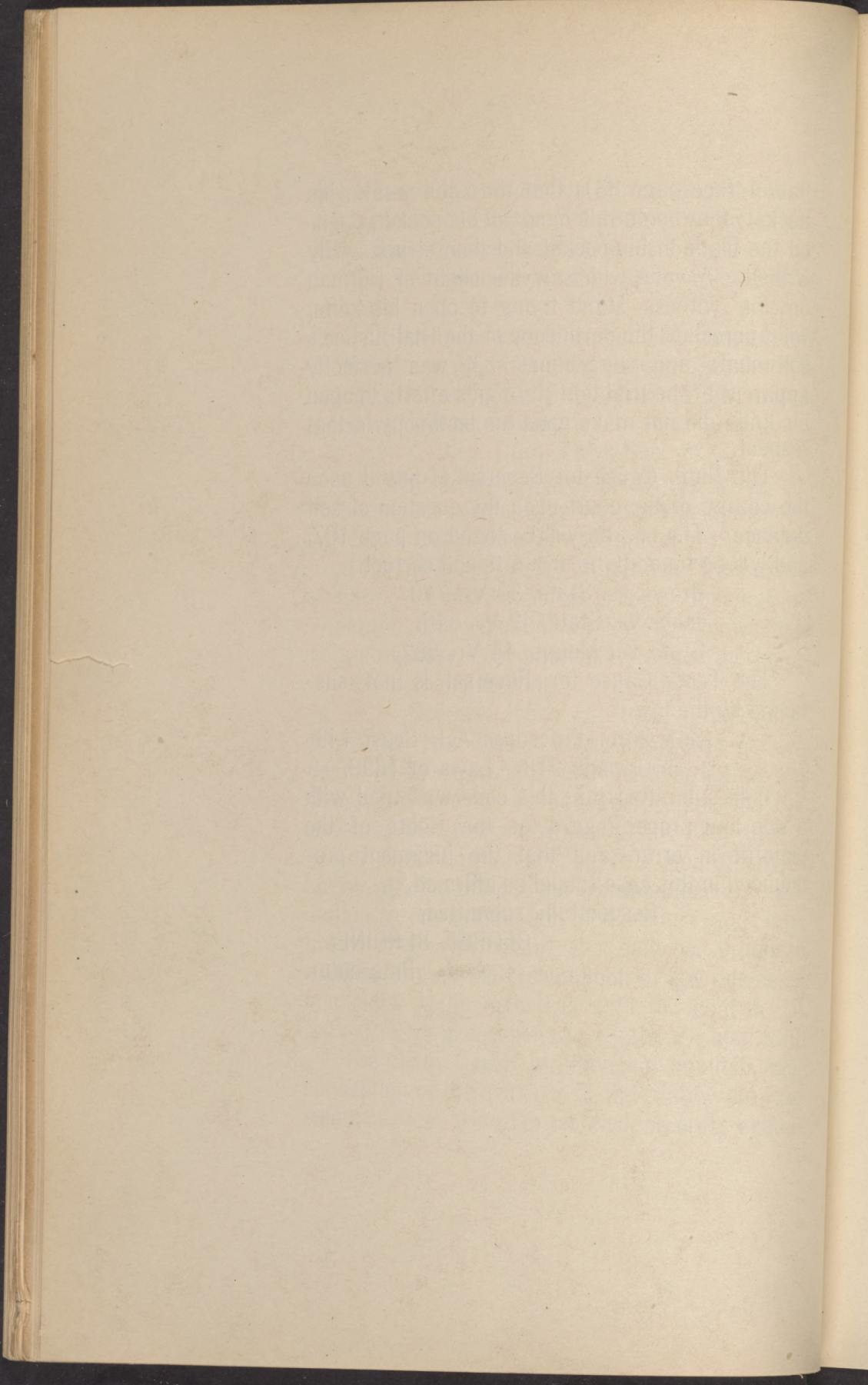
The Tenth Cause for Reversal is not sustained by the law.

See Crim. Procedure Act, Secs. 149-150, page 918. Laws of 1898.

It is submitted that this case was tried with a due and proper regard for the rights of the plaintiff in error, and that the judgment pronounced in this case should be affirmed.

Respectfully submitted,

GEORGE BERDINE,
Prosecutor.



New Jersey Court of Errors and Appeals.

THE STATE OF NEW JERSEY,
Defendant in Error,)

vs.)

PAUL HERMAN,
Plaintiff in Error.)

WRIT OF ERROR.

[Filed November 13, 1908.]

To Whom It May Concern:

This is to certify that Paul Herman, lately convicted in the Court of Oyer and Terminer of the county of Middlesex of the crime of murder in the first degree, has applied to me for a writ of error to be issued out of the Supreme Court for the review of said judgment of conviction, and that I, having considered the said application, have refused to order such writ of error to be issued. 10

Dated at Morristown, New Jersey, this twenty-eighth day of October, A. D. one thousand nine hundred and eight.

MAHLON PITNEY,
Chancellor.

NEW JERSEY, ss.—The State of New Jersey to our judges of our Court of Oyer and Terminer in and for the county of Middlesex.

Because in the record and proceedings, and also in the giving of judgment in our
 [L. s.] said court of Oyer and Terminer in and for the county of Middlesex upon a certain indictment against Paul Herman, late of said county, for willfully, feloniously and of his malice afore-
 10 thought killing and murdering Mike Melnik, whereof before you he hath been convicted, and is thereof convicted in the first degree by a certain jury of the county, taken between the State of New Jersey and Paul Herman, as it is said manifest error hath intervened, to the great damage of the said Paul Herman, as from his complaint we have received information, we being willing in this behalf to correct the error in due manner, if any there be, and that speedy justice be done to him, the said Paul Herman, command you that if judgment be thereon
 20 given, then that you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things concerning the same, including the entire record of the proceedings had upon the trial of said cause, to our Court of Errors and Appeals in the last resort in all cases, on the sixteenth day of November, one thousand nine hundred and eight, and this writ, that, the record and proceedings aforesaid being inspected, we may further cause to be done thereupon for correcting that error what of right, and according to the law and custom of
 30 New Jersey, ought to be done.

Witness, Mahlon Pitney, our Chancellor, at Trenton aforesaid, this twenty-ninth day of October, one thousand nine hundred and eight.

PETER BACKES,
Attorney.

S. D. DICKINSON,
Clerk.

The answer of James J. Bergen, within named: The record and proceedings of the plea whereof mention is within named, with all things concerning the same, including the entire record of the proceedings had upon the trial of the said cause, to the Court of Errors and Appeals in the last resort in all causes, within specified, at the day and place within contained, I certify in a certain schedule to this writ annexed as I am within commanded.

J. J. BERGEN, 10
Justice Supreme Court.

STATE OF NEW JERSEY, MIDDLESEX COUNTY, to wit.—
Be it remembered that at a session of the Court of Oyer and Terminer, held at New Brunswick, in and for the said county of Middlesex, on the first Tuesday of April, in the year of our Lord one thousand nine hundred and eight, before the Honorable James J. Bergen, one of the justices of the Supreme Court of Judicature of the State of New Jersey, and Theodore B. Booraem, judge of the Court of Common Pleas, in and for said county of Middlesex, the same being the April Term of the said Court of Oyer and Terminer, in the year aforesaid, according to the form of the statute in such case made and provided, upon the oaths of Albert Leon, Ira B. Tice, James A. Morrison, Harvey B. Groves, Frank E. Watson, William R. Reed, Frederick Deibert, George Green, Wesley Applegate, John B. Perrine, Rev. Wm. T. Barney, Ellis Appleby, Allison E. Dey, Abijah Chamberlain, Robert P. Judge, William H. Riddle, Frank R. Valentine, John H. Raymond, F. Percy Vail, Albert N. Randolph, Rev. Edwin Meeker, Jacob Steinberg, David Powers, good and lawful men of the said county of Middlesex, duly summoned and then and ther empaneled, sworn and charged on behalf of the State of New Jersey and for the body of the county of Middlesex, it is presented in manner and form, to wit:

“Middlesex Oyer and Terminer of April Term, A. D. one thousand nine hundred and eight.

“Middlesex County, to wit: The Grand Inquest for the State of New Jersey, and for the body of the county of Middlesex, upon their oath present, that Paul Herman, late of the township of Woodbridge, in the said county of Middlesex, on the tenth day of June, in the year of our Lord one thousand nine hundred and eight, with force and arms, at the township of Woodbridge aforesaid, in
10 the county aforesaid, and within the jurisdiction of this court, willfully, feloniously and of his malice aforethought, did kill and murder one Nikolaj Marnichek, against the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

“GEORGE BERDINE,
“Prosecutor of the Pleas.”

And afterwards, that is to say, at a session of the said Court of Oyer and Terminer holden at New Brunswick
20 aforesaid, in and for the county of Middlesex aforesaid, on Monday, the twentieth day of July, in the year of our Lord one thousand nine hundred and eight, of the term of April of the said Court of Oyer and Terminer, before the Honorable James J. Bergen, one of the justices of the Supreme Court of Judicature of New Jersey, and Theodore Booraem, judge of the Court of Common Pleas, in and for said county of Middlesex, here cometh the said Paul Herman, under the custody of Andrew S. Church, Esquire, sheriff of the said county of Middlesex (in whose
30 custody in the jail of the county aforesaid, for the cause aforesaid, he, the said Paul Herman, had been before committed), being brought to the bar in his proper person by the said sheriff to whom he is here also committed. And Paul Herman, now here in his proper person, having heard the said indictment, and forthwith being demanded concerning the premises in the said indictment above specified and charged upon him, how he will acquit him-

self thereof, he sayeth that he is not guilty thereof, and thereof for good and evil he puts himself upon the country.

And George Berdine, Esquire, prosecutor of the pleas of the State of New Jersey, in and for the county of Middlesex, who prosecutes for the State of New Jersey in the behalf does the like.

Therefore let a jury thereupon here come, to wit, on Tuesday, September fifteenth, in the year of our Lord one thousand nine hundred and eight, of the term of 10 September, at a session of the said Court of Oyer and Terminer, before the Honorable James J. Bergen, one of the justices of the Supreme Court of Judicature of the State of New Jersey, and Theodore B. Booraem, judge of the Court of Common Pleas in and for the said county of Middlesex, of good and lawful men of the said county of Middlesex, by whom the truth of the matter may be better known, and who are not of kin to the said Paul Herman, to recognize upon their oaths whether the said Paul Herman be guilty of the murder 20 in the indictment aforesaid above specified or not guilty, because as well the said George Berdine, Esquire, who prosecutes for the State of New Jersey in this behalf as the said Paul Herman have put themselves upon the said jury. And now, to wit, on the said Tuesday, the fifteenth day of September, in the year of our Lord one thousand nine hundred and eight, at the aforesaid session of the Court of Oyer and Terminer, at New Brunswick, in and for the county of Middlesex aforesaid, of the term of September of said Court of Oyer 30 and Terminer, before the said Honorable James J. Bergen, one of the justices of the Supreme Court of Judicature of the State of New Jersey, and Theodore B. Booraem, Esquire, judge of the Court of Common Pleas in and for the said county of Middlesex, here comes as well the said George Berdine, Esquire, who prosecutes for the State of New Jersey in this behalf, and the said Paul Herman, in his own proper person, under the custody of the sheriff as aforesaid, and the jurors of the

said jury by the said sheriff for the purpose empaneled and returned agreeably to the statute in such case made and provided, to wit: George Roeder, John Reng, Thomas Kay, George F. Liddle, Peter Letson, Jr., James Fisher, George Farr, Reuben McDowell, Lester Wobbe, Le Bree Higgins, T. S. Vandenbergh, Fred. Whitehead.

Being called come, who being elected, chosen, tried and sworn to speak the truth of and concerning the
 10 premises, upon their oath say that the said Paul Herman is guilty of murder in the first degree as above charged in manner and form as in and by said indictment is above alleged against him. Whereupon all and singular the premises being seen, and by the said justice and judge as aforesaid here fully understood, it is considered by the court that the said Paul Herman shall suffer death in the week beginning on the second day of November, nineteen hundred and eight, in accordance with the law provided for that purpose.

20 And the said Paul Herman in mercy, &c.

Judgment signed this sixteenth day of September, A. D. one thousand nine hundred and eight.

STATE OF NEW JERSEY, }
 COUNTY OF MIDDLESEX. } ss.

I, John H. Conger, clerk of the county of Middlesex, do hereby certify that the foregoing is a true, full and correct copy of a certain judgment as the same is on record file in my office in Book 4 of Oyer and Terminer, on pages 6, &c.

30 [L. s.] In testimony whereof I have hereunto set my hand and affixed the seal of said county, this thirtieth day of October, A. D. one thousand nine hundred and eight.

JOHN H. CONGER,
Clerk.

ASSIGNMENT OF ERRORS.

[Filed November 20, 1908.]

Afterwards, to wit, on the sixteenth day of November, in this term, before the judges of the said Court of Errors and Appeals in the last resort in all causes, at Trenton, comes the said Paul Herman, by his counsel, Peter Backes, and says that in the record and proceedings had at the trial of said cause, and also in the giving of judgment aforesaid, there is manifest error in this, to wit: 10

First. That the judges of the said Court of Oyer and Terminer in and for the county of Middlesex, before whom, &c., at and upon the trial of the said issue so joined upon the said indictment, allowed the prosecutor of the pleas to ask the following witnesses, produced upon the part of the State, and the said witnesses to make answer thereto, as follows, and which testimony so permitted to be given being separately and respectively assigned as erroneous:

(1) Of Isaac S. Vanderveer, photographer: 20

"Q. In the portion of the town designated as the locality or as the residence and place where this murder was committed?

"A. Yes, sir.

"Q. What house?

"A. Where the murder took place.

"Q. What front room?

"A. The front room of the house where the murder took place.

"Q. The room wherein you were told that the crime 30 was committed?

"A. Yes, sir.

"Q. Go on and describe the rest of the photographs.

"A. *P 5* is looking into the kitchen. I stood in the room where the crime was committed," &c. "*P 6* is a view in the front room where the crime was committed, showing the spot where the crime was committed."

(2) Of Morgan F. Larson, surveyor:

“Q. What is that map you have there—what does it represent?

“A. The lower part of this map is a map of the vicinity of Houston and Bee street, in Roosevelt.

“Q. In this county?

“A. Yes, sir; and it also shows the house where the murder was committed.

“Q. The house where the alleged crime was supposed
10 to have been committed or took place?

“A. Yes, sir; and the upper part of the map is a detailed drawing of the same building.

“Q. Tell us what they are in detail?

“A. The ground floor of the house is divided into two rooms, one room being a front room, another a kitchen, and there are two bedrooms, which I have marked here, with closets and outlets, &c.; and the furniture in the front room, which was placed by the lady of the house in the same position in which it was supposed to be, or in
20 the way they were placed at the time the murder was committed.

“Q. Is that the way you have them indicated on the map?

“A. Yes, sir.

“Q. I show you again *Exhibits P 5* and *P 6*; will you indicate on these the door that the defendant was supposed to have backed up against?

“[Objected to.]

“Q. Show that door on the map?

30 “[Objected to, and question withdrawn.]”

(3) Of Kate Melnik:

“Q. Where were you on Wednesday night, the night of your husband’s killing?

“A. I was in the house—in my house.

“Q. Did your husband (the deceased) and Paul Herman have any conversation about his (Herman’s) wife?

“A. Yes; my husband said to Paul Herman why he beat his wife so on Saturday.

“Q. Go on.

"A. Yes; Paul Herman said (after other words) that if somebody would say something, or say something to me, I would stab a knife into my brother or my father.

"Q. What was said, if anything, about Paul Herman's striking or hitting his wife?

"[Not answered.]

"Q. Did you see Paul Herman's wife after that?

"[Overruled.]

"Q. Did you see her?

"A. Yes, sir; I see her.

10

"Q. What was her condition as to her face or eyes?"

(4) Of Mitro Burak:

"Q. Were you arrested as a witness in this case?

"A. Yes, sir.

"Q. Well, the next day after you was arrested, and while down in the Carteret jail, did you see Mrs. Herman (the wife of defendant)?

"A. We did not see them, but we heard them talking through the wall.

"Q. Was Herman, the defendant, in jail, too, while you were there?

"A. Yes, sir.

"Q. Was anything said by Paul Herman to his wife while there (at the jail) as to whether she had been there, and that if he had gotten \$10 he could have run away instead of being caught?

"A. I did not know what the \$10 was needed for.

"Q. Was anything said about \$10.

"A. No, sir; I didn't hear anything about \$10."

(5) Of Charles Walling:

30

"Q. Did you see anyone when you came back?

"A. I seen Paul Herman's wife.

"Q. Did you see anything about her face—what her condition was?

"[No answer. Overruled.]

"Q. What did you say to Paul Herman with reference to who did the cutting?

“A. I asked him did he do it, and he said, ‘Yes, I done it.’”

(6) Of Paul Herman, defendant:

“Q. Did you ever black your wife’s eye?

“Q. When did you strike her like this [indicating]?

“A. On Saturday.

“Q. Was your wife’s eye at any time blackened by anything you did?”

Second. That the presiding judge, during the cross-
10 examination of the defendant, who, at the requirement of the prosecutor, was opening the knife (alleged to have been used at the alleged crime) in his pocket, said, in the presence of the jury, “I think it is proper to state that he now opens it by the use of his knee.”

Third. That the presiding trial judge charged the jury as follows, which is assigned as erroneous: “Dr. Suydam has testified as to the nature of the wound, and that the wound which he received on the tenth day of June was fatal in its nature, and was the cause of the death; so, if
20 you believe this evidence, and I recall no contradiction, it would seem that the deceased was killed by being cut in the abdomen by a sharp instrument,” which was erroneous because it was an incorrect statement of Dr. Suydam’s testimony. Dr. Suydam did not, in fact, so testify, but, on the contrary, testified that the perforation of the intestines was the result of some doctor or some physician having taken two stitches in the intestine or descending colon, and at the seat between these two stitches there was a perforation which had caused a descending peritonitis,
30 and that the perforation of the intestines naturally resulted fatally.

Fourth. That the learned trial judge charged the jury as follows, which is assigned as erroneous. Defining murder in the first degree, and instructing the jury as to the space of time requisite to intervene between the formation of a design to kill and its execution to constitute premeditation, he said: “A man may form an intent and instantly execute it with deliberation.”

Fifth. That the said judge neglected to charge the

jury, which is assigned as erroneous, and instruct them upon the law as to the crime of manslaughter, although there was evidence in the case which rendered such instructions necessary, and which would have justified the jury, if they believed him guilty of any crime, to have rendered a verdict of manslaughter, and thereby deprived the defendant of his right to have the probative force of such testimony passed upon by the jury.

Sixth. That the said trial judge charged the jury as follows, which is assigned as erroneous: "The defendant 10 says he had a knife in his pocket. Well, gentlemen, if that knife was open in his pocket, ready to be used, and taking into consideration that it is an ordinary pocket knife, such as is usually carried closed, that would be a fact which you would be entitled to take into consideration as to when the defendant formed an intent to kill, if he did."

Seventh. That the said trial judge charged the jury, which is assigned as erroneous: "So, when this defend- 20 ant uses a knife and stabs a man in a vital part, it is for you to say whether or not from that act you have a right to infer that he intended by his act to take life; that when he drew that knife and stabbed the deceased he had formed in his mind an intent to kill. If he had, it was murder."

Eighth. That the learned trial judge charged the jury, which is assigned as erroneous: "I charge you that, under the law of the State, it is your duty, when you render your verdict, if you find the defendant guilty, to declare the grade of the offense, either murder in the 30 first degree or murder in the second degree."

Ninth. That the learned trial judge charged the jury, which is assigned as erroneous (instructing them upon the law of self-defense): "In order to justify one in taking the life of another, or what is called self-defense, the party must be in danger of grievous bodily harm. If a man is struck with the fist, and he has the opportunity to withdraw, it is his duty to withdraw, and he has no right to take the life of another unless to protect his own life or to protect himself from serious bodily harm."

Tenth. That the said trial judge permitted, which is assigned as error, the testimony of Kate Milnik, Mitro Burak, Mitro Kornora, Michael Harko, Paul Herman, Joseph Borak and Kate Balenco, given in a foreign tongue, to be interpreted to the court and jury by an interpreter, who was not previously sworn as required by law.

Eleventh. There is manifest error in this, to wit, that by law the said Paul Herman was entitled to a trial on
10 the matter of fact put in issue by his plea of not guilty, and to every defense available under that plea, whereas, under the charge of the court, the only questions submitted to the jury were the degree of murder and self-defense.

Twelfth. There is also manifest error in this, to wit, that the said charge as a whole, and in each and every part of it, was illegal, and thereby defendant suffered manifest wrong and injury.

Thirteenth. There is also manifest error in this, to wit,
20 that the entire evidence in said cause, as a whole, did not show, beyond a reasonable doubt, that the said defendant, Paul Herman, was guilty of the crime of murder in the first degree, and did not justify said verdict.

Fourteenth. There is also manifest error in the said record and proceedings, and in the giving of judgment therein, in this, to wit, that the entire record of the proceedings had upon the trial of the said Paul Herman suffered manifest wrong and injury in the admission of
30 evidence and the charge of the court, which prejudiced the defendant in maintaining his defense upon the merits.

And the said Paul Herman prays that the judgment aforesaid, for the errors aforesaid, and for other errors therein, may be reversed, annulled and altogether holden for nothing, and that he may be restored to all things which he has lost by reason of said judgment.

PETER BACKES,

*Attorney and of Counsel With Paul
Herman, Plaintiff in Error.*

SPECIFICATION OF CAUSES FOR REVERSAL.

The plaintiff in error hereby specifies the causes relied upon for reversal of the judgment brought up by the writ of error in this cause, viz.:

First. That the judges of the said Court of Oyer and Terminer in and for the county of Middlesex, before whom, &c., at and upon the trial of the said issue, so joined upon the said indictment, allowed the prosecutor of the pleas to ask of the following witnesses, produced upon the part of the State, and the said witnesses to make answer thereto, as follows, and which testimony, so permitted to be given, being separately and respectively assigned as erroneous and cause for reversal: 10

(1) Of Isaac S. Vanderveer, photographer:

“Q. In the portion of the town designated as the locality or as the residence and place where this murder was committed?

“A. Yes, sir.

“Q. What house?

“A. Where the murder took place. 20

“Q. What front room?

“A. The front room of the house where the murder took place.

“Q. The room wherein you were told that the crime was committed?

“A. Yes, sir.

“Q. Go on and describe the rest of the photographs.

“A. *P 5* is looking into the kitchen. I stood in the room where the crime was committed,” &c. “*P 6* is a view in the front room where the crime was committed, showing the spot where the crime was committed.” 30

(2) Of Morgan F. Larson, surveyor:

“Q. What is that map you have there, what does it represent?

"A. The lower part of this map is a map of the vicinity of Houston and Bee street in Roosevelt.

"Q. In this county?

"A. Yes, sir; and it also shows the house where the murder was committed.

"Q. The house where the alleged crime was supposed to have been committed or took place?

"A. Yes, sir; and the upper part of the map is a detailed drawing of the same building.

10 "Q. Tell us what they are in detail.

"A. The ground floor of the house is divided into two rooms; one room being a front room, another a kitchen, and there are two bedrooms which I have marked here with closets and outlets, &c. And the furniture in the front room, which was placed by the lady of the house, in the same position in which it was supposed to be, or in the way they were placed at the time the murder was committed.

20 "Q. Is that the way you have them indicated on the map?

"A. Yes, sir.

"Q. I show you again *Exhibits P 5* and *P 6*; will you indicate, on these, the door that the defendant was supposed to have backed up against?

"[Objected to.]

"Q. Show that door on the map?

"[Objected to and question withdrawn.]"

(3) Of Kate Melnik:

30 "Q. Where were you on Wednesday night, the night of your husband's killing?

"A. I was in the house, in my house.

"Q. Did your husband (the deceased) and Paul Herman have any conversation about his (Herman's) wife?

"Yes; my husband said to Paul Herman why he beat his wife so on Saturday.

"Q. Go on?

"A. Yes; Paul Herman said (after other words) that if somebody would say something, or say something to me, I would stab a knife into my brother or my father.

"Q. What was said, if anything, about Paul Herman's striking or hitting his wife?

"A. [Not answered.]

"Q. Did you see Paul Herman's wife after that?

"[Overruled.]

"Q. Did you see her?

"A. Yes, sir; I see her. 10

"Q. What was her condition as to her face or eyes?"

(4) Of Mitro Burak:

"Q. Were you arrested as a witness in this case?

"A. Yes, sir.

"Q. Well, the next day after you was arrested, and while down in the Carteret jail, did you see Mrs. Herman (the wife of defendant)?

"A. We did not see them, but we heard them talking through the wall.

"Q. Was Herman, the defendant, in jail, too, while 20 you were there?

"A. Yes, sir.

"Q. Was anything said by Paul Hreman to his wife while there (at the jail) as to whether she had been there, and that if he had gotten \$10 he could have run away instead of being caught?

"A. I did not know what the \$10 was needed for.

"Q. Was anything said about \$10?

"A. No, sir; I didn't hear anything about \$10."

(5) Of Charles Walling: 30

"Q. Did you see anyone when you came back?

"A. I seen Paul Herman's wife.

"Q. Did you see anything about her face, what her condition was?

"A. [No answer.]

[Overruled.]

"Q. What did you say to Paul Herman with reference to who did the cutting?

A. I asked him did he do it, and he said, 'Yes, I done it.'"

(6) Of Paul Herman, defendant:

"Q. Did you ever black your wife's eye?

"Q. When did you strike her like this [indicating]?

"A. On Saturday.

"Q. Was your wife's eye at any time blackened by
10 anything you did?"

Second. That the presiding judge, during the cross-examination of the defendant, who, at the requirement of the prosecutor, was opening the knife (alleged to have been used at the alleged crime) in his pocket, said, in the presence of the jury, "I think it is proper to state that he now opens it by the use of his knee."

Third. That the presiding trial judge charged the jury as follows, which is cause for reversal: "Dr. Suydam has testified as to the nature of the wound, and that the
20 wound which he received on the tenth day of June was fatal in its nature, and was the cause of the death, so, if you believe this evidence, and I recall no contradiction, it would seem, that the deceased was killed by being cut in the abdomen by a sharp instrument."

Fourth. That the learned trial judge charged the jury as follows, which is cause for reversal: Defining murder in the first degree, and instructing the jury as to the space of time requisite to intervene between the formation of a design to kill, and its execution, to constitute
30 premeditation, he said: "A man may form an intent, and instantly execute it with deliberation."

Fifth. That the said judge neglected to charge the jury and instruct them upon the law as to the crime of manslaughter; although there was evidence in the case which rendered such instruction necessary, and which would have justified the jury, if they believed him guilty

of any crime, to have rendered a verdict of manslaughter; which is cause for reversal.

Sixth. That the said trial judge charged the jury as follows, which is cause for reversal: "The defendant says he had a knife in his pocket. Well, gentlemen, if that knife was open in his pocket ready to be used, and taking into consideration that it is an ordinary pocket knife, such as is usually carried closed, that would be a fact which you would be entitled to take into consideration as to when the defendant formed an intent to kill, 10 if he did."

Seventh. That the trial judge charged the jury, which is cause for reversal: "So, when this defendant uses a knife and stabs a man in a vital part, it is for you to say whether or not, from that act, you have a right to infer that he intended by his act to take life; that when he drew that knife and stabbed the deceased, he had formed in his mind an intent to kill. If he had, it was murder."

Eighth. That the learned trial judge charged the jury, 20 which is cause for reversal: "I charge you that under the law of the State, it is your duty when you render your verdict, if you find the defendant guilty, to declare the grade of the offense, either murder in the first degree or murder in the second degree."

Ninth. That the learned trial judge charged the jury, which is cause for reversal (instructing them upon the law of self-defense): "In order to justify one in taking the life of another, or what is called self-defense, the party must be in danger of grievous bodily harm. If a 30 man is struck with the fist, and he has the opportunity to withdraw, it is his duty to withdraw, and he has no right to take the life of another unless to protect his own life or to protect himself from serious bodily harm."

Tenth. That the said trial judge permitted, which is cause for reversal, the testimony of Kate Milnik, Mitro Burak, Mitro Kornora, Michael Harko, Paul Herman, Joseph Borak and Kate Balenco, respectively, given in a

foreign tongue, to be interpreted to the court and jury by an interpreter, who was not previously sworn as required by law.

Eleventh. That by law the said Paul Herman was entitled to a trial on the matter of fact put in issue by his plea of not guilty, and to every defense available under that plea, whereas, under the charge of the court, the only questions submitted to the jury were the degree of murder and self-defense, which is cause for reversal.

10 *Twelfth.* That the said charge, as a whole, and in each and every part of it, was illegal, and thereby defendant suffered manifest wrong and injury, which is cause for reversal.

Thirteenth. That the entire evidence in said cause, as a whole, did not show, beyond a reasonable doubt, that the said defendant, Paul Herman, was guilty of the crime of murder in the first degree, and did not justify said verdict. This is specified as cause for reversal.

20 *Fourteenth.* That in the entire proceedings had upon the trial of the said Paul Herman, he, the said plaintiff in error, suffered manifest wrong and injury in the admission of evidence, and the charge of the court, which prejudiced the defendant in maintaining his defense upon the merits, and are causes for reversal.

And the said Paul Herman prays that the judgment aforesaid, for the errors aforesaid, and for other errors therein, may be reversed, annulled and altogether holden for nothing, and that he may be restored in all things which he has lost by reason of said judgment.

30

PETER BACKES,

*Attorney and of Counsel with**Paul Herman, Plaintiff in Error.*

TESTIMONY.

Transcript of the evidence in the above-entitled cause, taken before his honor, James J. Bergen, justice of the Supreme Court of New Jersey, at the court house, in the city of New Brunswick, N. J., on Tuesday, the 15th day of September, 1908, at 11:15 A. M.

Appearances—

Mr. George Berdine, prosecutor of the pleas, for the State.

Mr. Harry Cook, for the defendant. 10

Mr. Berdine opening in behalf of the State.

Mr. Berdine—Mr. Cook, counsel for the defendant, has consented that certain photographs may be used without formal proof, but I think it is essential to prove them and will therefore call a witness for that purpose.

Isaac S. Vanderveer, a witness produced in behalf of the State, being duly sworn according to law, on his oath saith:

Examined by Mr. Berdine.

Q. What is your business?

A. Photographer. 20

Q. Where?

A. New Brunswick, N. J.

Q. Were you called upon to take photographs of a place known as Roosevelt?

A. Yes.

Q. In the portion of the town designated as the location or as the residence and place where this murder occurred?

A. Yes, sir. 30

Q. Look at these and tell us what they are [handing witness photographs]?

A. They are photographs.

Q. Tell us what each one is, so far as you can?

Court—Give each photograph a mark by which they can be identified.

[Photographs marked respectively *P 1*, *P 2*, *P 3*, *P 4*, *P 5*, *P 6*.]

Q. I hand you photograph marked *P 1*; what is it?

A. *P 1* is the house, the front of the house, showing down the street with the hotel at the corner.

10 Q. (By the Court.) What house?

A. Where the murder took place.

Q. (By Mr. Berdine.) Go on?

A. *P 2* is the side and rear of the same house; *P 3* is the back of the house and the yard; *P 4* is looking from the kitchen into the front room.

Q. What front room?

A. The front room of this house, where the murder took place.

Q. The room wherein you were told that the crime
20 was committed?

A. Yes, sir.

Q. Go on and describe the rest of the photographs?

A. *P 5* is looking into the kitchen. I stood in the room where the crime was committed, and this picture is looking into the kitchen from that room; *P 6* is a view in the front room where the crime was committed, showing the spot where the crime was committed.

Mr. Berdine—I offer those photographs in evidence.
[Marked *Exhibits P 1 to P 6*, both inclusive.]

30 No cross-examination.

Morgan F. Larson, a witness produced in behalf of the State, being duly sworn according to law, on his oath saith:

Examined by Mr. Berdine.

Q. What is your business?

A. County engineer.

Q. Your are a surveyor?

A. Yes, sir.

Q. What is that map you have there—what does it represent?

A. The lower part of this map is a map of the vicinity of Houston and Bee street in Roosevelt.

Q. In this county?

A. Yes, sir; and it also shows the house where the murder was committed.

Q. Show it—mark it?

A. It is designated by the letter "A." 10

Q. What does that indicate?

A. It is just a mark of identification.

Q. The house where the alleged crime was supposed to have been committed or took place?

A. Yes, sir; and the upper part of the map is a detailed drawing of the same building.

Q. Tell us what they are in detail?

A. The ground floor of the house is divided into four rooms, one room being a front room, another a kitchen, and there are two bedrooms which I have marked here 20 with closets and outlets, &c.; and the furniture in the front room which was placed by the lady of the house in the same position in which it was supposed to be or in the way they were placed at the time the murder was committed.

Q. Is that the way you have them indicated on the map?

A. Yes, sir.

Q. Explain it?

A. In the front window in the front room was a sewing machine, a chair and a bureau, and in the corner of the room was a bed, and in the opposite side of the room from the bed was another chair, a table and a bed. 30

Q. What does the upper part of the map represent?

A. Beyond the front room is a bedroom.

Q. And does that continue to the rear of the house?

A. Yes, sir; and the most easterly part of the house has another bedroom, and then the kitchen occupies the northeasterly portion of the building.

Q. And the extreme top of the map is out in the yard?

A. Yes, sir.

Q. Have you looked at these photographs which have been offered in evidence and marked *P 1* to *P 6*, inclusive?

A. No, sir.

Q. I show you *Exhibit P 6* and ask you if that represents the front room you have designated on the map?

A. I do not recognize it from this photograph.

10 Q. That is the wrong photograph; I show you *Exhibit P 4*—what does that represent, or does it represent the front room designated on the map?

A. Yes, sir; that is it.

Q. They represent the front room?

A. Yes, sir.

Q. I show you *Exhibit P 5*; what does that represent?

A. That is the kitchen, and shows it as designated on the map.

Cross-examination by Mr. Cook.

20 Q. What are the dimensions of that room you have marked as "front room?"

A. Twelve by fourteen feet.

Q. And what is the distance between the door going into the kitchen and the door going out on the porch?

A. The front door, here?

Q. No, the other door?

A. This one?

Q. Yes, that door?

30 A. I can scale it within an inch or so, if you have a rule.

Q. What scale is the map?

A. It is drawn on a scale of two feet to the inch.

Q. Then we can figure it out ourselves?

A. Yes, this is one inch to the foot (indicating the lower portion of the map), and this ten feet to the inch.

Redirect by Mr. Berdine.

Q. I show you again *Exhibits P 5* and *P 6*, will you indicate on these the door that the defendant was supposed to have backed up against?

Mr. Cook—I object to that as immaterial.

Q. (By Mr. Berdine.) Show that door on the map?

Mr. Cook—I object; this gentleman was not a witness to the crime and whatever he would tell us now, would be what he had learned from hearsay.

[Question withdrawn.]

10

Q. (By Mr. Berdine.) What door do you indicate on the map—the door into the hall or the door into the front room?

A. The door leading from the front door out to the hall.

Q. Where is that?

A. It is here, I have marked it “B.”

Q. Look at the photographs and see if they are so there?

A. Yes, sir; I have marked it “B” on the photograph.

John L. Suydam, a witness produced in behalf of the State, being duly sworn according to law, on his oath saith:

Examined by Mr. Berdine.

Q. What is your profession?

A. Physician—county physician of Middlesex county, New Jersey.

Q. How long have you held that position?

A. Nearly three years.

Q. How long have you been a member of the profession of medicine?

30

A. Twenty-six years.

Q. And in practice that long?

A. Yes, sir.

Q. Were you called at any time to visit the body of Micolaj Melnik?

A. Yes, sir; on the 12th of June I was called down to the Alexian Brothers' Hospital, in the city of Elizabeth, to perform an autopsy on one Mike Melnik, thirty years

of age, a resident of Roosevelt, as I was informed, and that he had been in the hospital about nine days.

Q. Where did he come from?

A. He was brought to the hospital from the borough of Roosevelt.

Q. Well, what did you find?

A. I found a wound just about six inches in a vertical direction, from the bottom of his pelvis, and about four inches transversely in the abdomen.

10 Q. Tell us what transversely means?

A. Running to the left of the body in this way [indicating].

Q. What else did you find?

A. I found a wound of one inch in diameter; I opened up the abdomen and I found considerable fluid, due to the peritoneum being inflamed, and as I went on I found two sets of stitches in the intestine, in the descending colon, and these perforations, having caused the blood to flow accounted for the fluid which I have already
20 mentioned; I also found another wound right at the top of the ileum, that is at the top of the ileum, between that and the lung, and that had two stitches in it.

Q. From your experience, could you say what was the cause of the wound?

A. The use of some sharp pointed instrument—you account for it in both places to the use of some sharp pointed instrument.

Q. Like a knife?

A. Yes, sir; like a knife.

30 Q. Could an instrument of that sort have produced it [handing witness a knife]?

A. Yes, I should judge an instrument of this description would produce the wounds I found?

Q. An instrument of that kind in the hand, and in the use of a person?

A. Yes, sir.

Q. I have not correctly understood just how the wound was made?

A. It was a cut running six inches in a vertical direction [indicating]; if you draw a line in the median line of the abdomen, then bisect that line with a line drawn horizontally to the left four inches, and you then have the location of where the stab was.

Q. And that wound was made with a knife?

A. Yes.

Q. And probably with a knife of this sort?

A. Yes, sir.

Q. What about the other wounds?

10

A. That was made with a knife.

Q. How serious was that wound?

A. That was not fatal.

Q. Tell us about it?

A. These perforations of the intestine were the result of some doctor or some physician having taken two stitches in the intestine, or in the descending colon, and at the seat between these two stitches, there was a perforation which had caused a descending peritonitis.

Q. Describe it more fully?

20

A. There is one of the large intestines, or gut [interrupted]——

Q. How do you make it clear that this cut with the knife caused all that?

A. By the perforation of the intestine.

Q. And that naturally resulted fatally?

A. Yes, sir.

Q. That was the case of both the wounds across here [indicating]?

A. Yes, sir.

30

Q. And you say they were made by a knife?

A. Yes, sir; there is no doubt about it.

Cross-examination by Mr. Cook.

Q. Doctor, when did you see this deceased person?

A. I saw him on the evening of June 19th, 1908, about six o'clock.

Q. And he was at the Alexian Brothers' Hospital in the city of Elizabeth?

A. Yes, sir; he was in the Alexian Brothers' Hospital in the city of Elizabeth, and I saw him on the Friday, June 19th, 1908, about six o'clock.

Q. The wound that you found, doctor, had it originally penetrated the intestines?

A. The perforation?

Q. Yes?

A. Yes, sir.

Q. What was there in that perforation to indicate, to
10 your mind, that it had been perforated, what was there to show that the intestines had been perforated?

A. Why there had been a wound pre-existing there, and it had been sewed up.

Q. How many stiches did you find?

A. I found two stiches in the descending colon, although the brothers there say there had been more than two.

Q. I didn't ask you that?

A. Well, I found two.

20 Mr. Berdine—The other physicians are not here yet, so we will have to make a divergence for a little while, in the order of offering our evidence.

Kate Melnik, a witness produced in behalf of the State, being duly sworn according to law, on her oath saith:

Examined by Mr. Berdine (by interpreter).

Q. Where did you live in June of this year?

A. Chrome.

Q. Were you married then?

A. Yes, sir.

30 Q. What was you husband's name?

A. Mikolaj Melnik.

Q. Do you know Paul Herman, the defendant?

A. Yes, sir; I know him.

Q. Do you know his wife?

A. Yes, I know her.

Q. Was she related to you or your husband?

A. She is, but not very near.

Q. What is her relation to you or your husband?

A. Her father was some relation.

Q. On Sunday, June 7th, of this year, did Paul Herman come to your house?

A. Yes, sir; he came.

Q. Was your husband there?

A. Yes, sir; he was.

Q. Was Paul Herman's wife there?

A. No, sir; she was not.

Q. Did your husband and Paul Herman have any conversation about his wife? 10

A. Yes; Paul Herman came to my house and my husband said to Paul Herman "Why he beat his wife so on Saturday?"—

Mr. Cook—I object to this as immaterial.

[Examination allowed.]

Q. (By Mr. Berdine.) Go on?

A. Paul Herman said, "That she should do as I command her to do," and my husband said to Paul Herman, "Why should she do, she has one child, what could she not do around," and Paul Herman said, "That if somebody would say something or say something to me, I would stab a knife into my brother or into my father." 20

Q. Say something to you about what?

A. When Paul Herman gets mad, when somebody says to him something [interrupted]—

Mr. Cook—I object to this as immaterial and ask that it be stricken out.

The Court—The last sentence should be stricken out as not responsive.

Q. (By Mr. Berdine.) What was said, if anything, about Paul Herman's striking or hitting his wife? 30

Mr. Cook—I object to the question as incompetent and immaterial.

The Court—Let the witness tell what took place.

Q. (By Mr. Berdine.) Did you see Paul Herman's wife after that?

A. I went that Sunday, in the afternoon, to her house.

Mr. Cook—I object to this witness answering anything

more than the question asked—"Did you see Paul Her-
man's wife after that," that calls for an answer yes or no.

[Objection sustained.]

Q. (By Mr. Berdine.) Did you see her?

A. Yes, sir; I see her.

Q. What was her condition as to her face or eyes?

Mr. Cook—I object to that as incompetent or imma-
terial.

[Objection sustained.]

10 Q. (By Mr. Berdine.) Where were you on Wednesday
night, June 10th, the night of your husband's killing?

A. I was in the house—in my house.

Q. What is your daughter's name?

A. Mary Melnik.

Q. How old is she?

A. Fifteen years old.

Q. Was your husband home that night?

A. He was home, but he went after Mary.

Q. Where was Mary?

20 Mr. Cook—I object—how does she know?

[Objection sustained.]

Q. (By Mr. Berdine.) Was your daughter home that
night?

A. Yes, sir; she was home.

Q. Was she home all evening?

A. Yes, sir; she was home all evening.

Q. Did she go out at all that night?

A. She went out at ten o'clock.

Q. Do you know where?

30 A. No, sir; I did not know where she went.

Q. Did you learn afterwards where she went?

Mr. Cook—I object to the question as immaterial and
incompetent.

[Objection sustained.]

Q. (By Mr. Berdine.) You said your husband went
out after your daughter?

A. Yes, sir; I don't know where he went; I did not
see where he went.

Q. Did you see Paul Herman that night, the defendant?

A. Yes, sir; I saw him as he came to my house—he came to my house—my husband was already out and he came to my house; he lit a match and I was on the bed, and he asked me—he say, “why my wife is not there,” and I said, “I did not see his wife here.”

Q. Are you talking now of Paul Herman, the defendant, asking you these questions?

A. Yes, Paul Herman asked me. 10

Q. What did you do after Paul Herman left, after doing these things, after asking you these questions?

A. Then I lied down again in the bed, and Frank Babitski came to my house and asked me—

Mr. Cook—I object.

Q. (By ‘Mr. Berdine.) After Frank Babitski came there, what did you do?

A. Frank came to me and said to me—he asked me—

Q. After Frank talked to you, what did you do? 20

A. I go up right away and went to that house.

Q. Whose house?

A. In the house where my man was cut.

Q. Is that the house also where Paul Herman was?

A. In that house, or to that house, I went.

Q. Was your daughter at the time, too?

A. My daughter was already in the house, and we together ran there.

Q. What did you find when you got there?

A. He was standing in the centre of the room— 30

Q. Who was?

A. My husband—and he was holding his side and blood was flowing from him.

Q. Anything else coming from him?

A. And I saw a policeman bringing Paul Herman—

Q. Was Paul Herman there when you saw your husband?

A. Yes, sir; he was.

Q. What was your husband doing when you saw him there, when the blood was running from him?

A. He was standing in the centre of the room.

Q. How was he holding his hands—stand up and show us how he held his hands?

A. He was holding himself like this. [Indicating with her hands on the abdomen.]

Q. Where was the blood coming from?

A. From here. [Indicating the lower part of the abdomen.]

Q. From the centre of the abdomen?

A. Yes, sir; here in the centre, like this, he was holding his hands here and through his fingers the blood was flowing. [Illustrating.]

Q. And who was there with him?

A. There were many people there.

Q. Was Paul Herman there, the defendant?

A. Yes, sir; he was there with the policeman.

Q. With a policeman?

20 A. Yes, sir; with a policeman.

Q. Would you know the policeman if you saw him?

A. I would recognize him.

Q. Does that look like the policeman you saw that night? [Calling upon Officer Walling to stand up, and who does stand up in the court room.]

A. Yes, sir; that is the same man.

Q. What became of your husband after that?

A. They placed him on the bed and the doctor came.

Q. Who was the doctor?

30 A. That one [indicating]; I do not know what his name is.

Q. Dr. Wantoch?

A. The one from Port Reading, Chrome.

Q. What was done with your husband, the next morning?

A. I put him in the carriage next morning, and took him to Elizabeth to a hospital.

Q. Did the doctor go with you?

A. Yes, sir.

Q. The same doctor that was there that night?

A. Yes, sir; the same.

Q. Did you see your husband after you took him to the hospital again?

A. Yes, sir; I saw him; I was there nearly every day with him.

Q. Do you know whether he died at the hospital or not?

A. I was there every day, and I was there on Friday morning, when he died, but he died before I got there— 10 when I got there he was already dead.

Q. Friday morning, June 19th?

A. Yes, sir.

Q. Did you see him lying on the bed?

A. Yes, sir; I saw him on the same bed on which he died.

Q. Was he buried at Perth Amboy on Sunday, June 21st?

A. Yes, sir.

No cross-examination.

20

Mary Melnik, a witness produced in behalf of the State, being duly sworn according to law on her oath saith:

Examined by Mr. Berdine.

Q. What is your name?

A. My name is Mary Melnik.

Q. Was that your mother, the last witness?

A. Yes, sir.

Q. Did you know this man, the defendant, Paul Herman (indicating) the defendant?

A. Yes, sir.

Q. Was your father's name Michael Melnik? 30

A. Yes, sir.

Q. Where did you live on June 17th and up to the 19th?

A. I was in Newark.

Q. Were you at Chrome?

A. I was home, at Chrome.

- Q. On those days ?
A. Yes, sir.
Q. Were you home on June 9th ?
A. Yes, sir.
Q. Were you home on Saturday, June 6th ?
A. Yes, sir.
Q. Were you home on Wednesday, June 10th ?
A. Yes, sir.
Q. Did you go out that night about half-past eight,
10 or so ?
A. Yes, sir.
Q. Where did you go ?
A. I went to Mr. Harko's house.
Q. Is that Paul Herman's place, too ?
A. Yes, sir.
Q. Why did you go there ?
A. I went after my brother Stephen.
Q. Did you see Paul Herman there ?
A. Yes, sir ; I did.
20 Q. What did he do to you ?
A. I was going with my brother and going through the
back yard, and Paul Herman was standing back, and I
stopped back of his yard and he catch me around here
(indicating around the waist).
Q. Around the waist ?
A. Yes, sir ; and then he took me in the house and into
Mrs. Herman's room where she was lying on the bed.
Q. And that is the same house where Mike Harko
lives ?
30 A. Yes, sir.
Q. Did you see Mrs. Harko there ?
A. Yes.
Q. Where was she ?
A. Lying in the bed.
Q. Was there anyone in bed with her ?
A. No, sir ; she had a baby.
Q. How old was the baby ?
A. I think it was two days old, I think so.

Q. Who else was in the room—who else did you see there?

A. I see Mrs. Herman and Paul Herman was there, and that is all I seen in that room.

Q. Do you know Alexander Kuzinak and Paul Herman's wife?

A. Yes, sir; he was there.

Q. Would you know the room if you should see it in a photograph—look at the map there?

A. I do not think I am able to say that. 10

Q. Can you read English letters?

A. No.

Q. Supposing the map shows the porch and the front room and the bedroom and the kitchen of Paul Herman's house—that is the porch, do you understand it?

A. Yes.

Q. And that is the hallway?

A. Yes.

Q. Where is the room you went into when you went in and saw Mrs. Harko—can you read this—that was a table 20 (indicating) and this is a table (indicating) and that is showing the machine and this the front portion of the house, and this the front door leading into the hallway and that is the doorway—now, which way did you go?

A. I went into Mrs. Harko's room.

Q. Where did you go in the house?

A. I came in from the back way.

Q. Up from the yard?

A. Yes.

Q. And went into the kitchen? 30

A. Yes.

Q. Where did you go from the kitchen?

A. I went to Mrs. Harko's room.

Q. Is that the back bedroom?

A. Yes.

Q. It corresponds to that, does it?

A. Yes.

Q. Does that map help you to locate where she was in bed with the child?

- A. No, sir; I cannot tell anything about that.
- Q. Well, she was in a bedroom in that house?
- A. Yes, sir.
- Q. Where did you go when you left there—or first—
after you were there awhile; did you see your father?
- A. Yes, sir; I did.
- Q. Your father came there?
- A. Yes, sir.
- Q. Was Paul Herman, the defendant, there, while your
10 father came there?
- A. Yes.
- Q. Did your father come to you?
- A. Yes.
- Q. What did he do to you?
- A. He took a strap and he strapped me on the hands
with this strap.
- Q. Do you mean this strap [handing witness a stick
with several thongs of leather attached thereto, each
thong knotted at the end, or near the end]?
- 20 A. Yes, sir.
- Q. What did your father do with the strap, to you?
- A. He came and struck me a little blow on this arm
with it.
- Q. Is that the strap he struck you with?
- A. Yes, sir; that is the strap he struck me on the arm
with.
- Q. Was Paul Herman, the defendant, there when he
struck you?
- A. Yes, sir.
- 30 Q. Did Paul Herman say anything?
- A. Paul Herman say, "What did he hit me for, it was
not my fault that I came in;" he said, "I took her in."
Mr. Berdine—I offer this whip or strap in evidence,
marked *Exhibit P 7*.
- Q. After your father struck you, where did you go?
- A. I sat a little while in Mrs. Herman's room, on the
bed, and I sat there a little while, and then I got up and
went home, and my father was in Mr. Harko's room
where I was—you see I came out of Mrs. Harko's room—

and then, when I came out, me and Paul Herman went out to the front of the house, and he was standing on the stairs, and then we got up and went back to Mrs. Harko's room, and sat there for a little while, and then papa came in and he struck me with the strap.

Q. Where did you go then?

A. I went home to my house.

Q. After you got home to your house, did you see Paul Herman?

A. I went to bed, and then I heard Paul come in and 10 he struck a match, and he asked my mother if Paul's wife was in our house, and mamma said "No."

Q. Then what?

A. Then he went out, and Frank Babitski he came and he said—

Q. Was Paul Herman there when Frank came in?

A. No, sir; he was not; he went out.

Q. After Frank came in and went out, what did you do?

A. We just got up. 20

Q. Who?

A. Me and mother.

Q. Where did you go?

A. To Paul Herman's house, to Mr. Harko's house.

Q. Just where you had left?

A. Yes, sir.

Q. What did you see when you got there?

A. I saw papa standing there in the room.

Q. What was he doing?

A. He was holding his guts like this, and there was 30 all blood flowing down.

Q. Show us how he was holding his guts, as you say?
[Witness illustrates by holding her hand to the lower part of her abdomen.]

Q. And blood was flowing down through his fingers?

A. Yes, sir.

Q. Did you see Paul Herman?

A. Yes, sir; I saw Paul Herman with the policeman.

- Q. What policeman?
 A. That man there. [Pointing to Officer Walling.]
 Q. [Officer Walling being called upon to stand up does so.] Is that the man?
 A. Yes, sir.
 Q. What did you do then?
 A. I went out after the doctor.
 Q. Did you come back again?
 A. I came back again.
 10 Q. Where did you find your father?
 A. I found my father in the same house, lying on the bed when I came back with the doctor.
 Q. The next day, where was your father taken?
 A. The next day my father was taken to Elizabeth, they put him on the wagon and took him to the hospital.
 Q. Did you see your father after he died?
 A. Yes, sir.
 Q. Where?
 A. I seen him in the house.
 20 Q. Were you at the funeral of your father?
 A. Yes, sir.

Cross-examination by Mr. Cook.

- Q. How long have you known Paul Herman?
 A. I don't know him very long, perhaps a year or more.
 Q. You had visited his house before, hadn't you?
 A. Yes, sir.
 Q. And when he put his arm around you, he led you right into the house?
 30 A. Yes, sir.
 Q. Right into the room where his wife was and where Mrs. Harko was.
 A. Yes, sir.
 Q. Did he say anything to you?
 A. No, sir; he didn't say anything to me.
 Q. While you were in the bedroom of Mrs. Harko, did your father come in?

A. No, sir; I was there a little while in Mrs. Harko's room, and then I went outside and came back, and then father came in.

Q. When your father came in, where were you?

A. In Mrs. Harko's room.

Q. Was that the front or the back bedroom?

A. On the back bedroom.

Q. Was there anything the matter with your arm then?

A. No, sir.

10

Q. Didn't you have a cut on your arm?

A. No, sir.

Q. Didn't you have it bound up at all?

A. No, sir; I did not.

Q. Your father then spoke to you about being in the house?

A. Yes, sir.

Q. And he began to beat you with this whip?

A. Yes, sir.

Q. And where did he hit you?

20

A. Right here on the arm.

Q. Which arm?

A. The left arm.

Q. Right on the arm, or on the hand?

A. No, sir; on the arm.

Q. Up on the arm [indicating]?

A. Yes, sir.

Q. Did he hit you with the lash or the butt end of the whip?

A. The butt end of the whip.

30

Q. Not the lash?

A. No, sir; not the lash.

Q. And then Paul interfered between you and your father?

A. Yes, sir.

Q. And what did Paul say?

A. Paul said to him, "What did papa hit me for, it was not my fault, it was his fault, because he took me in the house."

Q. And Paul prevented your father hitting you again with that stick, didn't he?

A. Yes, sir.

Redirect by Mr. Berdine.

Q. Did I understand you to say to counsel that your father hit you with this part [indicating the lash]?

A. Yes.

Q. That is what you said to me, is it not?

A. Yes, sir.

10 Q. And it was not with this part [indicating the butt of the whip]?

A. No, sir; he struck me with this part [indicating the lash].

Q. How did Paul Herman act when he started to interfere with your father striking you?

A. He just took me into Mrs. Harko's bedroom, and there he stopped for a little while, and then my father and Paul they went into Mrs. Harko's bedroom, and when they came in I was sitting on the bed, and I sat a
20 little while with Mrs. Herman, and then I went into Mr. Harko's room again to my papa——

Q. Did Paul Herman, when he told your father, "Why do you strike her, it is not her fault," did he show as if he was provoked, because your father hit you?

Mr. Cook—I object to the question as calling for an opinion of the witness; she may tell what was said or done, but she cannot give her opinion.

[Question withdrawn.]

Q. (By Mr. Berdine.) What did Paul Herman do or
30 say that indicated how his feeling was towards you?

A. I cannot tell you how he felt.

Q. Did this strapping your father gave you hurt you?

A. No, sir; it didn't hurt me.

Q. Not at all?

A. No, sir.

Q. It was just light?

A. Yes, sir; it was just a light tap.

Mitro Burak, a witness produced in behalf of the State, being duly sworn according to law, on his oath saith:

Examined by Mr. Berdine (by interpreter).

Q. Where did you live on Wednesday, June 10th, of this year?

A. I worked during the day, and in the evening I went out riding with a bicycle.

Q. Whom did you live with at that time?

A. I lived in the boarding bosses house, the one who got me. 10

Q. In Chrome or Roosevelt?

A. In Chrome.

Q. Do you know Mike Harko and Paul Herman, the defendant?

A. I do.

Q. Did you know Mike Melnik?

A. I did not see Mike Melnik.

Q. Were you acquainted with him at that time?

A. Yes, sir.

Q. Did you see him on the night of June 10th, of this 20 year?

A. I did, when he came from work, he was in the house, and then he came over there.

Q. Did you go over to see Mike Harko and Paul Herman that night?

A. No, sir; I did not go there, I was going around there on a bicycle and Mike called me in.

Q. Did you see Mike Harko and Paul Herman in there, in that house?

A. Yes, sir; I see him because Mike gave me beer right 30 then and Paul gave me whiskey.

Q. Were their wives there at the time?

A. Yes, sir.

Q. What relation is Paul Herman and Mike Harko?

A. Mike Harko married Paul Herman's sister.

Q. Who else did you see at Herman's place that night, with Harko and their wives?

A. There was no one there at that time, only the wives was sitting there with her child.

- Q. Did you see Domitzo Kornora and Alexander Kuzniak there at that time?
- A. Yes, sir; I did.
- Q. Did you see Mary Melnik, the child, there, too?
- A. Yes, sir.
- Q. Where was Mike Harko's wife?
- A. She was lying on the bed in her room.
- Q. With the baby with her?
- A. Yes, sir.
- 10 Q. That night, did Mike Melnik, the dead man, come over there?
- A. Yes, sir.
- Q. And was Mary Melnik there when Mike Melnik came over there?
- A. Yes, sir; she was.
- Q. What did Mike Melnik say to his daughter right there in the presence of all of them?
- A. He said, "Why don't you go home to help your mother, because she was weak, she had a child."
- 20 Q. Do you mean she did not have a child or was about to have a child?
- A. No, sir; not yet, she was to have one.
- Q. Did you see Melnik strike his daughter Mary?
- A. Yes, sir; I did.
- Q. What did he strike her with?
- A. With this [indicating *Exhibit P 7*].
- Q. How did he do it?
- A. I did not see how he struck her, I only saw as she was beginning to cry, and her scratching herself.
- 30 Q. What did Herman say to Melnik?
- A. He said, "Why do you strike her, she is not doing anything bad."
- Q. Then what did you do?
- A. I did not do anything, I was going around the kitchen with Paul Herman.
- Q. Did you go into the front room of the house that night, with Paul Herman and Mike Melnik?
- A. No, sir; I went with Paul Herman to the house, and I was standing with him in the house.

Q. In the front room?

A. In the front room, there is a table over there, and we were standing by the door that leads into the kitchen.

Q. Was the door to the hall closed or open?

A. The one from the kitchen was not closed.

Q. What about the other one?

A. Where I stood with Paul Herman was not closed, the other one was closed.

Q. Was that the other door leading to the hall?

A. No, sir; into the kitchen, into Harko's room, into 10 the kitchen.

Q. How was the door to the hall, open or closed?

A. Into the hall, the one that leads to the front was closed.

Q. Was Herman and Milnik in there?

Mr. Cook—I object to the question as leading.

Court—You may cross-examine him as to it.

A. Melnik was standing in Harko's room, and there his wife was lying on the bed, and we were standing there, and Melnik he came from there, and we were 20 standing over here, and he came from there over here.

[Indicating.]

Q. (By Mr. Berdine.) Who came from there?

A. Melnik.

Q. What did he do?

A. He did not do anything, he wanted to pass by and they were saying something, and Melnik struck Paul Herman like this. [Indicating a slap over the face.]

Q. How; show the jury where he struck him?

A. Somewheres in the face, you could hear it. 30

Q. Show us how—where?

A. He was standing, and he struck him straight like this. [Indicating.]

Q. With the side of his hand?

A. Yes, sir.

Q. And then what did Herman do?

A. Paul Herman I did not see him do anything, only he did this; he was standing, and he was doing like this.

Q. Stand up and show us ?

A. And he was leaning over like this a little, and then Melnik caught himself and said, "Have you knife, have you a knife, have you a knife," and then Herman he went through the kitchen.

Q. Stand up; where was Melnik's hand when he said "have you a knife, have you a knife?"

A. Here; he was holding it like this. [Indicating by holding his hands to the bottom of his abdomen.]

10 Q. Was anything the matter with Melnik when he was holding his hands so ?

A. He was holding it like this and blood was flowing down his fingers.

Q. From his body ?

A. Yes, sir.

Q. Well, did anyone else touch Melnik but Herman ?

A. No one touched neither Paul Herman or Milnik, no one else.

20 Q. What did Melnik say after he held his hand to his abdomen and the blood was running out of his stomach ?

A. "Go for the doctor, go for the doctor"—and I went for the doctor, and he was not home, and a policeman was standing there——

Q. Where did Herman go after that ?

A. I did not see where Herman went, he went through the kitchen and I went for the doctor.

Q. Herman went through the kitchen ?

A. Yes, sir; when he caught hold of his stomach, Herman went into the kitchen.

30 Q. Towards the yard, the back part of the house ?

A. Not into the yard, I saw him go into the kitchen ?

Q. Well, does that kitchen lead to the yard ?

A. Yes, sir.

Q. Did Melnik have any knife or any other weapon of any sort ?

A. No, sir; I did not see any.

Q. Well, were you arrested ?

A. Yes, sir.

Q. Were you put in our Middlesex county jail ?

A. Yes, sir; I was two nights and one day in Chrome and on the 12th I came here.

Q. Were you arrested as a witness in the case?

A. Yes, sir.

Q. Well, the next day after you were arrested, and while down in the Carteret jail, did you see Mrs. Herman?

A. We did not see them, but we heard them talking through the wall.

Q. Was Mrs. Herman there? 10

A. She came there, but only through the wall, because they would not let anybody there.

Q. Was Herman in jail, too, while you were there??

A. Yes, sir.

Q. What did you hear Mrs. Herman say to Paul Herman, or what did you hear Paul Herman say to Mrs. Herman while you were there?

A. Paul Herman asked his wife, "When we would go from there," and she said, "She did not know;" he asked her, "Where was Mike Melnik, what happened with 20 him," and she said, "You rascal, what did you do, he went into the hospital."

Q. Who said that?

A. She, his wife, said it to Paul Herman.

Q. What did he say when she asked him what did he do?

A. He said, "Where were you yesterday," and he said, "If you would have been home I would not have been sitting here," and nobody said anything else.

Q. Was anything said by Mrs. Herman to Paul Herman while there, as to whether he had stabbed Melnik or not? 30

Mr. Cook—I object to the question as leading, and as suggesting the answer to this witness.

[Question allowed.]

A. No, sir; I did not hear that.

Q. (By Mr. Berdine.) Was anything said by Paul Herman to his wife while there, as to whether she had

been there, and that if he had gotten \$10 he could have run away, instead of being caught?

A. I did not know what the \$10 were needed for.

Q. Was anything said about \$10?

A. No, sir; I didn't hear anything about \$10; only if she had been there he would not have been sitting there.

Q. Didn't he, the defendant, say that if he could have found his wife he would not have been there?

10 Mr. Cook—I object.

[Objection sustained.]

Q. (By Mr. Berdine.) Did Mrs. Herman say anything to Paul Herman about stabbing Melnik?

Mr. Cook—I object.

[Objection sustained.]

Cross-examination by Mr. Cook.

Q. When Melnik came to Harko's house, was his daughter Mary there?

A. Yes, sir.

20 Q. Did he have that strap with him when he came there?

A. Yes, sir; he brought it with him.

Q. And what did he do when he first came into Harko's house?

A. He did not do anything, except step right up to her and said, "What are doing here, why are not you home, your mother is over there, and why don't you help her," and he struck here.

Q. Was Mary crying before he struck her?

30 A. She was crying.

Q. Before her father came in?

A. Yes, sir.

Q. And did she continue to cry after her father hit her with that whip?

A. She did not say anything to her father, she only cried and was scratching herself.

Q. What do you mean by "scratching?" get up and show us?

A. She was touching herself like this [indicating rubbing her arm].

Q. Where her father had hit her with the whip?

A. I don't know whether he struck her in the same place or not; I didn't see.

Q. How long did you stay in that house after Mary's father whipped her with that whip?

A. Two or three hours; we were playing there a long time.

Q. And after Mary's father whipped her, where did 10 Mary's father go, in whose room?

A. Paul Herman took hold of him and said, "Why do you hit her, she is not doing anything bad here," and Mike Melnik went into the room where Harko's wife was.

Q. And Melnik went in with Paul Herman?

A. No, sir; Paul Herman remained with me, and the other went in.

Recess.

Mitro Burak, recalled for further cross-examination.

Mr. Berdine—Mr. Cook consents that I shall ask the 20 witness a few questions before he continues the cross-examination.

The Court—You may proceed.

Redirect by Mr. Berdine.

Q. Do you remember whether you were there when Melnik undertook to go out of the room?

A. Yes.

Q. Through the hall?

A. Yes, he came from the other room and went over here to the door [indicating].

Q. Was the door shut or open?

30

A. The one to the front was closed.

Q. Where was Paul Herman then when the front door was closed?

A. Standing by me, Herman was.

Q. Was Herman near the door or not?

A. As far as from me to the desk front, from the door.

Q. I show you *Exhibit P 6*; do you know whether that is the door leading from the front room to the hall?

A. There is one door here going out to the yard and one over here [indicating].

Q. That goes where?

A. Out in the front, in the road, in the street.

Q. Is that the front-door room—that is the one, the door from the front room to the hall?

10 A. To the house, away in the front.

Q. Is that the door that you mean was closed?

A. Not this; I don't know which door this is [indicating].

Q. You say the door was closed from the front room to the hall?

A. No, sir; this one over here was closed, but this other one was open [indicating].

Q. The one that was closed, where did that go to?

A. To the front way, in the road, in the street as you
20 go out.

Q. Go over to the map; this is the front room, this is the porch, and this is the street, this is the door from the front room to the hall, so out to the porch?

A. There was the other door leading out to the yard where they have the wood and everything.

Q. Out this way [indicating]?

A. The one that is over here to the front, that was closed; the other one that goes to the back was not closed.

Q. Where was Paul Herman when that door was
30 closed, when Melnik wanted to go out?

Mr. Cook—I object to the question because the evidence before the court and jury is not that the deceased man wanted to go out, but that it was Paul Herman that wanted to go out.

The Court—That is not my understanding of the evidence. My understanding is that it was the deceased man that wanted to go out. If that is not correct, then you will have the privilege of correcting it by cross-examination.

A. He was standing like this, and I was alongside him like this. [Illustrating.]

Q. (By Mr. Berdine.) Where was Melnik?

A. He came from there, straight this way to him, and struck Paul Herman right away.

Q. Was Herman against the door?

A. He was not; he was standing by the door but was not leaning on it.

Q. Did Melnik want to go out, as far as you know?

Mr. Cook—I object to the question on the ground that 10 it is leading. Let the witness state the facts, and the court will then be able to draw the conclusions—don't ask the witness for his conclusion.

Court—Let the witness describe what was done.

[Objection sustained.]

Q. (By Mr. Berdine.) What did Melnik want to do when Herman was by the door and it was closed?

A. It was not thought they were going to fight over there, there was no noise there, no teasing, and that is all.

Q. Where was Melnik going when he started towards 20 Herman, do you know where he was going, whether he was going out doors or where?

A. He said he was going home, because we were all going home then.

Q. Did Herman say anything to Melnik then?

A. They said something, both said something.

Q. Who spoke first?

A. I don't remember who began, I was a little drunk.

Q. Who stood by the door?

A. Opposite the door stood Herman on the other side 30 by the door, I was standing, we were talking, both of us, and he came and struck him in the face, and at that time everything happened, and he caught himself by the stomach, and he says, "have you a knife, have you a knife, have you a knife," and Herman started to go through to the kitchen, and he says, "go for a doctor, go for a doctor; I won't go out of the house."

Q. Did Melnik try to go out of the door?

Mr. Cook—I object to that as immaterial.

[Objection sustained.]

Q. (By Mr. Berdine.) Did Herman undertake to stop Melnik going out of the door?

Mr. Cook—I object to the question as leading.

[Objection sustained.]

Further cross-examination by Mr. Cook.

Q. When Mary's father hit her with the whip, where was Mary?

A. She went through to the other room, to Paul's
10 room.

Q. When you say "into Paul's room," do you mean one of the bedrooms going off of the kitchen?

A. Yes, sir; there is a door from the kitchen to that room.

Q. The room that you speak of, do you mean the room off the bedroom or off the kitchen, or the bedroom in front of the house?

A. How do you mean?

Q. Were you in the house when Mary came there?

20 A. When I came there Mary had already been there?

Q. When you first saw Mary, where were you?

A. She was sitting on the chair by the window.

Q. In what room of the house?

A. In the kitchen.

Q. Now, where was she with reference to that kitchen when her father came in?

A. When her father came in she got up, and he struck her right then, and she started to walk to Paul's room, and she was crying and she was scratching herself.

30 Q. Then it was in the kitchen that Mary's father hit her with the whip?

A. Right in the centre there, from the kitchen to the bedroom.

Q. About what time of night was it when Mary's father came to the house after Mary?

A. I didn't have a watch with me; I don't know what time it was.

Q. Well, after Mary was whipped, did she go home?

A. She went home right away.

Q. Now, who in the house, or who was left in the house, after Mary went out?

A. Where, in Harko's house, or Melnik's?

Q. In Harko's house?

A. Paul Herman, Mitro Kornora, Paul Herman's wife was there, and there was no one else there—oh, yes, Harko's wife, she was lying down.

Q. What did you people do between the time Mary was hit with the whip and Melnik was cut—what did you do during that interval of time?

A. We did not do anything then, only we were talking with Herman a little, Melnik was sitting in Harko's room, and we came with Herman around here, and he treats to a drink, and we were talking together and nobody said anything there about any fight, that there would be a fight—

Q. There was no quarreling?

A. No, sir; I didn't hear any.

Q. Everything was friendly?

20

A. They were good; they were talking together.

Q. Drinking a little beer and whiskey?

A. Yes, sir; drinking beer and whiskey.

Q. And Paul Herman was in the front room?

A. No, sir; he was in the room where they were fighting.

Q. Who else was in the front room besides Paul Herman?

A. Mike Melnik and I, and Kornora, we four were there, and Herman.

30

Q. All talking together?

A. We two were talking with Herman, and the other one came and struck him in the face—

Q. When you say the "other one," do you mean Melnik, the deceased man?

A. Yes, sir.

Q. Now, when Melnik hit Herman in the face with his hand, who had hold of Paul Herman?

A. Nobody hold Herman, only Kornora took him by

the shoulder, and he says, "Go away to sleep," and he did that, and went away, and then this other one grabbed hold of his stomach.

Q. Did not someone have hold of Paul Herman when the deceased man hit Herman in the face?

A. Nobody had hold of Herman or struck him or anything, only Kornora touched his shoulder and told him to go and sleep.

Q. Did not someone have their hand on Herman and
10 try to push him into the room to go to bed, before he was hit in the face?

A. No, no, nothing; nobody held Herman then.

Q. Was Herman told to go to bed before Melnik was cut or afterwards?

A. That was after the cutting, when he struck him like this, then everything happened, and Kornora told him to go to sleep, and then he grabbed hold of himself like this [indicating], that is all, he was already holding himself by the stomach.

Q. As a matter of fact, did not someone have their
20 hands on Paul Herman, trying to push him into the back room when Melnik hit him in the face with his hand?

A. No, sir; nobody pushed him; he went himself after he did it—he went himself.

Q. Did anyone tell Paul Herman to go to bed?

A. No, sir; Kornora told him to go to sleep.

Q. But he did not put his hand on him?

A. Yes, he touched his shoulder, but nobody struck
him.

Q. And that was after Melnik had hit Paul Herman
30 in the face with his hand?

A. That happened all at the same time.

Q. Did you see a knife in Paul Herman's hand?

A. No, sir; I didn't see any; I only saw him move a
little; I did not see any knife.

Q. Did you see Paul Herman strike at Melnik?

A. No, sir; nobody struck Melnik.

Q. Melnik, I mean, the dead man, the deceased man?

A. No, sir; I didn't see it.

Mitro Kornora, a witness produced in behalf of the State, being duly sworn according to law, on his oath saith:

Examined by Mr. Berdine (by interpreter).

Q. On June 10th of this year, where did you live?

A. At Michael Melnik's.

Q. At Carteret or where?

A. In Chrome, I was boarding there.

Q. Did you know Michael Melnik, the deceased?

A. Why I know him for ten years.

10

Q. Did you know the defendant here?

A. Why shouldn't I know him.

Q. Did you know Mike Harko?

A. Yes, sir; I am boarding there.

Q. Did you go out that evening to Paul Herman's and Mike Harko's house?

A. To Harko's I went.

Q. Who did you find there?

A. Mike Harko called me in.

Q. Did you see Paul Herman there?

20

A. Before Harko had called me I see Paul Herman on the street, he was going for beer, and he called me to the saloon for beer.

Q. Did you go back to his house?

A. No, sir; Paul Herman went himself to the house.

Q. Did you go to the house that night and find Paul Herman and his wife there, and Harko and his wife?

A. I was sitting with Harko's wife—

Q. Where?

A. Where she was lying.

30

Q. In Paul Herman's house?

A. No, sir; I was not in Paul Herman's house.

Q. In whose house were you?

A. I was in Harko's house, Paul, it is his room, and Harko also, it is his room.

Q. Did you meet Herman and his wife and Harko and his wife there, and Mitro Burak, and Kuzniak?

A. Mitro Burak was there, Alexander Kuzniak was there, Joe Burak was there, and Babitski.

Q. Did Melnik come there that night?

A. Later he came there.

Q. Did you see Melnik's daughter there when Melnik came?

A. I saw Melnik, but I did not know whether he came for the girl or not.

Q. Did he come there and see the girl there?

A. I don't know, I did not see that, I was sitting in the other room.

10 Q. Were you there when Melnik struck his daughter with that whip?

A. No, sir; I was in the other room with Mrs. Harko and I——

Q. Did you hear any talk between Paul Herman and Melnik about his striking the girl?

A. No, sir.

Q. Did you ever see that before? [Handing witness P 7.]

A. No, sir; I did not.

20 Q. Did you hear Melnik say anything to his daughter Mary about going home?

A. No, sir; I did not hear that, I did not hear that till Melnik came into the room in which I was, with Mrs. Harko.

Q. Did you see Paul Herman and Mike Melnik in the room together at any time that night?

A. Oh, no, sir; they were in that room, in Harko's room, and were drinking beer together, Paul Herman drank, Mike Melnik drank, Mike Harko drank, and I
30 drank, and Paul Herman brought me some sort of a pas-
try on a plate.

Q. Go on?

Mr. Cook—I object to his going ahead. I think I am entitled to have the question asked, so as to know whether the question is proper or not. I do not think the witness ought to be permitted to go ahead and tell the story his own way.

Mr. Berdine—Very well, I will ask the question.

Q. (By Mr. Berdine.) Go ahead and tell us what happened in that place?

Mr. Cook—I make the same objection to that question.
[Question allowed.]

A. We all drank beer, and Melnik went and Paul Herman went out, and then Mitro Burak went out, and I and Harko and Mrs. Harko remained, and I then went out to go home, and Mitro Burak, Paul Herman and Mike Melnik were standing by the door.

Q. Give us that about the door? 10

A. And then Melnik at that time struck Paul Herman.

Q. Where was Paul Herman when Melnik struck him?

A. There by the door.

Q. Was Herman standing against the door, or how?

A. No, sir; by the door; he was not against the door.

Q. Did you know where Melnik was going?

A. He wanted to go home; he went out of the room, and he said he was going home.

Q. To go home, would he have to go out of the door where Paul Herman was? 20

A. Always, you go through that door.

Q. Was Paul Herman there when Melnik wanted to go through the door?

A. No, sir; I don't know that; they were standing there, all of them; Paul Herman was by the door and Melnik opposite him; Mitro Burak was standing here, and I was standing behind Melnik, like this [indicating].

Q. How did Melnik strike Paul Herman?

A. Like this, in the face [illustrating as though striking with the open hand on the side of the face]. 30

Q. With his fist or with his hand?

A. With the hand, like this [again illustrating].

Q. Very hard?

A. I don't know if hard or not.

Q. After Melnik struck him with the flat of his hand, what did Paul Herman do?

A. At that moment I took him like this [illustrating by laying his hand on his own shoulder] and said, "Paul,

go to sleep, that is the best you can do," and he went to the kitchen.

Q. Where was Melnik then?

A. Melnik was holding his stomach, like this [illustrating]. He opened his pants, like this, and grabbed himself, like this [illustrating], and said—and asked us to go for a doctor, and I went with Mitro Burak for the doctor.

Q. What did you see—did you see blood coming out,
10 or what did you see?

A. Blood was flowing between his fingers.

Q. Did you go back with the doctor?

A. No, sir; the doctor was not there, and we go with the policeman.

Q. Who was the policeman?

A. That one there [pointing to Officer Walling].

Q. Officer Walling?

A. Yes, sir.

Q. Who was there when you came back?

20 A. Many people were there, and they were standing in the yard and in the road; they were all there.

Q. Was Harko there?

A. Where, in that room?

Q. When you came back with the policeman, where was Harko and where was Paul Herman?

A. When the policeman and Mitro Burak and I came back, Harko and Herman were standing in the yard.

Q. What did the policeman do?

30 A. Mitro Burak went first, and the policeman went to them, sideways, and came to them, and grabbed them both like this. [Illustrating.]

Q. What did Harko say to Herman just before the policeman took hold of him, by the telephone pole?

Mr. Cook—I object.

[Question allowed.]

A. He said, "He ought to be afraid, brother-in-law, to God for what you have done."

Q. What did Herman say?

A. And Paul Herman said to him, "He got what he wanted."

Q. What did the policeman do?

A. He came there and grabbed him, and he asked Harko, "Where is the man that cut the other one with the knife."

Mr. Cook—I object to all this.

Mr. Berdine—Was Herman there?

A. Yes, sir; they were standing together on the street.

Q. Go on?

10

A. And Harko says, "You have cut him."

Q. Were you in jail at Chrome, after the fight?

A. They took Paul Herman first, and us afterwards.

Q. While you were in jail, did Herman's wife come there to see him?

A. No—well, she came to him, but she could not see him, we were all locked up.

Q. What did you hear Herman's wife say to Herman?

Mr. Cook—I object.

[Question allowed.]

20

A. She came to him and asked him, "What are you doing there, Paul," and Herman asked her, so as to be heard, "Was he hurt," and she said, "They took Melnik to the hospital," and then Paul Herman asked her, "Where were you yesterday, maybe it would not have happened like this."

Q. Did she say anything to him in your hearing about \$10.

A. Who?

Q. Did Herman say anything to his wife?

30

A. No, sir.

Q. Did you hear either one of them say anything about \$10?

A. Herman was in one room, and I was in the other, and Mitro Burak was in the third room, and he said, "If I would have had \$10 I would have gone away."

Q. Did you talk to Herman?

A. We did not see each other, but we talked together.

Q. What did he say to you and what did you say to him?

A. I said to him, "What did you do," and Burak said it too.

Q. What did he say?

A. And Herman said, "What will happen to you, that is all mine."

Q. Did he say anything to you that you would get out all right, and that he was the one that would get it,
10 or anything to that effect?

A. To whom, to his wife, he did not say it to his wife.

Q. Did you say anything to Paul Herman telling him about what trouble you have put us in, and we are locked up—

Mr. Cook—I object to the question as leading.

[Objection sustained.]

Q. By Mr. Berdine.) What did you say to him about being in jail, locked up?

A. What did I say to him?

20 Q. Yes?

A. I didn't tell him anything else, neither did he to me.

Q. Did you say anything to him about your being locked up?

A. Yes, sir; we said to him, "What did you do, Paul; we will be sitting here, and you too, we don't know for what."

Q. And what did he say?

A. What would he say, he didn't say anything to that.

30 Q. Did you see anybody else at the house, the night that Herman stabbed Melnik, did you see anybody else touch anybody?

A. Who?

Q. Anybody.

A. No, sir; it was all peaceful; Herman gave myself whiskey and beer, and he brought it in a pail, and he brought me this pastry and it was all nice, and peaceful.

Cross-examination by Mr. Cook.

Q. Had there been a christening in Harko's family?

A. No, sir; it was the celebration of the birth.

Q. What day was the child born?

A. Probably the 8th, on Monday.

Q. Did you work on Monday?

A. I did, in the copper works; I was working steady there.

Q. On the 8th of July were you at Harko's house?

A. From the 1st of July I went to board with Mel- 10
nik's; I was in March, April and May in Harko's house.

Q. On the 10th of June was the first day in June that
you had been at Harko's house?

A. I was there the Sunday before; there were two men
there, Harko and I.

Q. Then on the 10th of June, what time was it when
you went to Harko's house?

A. Maybe it was seven o'clock and maybe a little after
seven; I didn't have a clock and I don't know; I came
from work and I had supper, and went in the yard. 20

Q. Were you not all drinking beer and whiskey at
Harko's house all the evening?

A. When I came there, there was whiskey and beer
there.

Q. And after that was drunk up you got more, did you
not?

A. In the saloon; I myself gave ten cents for beer.

Q. And you were buying beer and whiskey during the
entire evening, were you not?

A. I don't know if they bought it or not; I know I 30
gave ten cents for beer, and I saw Herman going for beer
when he called me.

Q. Did you see Melnik strike his daughter?

A. No, sir.

Q. Now, do you know what time of night it was when
Melnik came after his daughter?

A. I did not have a watch; I don't know.

Q. Had you been in Harko's house long before Melnik
came for his daughter?

A. Harko had two rooms, and I sat a little in one room and Mrs. Harko called me to her room where she was.

Q. The first time you saw Melnik in Harko's house that night, was it long after Melnik's daughter had come there, or was it right after Melnik's daughter came there?

A. Melnik's daughter was there first, and Melnik came for the girl; I did not see that, I only heard it; I did not see Melnik's daughter there.

Q. Do you remember the occurrence of Melnik striking his daughter?

A. I did not see that.

Q. Well, about what time of night was it when Melnik suggested going home?

A. To his girl? I don't know.

Q. I did not say to his girl; I said going home himself?

A. He went out from this room; I do not know how long it was; I was still sitting with Mrs. Harko.

Q. Did you sit any part of the evening with Melnik and Herman?

A. When they came to Mrs. Harko's room.

Q. How long were they in Harko's room?

A. I cannot say.

Q. During all the time they were in Harko's room, was there any quarreling?

A. No, sir; we were all drinking beer together.

Q. And all friendly?

A. Yes, sir.

Q. Now, after you left Harko's room, into what room in the house did you, Paul Herman and Mike Melnik go?

A. Paul Herman went out, Mitro Burak went out to the other room of Harko's, because he went there through the kitchen, and I remained in that room where we were, Harko, Mrs. Harko and I.

Q. What brought you out of Mrs. Harko's room?

A. To go home to sleep.

Q. Now, when you went home, did you go from the kitchen into the front room where Paul Herman and Melnik were?

A. Through where you go to the yard.

Q. Didn't you go into the front room at all?

A. You have to, you have to go out through that room.

Q. Now, when you went into that room, who was in there besides yourself?

A. Mitro Burak, Mike Melnik and Paul Herman.

Q. What were they doing?

A. They were standing, there was a door there and right by it another door.

Q. Were they talking? 10

A. Paul Herman was saying something to Burak.

Q. Did you hear Paul Herman say anything to Melnik?

A. No, sir.

Q. Did you hear what Herman said to Burak?

A. No, sir.

Q. There was no quarreling of any kind?

A. No, sir.

Q. And without provocation, Melnik stepped over and slapped Herman in the face? 20

A. They were standing altogether.

Q. All three together?

A. Yes, sir.

Q. Close together?

A. Yes, sir.

Q. And without any provocation whatever, that you could see, Melnik hit Herman in the face with his hand?

A. That was not a long time, that was about two or three minutes.

Q. But during that two or three minutes, had Herman 30 said anything to Melnik or Melnik said anything to Herman?

A. I did not hear it.

Q. You were right alongside of them?

A. I was going right by him at the time that Melnik struck him.

Q. Did you have hold of Paul Herman when Melnik struck him?

A. Why should I hold Paul Herman?

Q. Didn't you have hold of Paul Herman by the throat this way [illustrating] ?

A. What for—for his goodness to receive me ?

Q. Didn't you have Paul Herman by the throat when Melnik hit Herman in the face—answer the question yes or no ?

A. No.

Q. What did you see Herman do ?

A. Nothing; I told Herman to go to sleep, and he
10 went.

Q. Went where ?

A. To the kitchen.

Q. Where did he go then, after he went into the kitchen ?

A. We went for the doctor, I don't know where he went.

Q. Didn't you see him again that night ?

A. In the yard, where he was talking.

Q. Who was he with when you saw him in the yard ?

20 A. With Harko.

Redirect by Mr. Berdine.

Q. Do you mean the yard or the street ?

A. The street where people go, not the one where you travel in, not the sidewalk where you travel.

Joseph Wantoch, a witness produced in behalf of the State, being duly sworn according to law, on his oath saith:

Examined by Mr. Berdine.

Q. You are a practicing physician ?

30 A. Yes, sir.

Q. In the section of this county called Roosevelt ?

A. Yes, sir.

Q. How long have you been practicing ?

A. Since May, 1904.

Q. Did you know Michael Melnik ?

A. Yes.

Q. Were you called in to attend him on June 10th, 1908?

A. Yes, sir.

Q. For what?

A. For a stab-wound in the left groin and a wound just above the left hip.

Q. What was his condition?

A. Very serious; the wound in the left groin seemed to be very serious; his intestines were protruding through the wound, and on an examination of the intestines I found six or seven perforations through the intestines; I do not remember exactly which, but there were six or seven perforations altogether.

Q. Describe the whole thing?

A. The intestines were protruding out through the hole made in the abdomen.

Q. Out through the flesh?

A. Yes, sir; out through the flesh, through the hole made in the abdomen by the stab-wound, and on a closer examination of the intestines I found several holes or perforations in the intestines themselves.

Q. How was the other wound?

A. That other wound was not so severe; that was simply through the flesh; it did not perforate any of the intestines.

Q. What, as a matter of fact, did you do?

A. I enlarged the opening in the abdominal wall—

Q. Did you give him attention?

A. Yes, sir.

Q. Where was he?

A. In his house.

Q. From there where was he taken?

A. He was taken from there to the Alexian Brothers' Hospital, in the city of Elizabeth.

Q. Did you have anything further to do with it?

A. Yes, sir; I attended him every day.

Q. And finally what became of the man?

A. He died.

Q. Was he the man that Dr. Suydam, the county physician, performed an autopsy upon?

A. I think so.

Q. Don't you know?

A. I was not present at the time.

Q. Do you know whether he was afterwards buried or not?

A. Yes, sir.

Q. He was buried, I suppose?

10 A. Yes, sir; I think he was.

Q. Can you tell, from the character of the wound, with what sort of an instrument it was done with?

A. It was evidently done with a knife blade.

Q. Look at that knife; do you think it was done with an instrument of that sort?

A. Yes, sir; very likely.

Q. Would that be an instrument that a wound of that sort would be likely to be done with?

A. Yes, sir.

20 Q. (By the Court.) When you examined this wound, what was the superficial appearance of it?

A. The intestines protruded right through the wound.

Q. I mean the wound, was it a straight cut or what sort of a cut was it?

A. There was evidently, as far as you could see, a straight cut more in the nature of a stab.

Q. How long was the cut?

A. About between half an inch to three-quarters of an inch in size.

30 Q. How much force would you have to use to make a wound of that kind?

A. I should not think it would take very much force.

Q. How deep would it go in?

A. After the point of the wound is once punctured, it might be possible to shove it all the way in, even to the handle.

Q. (By Mr. Berdine.) Would it not be needful to have a powerful strong arm behind it, to send it where that went?

A. It would not be absolutely necessary.

Q. Is it probable or not—what are the probabilities?

A. The probabilities are that if a knife like this were used, in a case like that, it would puncture at least to the full length of the blade.

Q. Would the full length of that blade enter where this wound was?

A. It could very easily; yes, sir.

Cross-examination by Mr. Cook.

Q. How many stab wounds were there? 10

A. There was one in the abdominal portion of the body, in the left groin, and another wound just above the left hip.

Q. Could one stab wound in the groin have caused the punctures as they have been described by you?

A. Yes, sir.

Q. I believe you said there were six or seven perforations of the intestines?

A. Yes, sir.

Q. Were any of those punctures, or perforations, 20 sewed?

A. I sewed every one that I could find, that night.

Q. How many did you find that night?

A. Either six or seven, I cannot be positive which.

Q. You attended this man daily thereafter, did you not?

A. Yes, sir.

Q. Were you present at the time of the post-mortem examination?

A. No, sir. 30

Q. And as far as your personal knowledge is concerned, you don't know that a post-mortem examination was held upon the body of Melnik?

A. Not from my personal knowledge.

Q. And from your personal knowledge, you don't know anything about where his body was taken, do you?

A. No, sir; I do not.

Q. (By Mr. Berdine.) Was the wound necessarily a fatal one?

A. Yes, sir.

Michael Harko, a witness produced in behalf of the State, being duly sworn according to law, on his oath saith:

Examined by Mr. Berdine (by interpreter).

Q. Where did you live on the 10th of July of this year?

10 A. In my house.

Q. Where?

A. Chrome.

Q. This county?

A. Yes, sir.

Q. Early in the evening of that day who was at your house?

A. John Babitski, Mitro Kornora came there, and Mitro Burak.

Q. Do you know Paul Herman?

20 A. Paul Herman lived with me, altogether.

Q. What relation is Paul Herman to you?

A. He is my brother-in-law; I have his sister.

Q. Did you have a child two or three days old that night?

A. The child was born on the 8th, on Monday.

Q. Was Mary Melnik there?

A. She was; I did not see her when she came there.

Q. About nine o'clock at night, did Mike Melnik come in?

30 A. He came in there.

Q. Where was your wife—was she in bed or up at that time?

A. She was lying in bed.

Q. Where is the room—can you tell us on that map?

A. I don't know whether I can.

Q. Go to the map—this is the front room, this is the porch, this is the hall, that is the kitchen, that is the bedroom, and that is a bedroom?

A. My wife was in this room on the bed [indicating

that she was lying in the back room, off the kitchen], and that room, that was the bedroom of Paul Herman [indicating a rear bedroom from the kitchen].

Q. Where was your wife—in what bed?

A. Here, in my room.

Q. Point on the map where it is?

A. This is the kitchen, and there was the room in which my wife was lying [indicating]; here is the entrance from the kitchen to the room where my wife sleep; she was lying here [pointing to the left-hand corner of the room].

Q. Did you see Mike Melnik strike his daughter with a whip?

A. No, sir; I did not, I was sitting in my room with my wife.

Q. Did you hear Paul Herman say anything to Melnik, after he struck her with the whip?

A. When I was coming out, Melnik's daughter was crying, and I went out of my room—

Q. What did Paul Herman say to Melnik, after the daughter was struck with the whip?

A. Paul Herman says to Melnik, "Why do you beat her, she did not do anything bad here."

Q. Did he say "bad here" or strike her with the whip?

A. "Bad here."

Q. What did Melnik say?

A. Melnik said to Herman, "Shut up, and quit—skidoo."

Q. About eleven o'clock that night, did you see Melnik, Herman, Mitro Burak and Kornora?

30

A. They were playing in my room, I did see them, they were drinking beer and whiskey.

Q. Was that in the front room?

A. That was there where my wife was lying.

Q. Did you see them while they were in the front room, when Melnik started to go home?

A. When they went out of my room, I remained in my room, when I heard, later, that they were talking, I went to the front room.

Q. Where was Paul Herman when you got there?

A. When I go to the front room—you see this door—the door stands like this and Paul Herman was standing here, and Mitro Burak was standing here by Paul Herman, Kornora stood over here [near the front door], Melnik stood opposite Paul Herman.

Q. What took place?

A. At that time when I go out, I see them standing there together, and I see Melnik strike Herman in the
10 face.

Q. With what?

A. His hand.

Q. With the flat of his hand?

A. Like this [indicating a slap with the flat of the hand].

Q. What did Paul Herman do?

A. And Herman pushed him away from himself.

Q. And what did you see?

A. When Herman pushed him from himself, Melnik
20 grabbed hold of his side like this [indicating] and said
“Have you a knife, have you a knife.”

Q. Was blood coming out of Melnik’s side?

A. I did not see any more, because my wife got up from her bed and went to the kitchen and she fell on the stove, and I went and took hold of her, and put her back in the room.

Q. Did you hear Melnik say, “Get a doctor?”

A. I heard that.

Q. Did you see blood coming from Melnik?

A. After I lay my wife back to my bedroom, I see
30 blood flowing from Melnik, through his fingers.

Q. Did you see Paul Herman afterwards on the street near the telegraph pole?

A. I did, on the street—on the path.

Q. What did you say to Herman?

A. I went out of the house, and here is the telegraph
post by the house [indicating], and he was standing by

the telegraph post, and I come and he ask me, "Did you see my wife," and I answered him, "No, I did not."

Q. What did you say to him?

A. And I said, "What did you do—what good did you do?"

Q. Did you ask him if he stabbed Melnik?

A. No, I did not say that; I said, "What good did you do, you made such a trouble."

Q. Was there any angry words passed between Paul Herman and Mike Melnik before Herman stabbed Melnik?

Mr. Cook—I object to the question; it is not for the witness to say what angry words passed.

[Question withdrawn.]

Q. (By Mr. Berdine.) Did you hear any trouble between Paul Herman and Mike Melnik at all?

A. No, sir; I did not.

Q. Did you see anyone touch Herman?

A. Who, Melnik?

Q. Except Melnik?

A. Mitro Burak and Mitro Kornora asked him to go to sleep at that time when Melnik struck him.

Q. And that is all you saw and heard?

A. That is all; I did not hear any more; it was only a quarrel.

Q. (By the Court.) When you were talking with Paul Herman at the telegraph pole, and asked him why he did it, did Herman make any reply, and if he did, what did he say?

A. He did not answer anything to this, only at that moment a policeman came, and the policeman asked me "Where is the man who had stabbed the other one," and I said, "There—you have got him, this man here," and he asked me, "Where is the man that is cut," and I said, "Come to the house, I will lead you there."

Q. (By Mr. Berdine.) When you said "Here is the man here," did you point to Paul Herman?

A. Yes, sir; I pointed to Paul Herman.

Cross-examination by Mr. Cook.

Q. Why did you get up and leave the room where your wife was?

A. Because I had to go home, and I heard loud talking in the front room, and for that reason I went out.

Q. Who was talking loud in the front room?

A. They all were talking, one to the other.

Q. What were they saying?

A. What they said I don't know.

10 Q. Didn't you hear what they said?

A. I did not hear it, because when I went out of my room at that moment he struck him.

Q. Now, Melnik struck Paul Herman?

A. Yes, sir.

Q. Well, when Melnik struck Herman, did anyone have hold of Herman?

A. At that time Mitro Kornora held his hand like this on Herman [illustrating], and Mitro Burak stood like this by him, and Mitro Burak says, "Don't make any
20 trouble, go to sleep."

Q. At the time that Melnik hit Herman in the face with his hand, did Burak or anyone else have a hold of Paul Herman?

A. At that time I don't know, because when I came out he was striking Paul Herman; here is the door and here is the kitchen, here is another room [indicating], and I came from my room to the kitchen; here is a door to the front room; when I came to that door Melnik struck Paul Herman, and I could not say whether the
30 other two held him or not; I saw Kornora, as he had his hand on Herman like this [indicating], and Mitro Burak standing by him and saying, "Go to sleep, and don't make any trouble."

Q. Was that after the blow was struck by Melnik?

A. I saw it, because when I came out, Melnik was striking him.

Q. And you saw Mitro Burak with his hand on Herman, before you saw Melnik hold his hands down on his stomach?

A. Yes, sir; I saw when he was holding his stomach.

Q. But before you saw Melnik holding his stomach, had you seen Mitro Burak and the other man, Kornora, have hold of Paul Herman?

A. No, sir; not then; I went for my wife, because she was fall down, and I had to go for my wife; she fell on the stove.

Q. Now, did you see Melnik hold his hands on his stomach?

A. I did, but that was after I led my wife to my room. 10

Q. And how soon was that after you saw Melnik hit Paul Herman in the face?

A. Do you mean what time it could have happened?

Q. No, you say Melnik——

A. How soon Melnik took hold of his stomach after he struck Paul Herman?

Q. Yes, how soon was it after he struck Paul Herman, was it, that Melnik took hold of his stomach?

A. Probably one or two minutes, I cannot tell you, a short time.

Q. Well, when you saw Mitro Burak have a hold of Paul Herman, how did he have hold of him? 20

A. Mitro Burak was standing by the side and had him like this, and told him "To go to sleep and don't make any trouble."

Q. And while Burak held him on one side, did Kornora have hold of him on the other side?

A. He was standing opposite him on this side, and held his hand on him like this [illustrating by laying his hand upon the shoulder of counsel], and said "Go 30 to sleep, don't make any trouble."

Charles Walling, a witness produced in behalf of the State, being duly sworn according to law, on his oath saith:

Examined by Mr. Berdine.

Q. Were you an officer in the borough of Roosevelt on the 10th of June this year?

A. Yes, sir.

Q. Were you present on duty that night at Roosevelt?

A. Yes, sir.

Q. Do you recall seeing this man, the defendant, Paul Herman, that night?

A. Yes, sir.

Q. Under what circumstances were you present?

A. About eleven o'clock, or a few minutes after, on Wednesday night, June 10th, these two witnesses—

Q. What did you see?

10 A. I saw them on Woodbridge avenue, about ten minutes after eleven o'clock, and they said there is trouble down the street.

Q. Did you go?

A. Yes, sir.

Q. Where did you go?

A. Down Houston street.

Q. Tell us something about the location, and who lived there?

A. Paul Herman lived down there.

20 Q. You went down to Paul Herman's house on Houston street.

A. Yes, sir.

Q. Who did you find there?

A. Before we got to the house, Paul Herman was standing up by a telegraph pole.

Q. Who was with him?

A. Mike Harko and these two fellows that came after me, and they pointed those two men out.

Q. One of which was Paul Herman?

30 A. Yes, sir.

Q. And the other was Mike Harko?

A. Yes, sir.

Q. The preceding witness?

A. Yes, sir.

Q. What did you do?

A. I walked over to them, and I says "What is the trouble," and one fellow said—

Mr. Cook—I object unless it is shown that it was said in the presence of Paul Herman, the defendant.

Q. (By the Court.) Who was there?

A. Paul Herman and Mike Harko were together, near this telegraph pole; I walked over to them and these two fellows told me "These are the two fellows that made the trouble;" and I said "What is the trouble;" and they said "Come in the house," and I went into the house, and when I got in I saw this man Melnik standing in the house holding his stomach [illustrating], and he was bleeding; and I said, "Who has stabbed you," and he pointed to this man, the defendant [indicating]. 10

Mr. Cook—I object. I understand that Paul Herman was out on the street.

Witness—No, I took Paul Herman and Mike Harko in the house with me.

The Court—Proceed.

A. When I walked into the front room, and as I said before, I seen Melnik was standing in the front room holding his hand over his stomach just like that [indicating].

Q. (By Mr. Berdine.) What was his condition? 20

A. He was holding his intestines, they were protruding out of the flesh, and I asked him who stabbed him; I said, "Who stabbed you," and he pointed to Paul Herman; and I said to him, "Where is the knife you done it with?"

Q. Who did you say that to?

A. I said that to Paul Herman, and he said "I will get the knife for you," he said, that it was done with, and he went out into the back yard, and I went with him, and he turned over a little dog or chicken house, and he 30 picked up the knife and gave it to me and said "That is the knife."

Q. And what did you do?

A. I went up to Dr. Wantoch, and I sent him down to the house, and as I came back, I see the two witnesses and I locked them up, and then me and Officer Engel, we got the two fellows and locked them up.

Q. Did you see anyone when you came back?

A. I seen Paul Herman's wife.

Q. Did you see anything about her face and what her condition was?

Mr. Cook—I object to the question as incompetent and immaterial.

[Objection sustained.]

Q. (By Mr. Berdine.) Where did you put him after he was jailed in Roosevelt?

A. I brought him up here into the county jail.

Q. (By the Court.) Just tell the jury where this
10 knife was?

A. The knife was in the back yard under what I should call it a dog-house.

Q. How far under the dog-house was it?

A. He raised it up about two feet and stooped down and took it up from under this small dog-house, it wasn't a large dog-house.

Q. (By Mr. Berdine.) How far in the back yard was it?

A. I should judge ten or fifteen feet from the back
20 door of the house.

Q. A fair-sized dog-house you say, and he held it up about two feet—was it three or four feet high?

A. Yes, I should say it was three or four feet high and he held it up about two feet and then stooped down and picked up the knife.

Q. (By the Court.) Could the knife be reached without raising the dog-house?

A. No, sir; it could not.

Q. (By Mr. Berdine.) Is that the rear of the house,
30 you have reference to [handing witness *Exhibit P 3*]?

A. Yes, sir; I think so.

Q. Where is the dog-house?

A. There [indicating a small dog-house on the picture].

The Court—Let the picture be marked with the word “dog-house.”

[Picture marked “dog-house.”]

Cross-examination by Mr. Cook.

Q. What did you say to Paul Herman with reference to who did the cutting?

A. I asked him did he do it, and he said "Yes, I done it."

Q. Didn't you testify a moment ago that you asked him where the knife was?

A. Yes, sir; I did.

Q. Well, before you asked him where the knife was, did you ask him what he did it with? 10

A. Before I asked him where the knife was, I went in to see Melnik, into the house, and when I got there, I found Melnik standing in the front room holding his hands to his abdomen, like this [indicating], he was holding his intestines, they were protruding out of the flesh, and I asked him "Who stabbed you," and he pointed to Paul Herman, and I turned to Paul Herman and I said "Where is the knife you done it with," and when I said that to him, he said, "I will get the knife for you."

Q. And then, what was the next question? 20

A. I asked him where it was.

Q. And he walked right out?

A. Yes.

Q. And showed you the knife?

A. Yes, sir.

Q. And he gave it to you?

A. Yes, sir.

Q. He made no attempt to hide what he did at all?

A. Oh, no, sir; he lifted up the dog-house and he brought the knife out and handed it to me. 30

Q. What else did he say with reference to that being the knife?

A. Nothing.

Q. Is that all he said?

A. Yes, sir; that is all he said, I didn't ask him any other question.

Q. (By Mr. Berdine.) Were you in uniform at the time?

A. Yes, sir.

Q. He knew you to be an officer, did he?

A. Yes.

Samuel Engel, a witness produced in behalf of the State, being duly sworn according to law, on his oath saith:

Examined by Mr. Berdine.

Q. What is your vocation—you are an officer in Roosevelt?

A. Yes, sir.

10 Q. On Friday morning, June 12th, were you in company with Officer Walling when he brought Paul Herman to jail here?

A. Yes, sir; I helped him bring him.

Q. Accompanied by Burak and Kornora?

A. Yes, sir.

Q. What was said in the presence of Paul Herman on the way that you heard, by any of the parties?

A. The only thing I heard him say, when we got to Amboy, he broke down and started to cry; so the fellow
20 said to him, that is one of the witness said to him, I think it was Burak, he says "What are you crying for, why didn't you cry when you stabbed him."

Q. Did he make any reply to that?

A. No, sir; he didn't reply, he only kept on crying.

No cross-examination.

Mr. Berdine—We offer in evidence the map, the photographs, the knife and the whip.

[The map being marked *Exhibit P 8.*]

State rests.

30 Opening by Mr. Harry Cook, in behalf of the defendant.

Paul Herman, being duly sworn according to law, on his oath saith:

Examined by Mr. Cook (by interpreter).

Q. In June last, where did you live?

A. At Chrome.

Q. With whom did you live?

A. With my brother-in-law, Mike Harko.

Q. Are you married?

A. Yes, sir.

Q. On the 10th of June last at night, were you home?

A. Yes, sir.

Q. Who was at your house that night? 10

A. First came Mitro Kornora—I went to the saloon for beer, and for a quarter of whiskey and Mitro stood by Mr. Gerba's house.

Q. You got your beer and whiskey—did you go home again?

A. I saw Mitro Kornora standing there by the wall, and I said to Mitro "Come to the saloon, we will have a glass of beer each."

Q. Did you go?

A. No, sir; Mitro did not come, because he works 20 in the copper works and he had his face all broken out.

Q. Well, after you left the saloon, where did you go?

A. I went to the saloon and got ten-cents' worth of whiskey, for a quarter of whiskey and ten-cents of beer and brought it up to the house, and I told my brother-in-law that Mitro was standing there, and he called him to the house.

Q. Did Mitro come to the house?

A. My brother-in-law went on the porch and called Mitro Kornora to come into the house. 30

Q. Did Mary Melnik come to your house that night?

A. Yes, sir.

Q. Was she alone?

A. She was with Alexia Kuzniak.

Q. And where were you?

A. I was home then.

Q. Where were you when Mary Melnik came to your house?

A. On the porch, on that side of the house, from the road, and my wife, Electia Kuzniak, Mary Melnik, they came up from the street, from the front, and she called to her brother, Steve, and Electia Kuzniak said to me, "Go call her into the house."

Q. Did you call her into the house?

A. Yes, sir; I went down two steps, took her under the arms, and I said, "Come, Mary, to the house."

Q. When she came to the house, into what room did
10 she go?

A. She went straight to my sister's room, where my sister lie on the bed.

Q. Where was she when her father came to the house?

A. She was in my room, sitting on the bed with my wife.

Q. Which is your room?

A. The last room in the road from the kitchen.

Q. Now, when her father came, what room did he come into?

20 A. Mary's father came straight to the front room, he did not knock on the door or anything, he opened the door and came in——

Mr. Berdine—I object to this as immaterial.

The Court—You may proceed.

Q. Go on?

A. He came from the front room, through the kitchen, to my room, and Mary Melnik had her sleeves rolled up, and Mike Melnik struck her with this strap, over the arm, about three times.

30 Q. Did it make her arm bleed?

Mr. Berdine—I object as immaterial.

[Question allowed.]

A. Yes, she had some sore over here on her arm [indicating], and Mike Melnik struck her over that, and it was bleeding.

Q. (By Mr. Cook.) When her father hit her, what did you do?

A. I was standing in front of them, and I said to Mike Melnik, "That he should not hit her, that she was doing

nothing bad, that she was not doing anything bad, but sitting with my wife [interrupted]——

Q. Do you know what time of night that was?

A. It was probably about half-past nine or ten.

Q. Now, did her father remain at your house, after Mary went away?

A. Yes, sir; after the father beat the girl, my wife took her and led her home.

Q. What did he do in your house that evening?

A. Mike Melnik went straight to the room in which 10 my sister was living.

Q. What did he do there?

A. There was beer and whiskey and they started to drink.

Q. Who was in the party?

A. Alectia Kuzniak, Mitro Burak, Mitro Kornora and I and my brother-in-law.

Q. How long did you stay in that room drinking?

A. I don't know how long it was, an hour or an hour and a half, I cannot say. 20

Q. Who went out of the room first?

A. Mitro Burak and I went together.

Q. Where did you go?

A. He went to the front room, by the door, by the drink, where the drink stood, and I wanted to go to the hall, to a ball, a society ball, a Polish society ball.

Q. Did you get out of the room?

A. No, sir; I only went from the kitchen to the front room.

Q. Why didn't you go any further? 30

A. Mitro Burak said, "Don't go, we will stop over here and go to bed."

Q. Then after you made up your mind not to go to the ball, what did you do?

A. We were conversing with Mitro Burak——

Q. While you were talking with Mitro Burak, what happened?

A. Mike Melnik went out from my sister's room, he

went to the kitchen, and then to the front room, and we met there right away.

Q. Who was in that front room when Melnik came in, how many of them?

A. Mitro Burak and I, and later came Mitro Kornora.

Q. What were you doing there?

A. We were talking together.

Q. What about?

A. Mike Melnik said "He would shit on my mother."

10 Q. What had you said to Melnik to bring that remark from him?

A. I replied the same way to him.

Q. Why did Melnik say that to you in the first place?

A. I don't know.

Q. Had you said anything to Melnik?

A. No, sir.

Q. After you had said you would do the same thing to him, what did Melnik do?

20 A. At that time Mitro Kornora came out, and he grabbed me by the throat, and Mike Melnik struck me in my face on my lips with his fist.

Q. What did you do then?

A. I did not know what to do; I could not breathe or nothing, and I struck him with a knife.

Q. When you struck with the knife, did you know who you were hitting with it?

A. I did not know whom I was striking; I was striking blindly.

Q. How long have you known Mike Melnik?

30 A. I have known him from my birthday; he is from one place and I am from another city, in my country.

Q. Have you and Melnik had any difficulties since you have been at Chrome?

A. Not before; there never was no trouble, only a week before this fight.

Q. What occurred then?

A. I came from the shop and I went home, and I asked my wife for supper; I wanted to go to the post-office, maybe I had a letter from the old country, and my wife

told me that supper was not ready, and I said to my wife, what was she doing during the day, she had only one child, that she should not have supper ready, and she talked some more to me, and I struck her like this [illustrating, as though giving a smack with the open hand], and then Mike Melnik said, in a saloon, and this was heard by Alectia Kuzniak and Joseph Burak——

Q. Did Joseph Burak tell you what Mike Melnik had said?

Mr. Berdine—I object to that question—when and 10 where should be given—I object to it as incompetent.

The Court—I think it would be better to prove the matter first, and then you can recall this witness and ask him about it if you wish.

Mr. Cook—I can do that, and I will withdraw the question.

Cross-examination by Mr. Berdine.

Q. Did you ever black your wife's eye?

Mr. Cook—I object to that as incompetent.

[Question withdrawn.]

20

Q. (By Mr. Berdine.) When did you strike her like this [illustrating]?

A. On Saturday.

Q. Was her eye blackened from it?

Mr. Cook—I object to the question as incompetent.

[Objection sustained.]

Q. (By Mr. Berdine.) Was your wife's eye at any time blackened from anything that you did?

Mr. Cook—I object to the question as incompetent.

[Objection sustained.]

30

Q. (By Mr. Berdine.) Did you ever see this man [calling upon a man in the court room to stand up]?

A. Yes, sir; I saw him somewheres, but I don't remember where.

Q. Did you ever talk with him?

A. I do not remember.

Q. Were you in Middlesex county jail, in this square here, on the 10th of August, 1908, this year?

- A. I was here in jail; yes, sir.
- Q. On the 10th of August of this year?
- A. When was that?
- Q. A month ago?
- A. I don't remember, I am staying here for four months now.
- Q. You have been in jail four months?
- A. Yes, sir.
- Q. Did you ever see this man [indicating Prosecutor's Detective Hoffman]?
- 10 A. Yes, sir.
- Q. Where?
- A. I was speaking with him.
- Q. Where?
- A. In the jail.
- Q. Do you know when?
- A. Yes.
- Q. When?
- A. Either Monday or Tuesday, in what month I do
- 20 not remember.
- Q. Can you speak English?
- A. No.
- Q. Could he speak Polish?
- A. Who?
- Q. Mr. Hoffman here?
- A. No, sir.
- Q. Did he talk with you?
- A. The other man was speaking with me.
- Q. Did you see them together?
- 30 A. Yes.
- Q. In the county jail?
- A. Yes.
- Q. About five weeks ago?
- A. Yes.
- Q. On what day?
- A. I don't remember what day.
- Q. I thought you said Monday or Tuesday?
- A. I said it was Monday or Tuesday.
- Q. Did you talk with them about your case, or did you

talk to Detective Hoffman through this man, Mr. Frankel [indicating the man who had formerly been asked to stand up in the court room] ?

A. Yes, sir.

Q. Did you tell him all about the case ?

A. Yes, I told him to the end, how it happened ?

Q. Did you make a remark in effect like this—on Monday, June 8th—my sister, Mike Harko's wife, had baby—

Mr. Cook—I object to this question—if there is any 10 confession or admission made by this man, through an officer or through an interpreter, I think it should have been introduced at the time and as part of the State's case, and not introduced through a cross-examination.

The Court—What have you to say to that, Mr. Prosecutor ?

Mr. Berdine—I am laying a foundation for other contradictions. I think it is competent.

The Court—I do not see how it is competent. If he made a confession, that confession ought to have been 20 proven as part of your main case. If he makes a statement here, or if he has made statements differing from what he has made here, you may ask him if he did not make such and such a statement, differing from the statements he has made here.

Mr. Berdine—I am seeking to do just that thing now.

The Court—I think the cross-examination must be confined to something he has said here, in his direct examination. If he has made a statement here, which differs from other statements made by him, then you may 30 ask him if he did not make a different statement to someone else, and call his attention to the statement he made.

Q. (By Mr. Berdine.) While in the jail, at the time you now admit Mr. Frankel and Mr. Hoffman were there, while relating your story to them, you said that Kornora grabbed you by the throat and choked you, and that Mike Melnik struck you with his fist, cutting your lip, and that Burak did not do anything—did you say that ?

A. Yes, sir.

Q. You understand English then, you understand me?

A. Yes, a little.

Q. Then did you say, "I put my hand in my pocket and I opened my knife and stabbed Melnik in the stomach once," did you say that to Frankel while in the jail, at the time I asked you about before?

Mr. Cook—I object to the question—that does not contradict any statement he has made here.

10 Mr. Berdine—Yes, he said he took his knife and struck blindly, and did not know who he was striking.

[Question allowed.]

A. Yes, sir.

Q. (By Mr. Berdine.) At the same time, did you not tell Mr. Frankel, in the presence of Mr. Hoffman, "I then went to my room, my wife was not there, and then I went to the yard, and threw my knife down in some wet, near a dog-house—"

20 Mr. Cook—I object to that question; he has not been interrogated at all upon that subject, as a matter of direct examination.

The Court—No, he has not been asked anything about that. I will overrule that question.

Q. (By Mr. Berdine.) Where were you, in that room, when Melnik started to go out, in the front room?

A. By the door in the front room, not right by the door—the door was over here, and I was alongside of it [indicating].

Q. Where was your wife?

30 A. When we started to quarrel, she went out to the yard.

Q. Then she was not in the house at the time you stabbed Melnik?

Mr. Cook—I object to the question as not being cross-examination. I have not interrogated this man upon any such subject at all.

[Question allowed.]

A. No, sir.

Q. (By Mr. Berdine.) Where was the knife before you stabbed Melnik?

A. I had it in my pocket.

Q. How did you get it out of your pocket?

A. With the left hand; I took it out of my pocket; I opened it with one hand.

Q. Is this the knife [handing witness *Exhibit P 7*]?

A. Yes, sir.

Q. Shut it up?

[Witness does so.]

10

Q. How did you open it?

A. With my left hand.

Q. Open it?

[Witness opens the penknife with his left hand, in his pocket, after some time.]

Q. Stand up and open it?

The Court—I think it is proper to state that he now opens it by the use of his knee.

Q. (By Mr. Berdine.) Were you all that time, by the use of your hand, trying to open it in that way?

20

A. Yes, sir; I had my hand in my pocket.

Q. Open it again?

A. I cut my finger-nails, and I cannot open it now as well as I did. [After some difficulty the witness opens the penknife in his pocket.]

Q. How long did it take you to open it after Melnik, with his hand, struck you in the face and when you opened it and stabbed him; how long after Melnik struck you in the face, as you have said, did it take you to put your left hand in your pocket and open your knife, and then take it out and stab him?

A. I had my hand in my pocket, and how long it took me to open the knife I do not remember.

Q. Were you sober or drunk?

A. We were all drunk?

Q. How do you know you were drunk?

A. I was drunk three days; we were drinking little by little, from the time of the birth of the child.

Q. Didn't you work that day?

A. No, sir.

Q. Didn't you say you worked that day?

A. No.

Q. Did you have any conversation with anyone that day or that night, did you have any talk?

A. With Alexia Kuzniak.

Q. Do you know what took place that day, do you remember at all?

A. No.

10 Q. How do you know that you took your knife out, and that you opened it in your pocket, and so on?

A. I know it, because I know I had both hands in my pocket; I did not take my right hand out of my pocket.

Q. You know you took your knife out with your left hand, and that you opened it in your pocket with your left hand?

A. Yes.

Q. And you know all that these men said to you that day—all that Melnik said to you—is that so?

20 A. I remember a little, not all.

Q. Well, you have narrated all the things you remember here, have you not?

A. What I said I remember.

Q. And you remember distinctly that you had your nails all right then for opening your knife and you haven't them so now, is that it?

A. I know, because when I came to the jail I cut them off.

30 Q. How long after this accident did you come to the jail?

A. After this fight.

Q. Where was the place you cut them off; what place were you in when you cut your nails off?

A. Here.

Q. Over here?

A. Here in the New Brunswick jail.

Q. That is where you cut your nails off?

A. Yes, sir.

Q. Were they long or short?

A. They were not so long—they were neither long or short.

Q. Was that the first time you cut them after you stabbed Melnik?

A. Yes, sir.

Q. How long before that had you cut your nails?

A. Before that, I was wont to cut them every Sunday, and when I go to church I find this black dirt under them, and I cut them.

Q. Do you remember, while you were in jail, and 10 when you saw Mr. Frankel and talked with him, that you said this, "No one was drunk that he did not know what he was doing."

A. I said that.

Q. Then you did know what you were doing?

A. I said that we were all drunk, but we were not so drunk that no one knew what he was doing; we were not that drunk.

Redirect by Mr. Cook.

Q. How did you come to make a statement to Mr. 20 Hoffman and Mr. Frankel?

A. The gentlemen came to the jail door and called me to the door, and behind the door in the jail I talked.

Q. Did they tell you who they were?

A. No.

Q. Did they say why they wanted to talk to you?

A. Yes, sir.

Q. What did they say?

A. That gentleman [Mr. Hoffman] says to me, I want to hear how that happened up there, and the other gen- 30 tleman [Mr. Frankel], who interpreted, said, "Whatever you want to say you can, and whatever you don't want to say, you don't have to," and I then told everything as it happened.

Further cross-examination by Mr. Berdine.

Q. Now, what did you tell them?

Mr. Cook—I object.

[Objection sustained.]

Q. (By Mr. Berdine.) I want to go into all that took place in the jail——

Mr. Cook—I object.

[Objection sustained.]

Adjourned to Wednesday, September 16th, 1908, at 10 A. M.

10 Transcript of the evidence in the above-entitled cause, taken before His Honor James J. Bergen, justice of the Supreme Court of New Jersey, at the court house, in the city of New Brunswick, N. J., on Wednesday the 16th day of September, 1908, at 10 A. M.

Appearances—

Mr. George Berdine, prosecutor of the pleas, for the State.

Mr. Harry Cook, for the defendant.

Joseph Borak, a witness produced in behalf of the defendant, being duly sworn according to law, on his oath saith:

20 Examined by Mr. Cook (by interpreter):

Q. Where do you live?

A. Chrome.

Q. Did you live there in the month of June last?

A. Yes, sir; I boarded with Mike Melnik.

Q. With Melnik, the deceased man?

A. Yes, sir.

Q. How long have you known Melnik?

A. I know him from the old country, always.

Q. How long have you known Paul Herman?

30 A. I know him—well, he is the brother of my wife.

Q. Do you remember the death of Melnik?

A. I was working.

Q. You remember the fact?

A. I heard, when I came from my work, that they take him.

Q. Now, before his death, had you met him in a saloon, at Chrome, shortly before his death, did you meet him in a saloon, at Chrome?

A. I was in Carteret with Melnik and Melnik's daughter and Alexia Kuzniak and Mitro Burak, we were all in Carteret.

Q. When was that?

A. On Saturday.

10

Q. Before the death of Melnik?

A. Yes, sir; not right before his death, but before it.

Q. What, if anything, did he say with reference to any threat towards Paul Herman?

Mr. Berdine—I object to the question on the ground that there has not been fixed, sufficiently, the time or place, to give us an opportunity of contradicting it—when and where did it happen?

[Objection sustained.]

Q. (By Mr. Cook.) You say it occurred on a Saturday?

A. Yes, sir; on a Saturday.

Q. In what month?

A. In the same month in which he was killed.

Q. What, if anything, did he say with reference to any threats towards Paul Herman?

Mr. Berdine—I make the same objection to that question.

Q. (By the Court.) Where was it?

A. It was in a saloon that he said it, Mr. Duff's saloon; I, Mitro Burak and Alex Kuzniak were in the saloon, and Paul Herman was home, and his wife was home; Paul Herman got angry for something with his wife, and I, now, went to a saloon with Mitro Burak and Alex Kuzniak, and Mike Melnik stopped into Paul Herman's house and Melnik came to the saloon and said, "He will show him how it is to be beat, because he beat his wife."

Q. Did he say what he would do?

A. That he would beat him.

30

Q. Did you tell what you heard Melnik say to Paul Herman?

A. No; I went to work on Sunday morning, and I worked twenty-four hours, until Monday morning; Paul Herman came to work and told me that Melnik was in his house, that they were drinking whiskey, both of them, and that he told him the same thing which he told us in the saloon—I don't know any more.

The Court—I understand, Mr. Cook, that you desire to
10 prove that the deceased made a threat to do an injury to the defendant, which threat this witness conveyed to Herman, the defendant.

Mr. Cook—Yes, sir.

The Court—But that is not what he says—you may repeat your question.

Q. (By Mr. Cook.) Did you ever tell Paul Herman what Melnik said to you in the saloon at Carteret?

A. There was not any time, because that happened on the Saturday, and on the Monday, Paul Herman told it
20 to me in the shop.

Q. Did Paul Herman tell you the same thing that Melnik had told you?

Mr. Berdine—I object to that as incompetent.
[Objection sustained.]

Cross-examination by Mr. Berdine.

Q. Who struck his wife, did you say?

Mr. Cook—I object to that as incompetent.
[Question allowed.]

A. Paul Herman struck his wife.

30 Q. (By Mr. Berdine.) What time of day was that?

A. That was in the evening.

Q. What time, about?

A. Probably about eight o'clock; I don't know myself.

Q. How long before the murder?

A. I don't know, about a week or so.

Q. Didn't you see Herman between the time of the murder and the time of this talk in the saloon?

A. No, sir.

Q. Now, you say Mary Melnik, that was on the the witness-stand, and her mother, were present with you in the saloon when he made this remark?

A. No.

Q. Who was in the saloon?

A. Alexia Kuzniak.

Q. Who else?

A. Mitro Burak; Mitro Burak went out and did not hear it.

Q. Who else?

10

A. Alex Burak and I.

Q. Didn't you tell us, in answer to Mr. Cook's question, that Mrs. Melnik and Mary Melnik were in the saloon at the time?

A. No, sir; the wife was in Melnik's house.

Q. And you never told that to anybody?

A. No, sir.

Q. You never mentioned it to anybody?

A. No, sir.

Q. Just forgot all about it?

20

A. I didn't say anything.

Q. And you don't know whether it was a month or two months before the murder, do you?

A. I don't know anything.

Q. You don't know anything about it?

A. I did not know anything of it, because I was working.

Q. Well, was not this conversation in the saloon a month or two before the murder?

A. There was not anything, they were always kissing 30 each other and drinking whiskey together.

Q. Melnik and Herman, you mean?

A. Yes, sir; they always went together; he went to Melnik and Melnik went to him.

Q. And they were perfectly good friends?

A. They were good friends; I did not see anything.

Q. There was never any trouble between them?

A. No, sir.

Q. Was not this talk that you speak of, in the saloon, at least a month or two before the murder?

A. No, sir.

Q. How long before?

A. I don't remember—a week or more—I cannot say.

Q. Who did you first tell it to?

A. I didn't tell it to anyone.

Q. How did they know to ask you the questions here; has anybody talked with you since the case began?

10 A. Alex Kuzniak was talking to me and I was talking to him, when we came to the house; there were more men there.

Q. When was that?

A. On that Saturday.

Q. Since that Saturday have you talked with anybody at all about it up to the present time?

[Not answered.]

Q. Was Melnik mad, or provoked, when he made the remark that you say he did make in the saloon?

20 A. He was not very much, and he said that he saw him strike his wife.

Q. And was it not a fact, that he was simply provoked that Herman had struck Herman's wife?

A. He was mad about it.

Q. Just mad about that, because Herman had struck Herman's wife?

A. Yes, sir.

30 *Alexander Kuzniak*, a witness produced in behalf of the defendant, being duly sworn according to law, on his oath saith:

Examined by Mr. Cook (by interpreter).

Q. In the month of June, where did you live?

A. With Melniks.

Q. Do you know Paul Herman?

A. Yes, sir.

Q. Do you know Joe Burak?

A. I do.

Q. Were you in the saloon with Mary Melnik, Michael Melnik and Joe Burak, at Carteret, on a Saturday afternoon?

A. Yes, sir; I was.

Q. What day in June was that?

A. That was on a Saturday.

Q. And how soon before Melnik was killed was it?

A. I don't remember, it could have been a week before that.

Q. Well, was it more than a week? 10

A. I don't remember how long it was.

Q. Are you sure it was in the month of June?

A. It was in the same month.

Q. Did you hear Melnik say anything about Paul Herman at that time?

A. No, sir; not before that.

Q. Well, did you at that time?

A. At that time, in the saloon, in Carteret, he said nothing.

Q. Did you hear him say anything after that with 20
reference to Paul Herman?

A. After that I did not hear anything either.

Q. In the month of June, did you hear Melnik say anything about Paul Herman?

A. I did not hear anything; I was not sitting home; I was going around for work.

Q. Did you hear, in the month of June, Melnik make any threats, as to what he was going to do to Paul Herman?

Mr. Berdine—I object to the question as leading. 30

The Court—It is quite leading, but I will permit the question.

A. I did not hear anything in that month.

Q. Did you hear anything in the month of May?

A. No, sir; I did not.

No cross-examination.

Paul Herman, recalled in his own behalf, his direct examination continued:

Examined by Mr. Cook (by interpreter).

Q. Did Melnik, in the month of June, make any threats to you, as to what he was going to do to you?

Mr. Berdine—I object to the question.

The Court—He is not a judge of threats, he may tell what happened.

[Question withdrawn.]

10 Q. (By Mr. Cook.) In the month of June, you had some trouble with your wife, didn't you?

A. Yes, sir.

Q. After that trouble with your wife, did you meet Melnik?

A. Yes, sir.

Q. What if anything, did Melnik say to you about the trouble with your wife, in the month of June?

Mr. Berdine—I object to the question on the ground that there is no sufficient time and place mentioned—
20 give us the time and place, we are entitled to that.

The Court—He said it was in the month of June—

[Question allowed.]

A. When I came from work, on Sunday morning, after breakfast I went to Melnik's house—I came to the house and said "Good morning," and Melnik says, "Hello, brother-in-law, it is a good thing you came into the house, I will beat you."

Q. Did he say what for?

Mr. Berdine—I object to that.

30 [Question allowed.]

A. He did not say what for; I asked him, "Why will you beat me;" and Melnik said, "Because you struck your wife."

Q. Do you know Joe Burak?

A. Yes, sir.

Q. Did Joe Burak, in the month of June, tell you that Melnik had told him that he would beat you?

Mr. Berdine—I object on the ground that the question is leading.

[Objection sustained.]

Q. (By Mr. Cook.) After the conversation with Melnik, in Melnik's house, on this Sunday, did you see Joe Burak?

A. No, sir; Joe was working.

Q. Didn't you meet him at his work?

A. Yes, on Monday morning.

Q. On the Monday, after your visit to Melnik's house on Sunday, what, if anything, did Joe Burak say to you with reference to what Melnik had told you on the previous Sunday?

Mr. Berdine—I object.

[Question allowed.]

A. I told to Joe Burak—I told him that Melnik got ready to beat me for my beating my wife.

Cross-examination by Mr. Berdine.

Q. You went to Melnik's house, you said?

A. Yes, sir.

Q. And that is where Melnik told you that he would beat you for abusing your wife?

A. Yes, sir; in Melnik's house.

Q. Did he beat you at Melnik's house?

A. No, sir.

Q. He didn't do anything to you, did he?

A. No, sir.

Q. You sat down and had a conversation, and talked there, didn't you?

A. No, sir; I didn't sit down; I rolled a cigarette, and went with Mitro Burak on the porch. 30

Q. Who was there with Melnik—his wife and daughter, were they there at the time you speak of?

A. Yes, sir; and two men from Newark, or from Carteret.

Q. Do you know them?

A. Maybe I do.

Q. Well, who are they?

A. I do not see them here.

Q. What is their names?

A. I don't know.

Q. Were they in the room when Melnik said that?

A. Yes.

Q. And Mrs. Melnik was there and Mary also was there?

A. Yes, sir.

Q. Did you see Melnik after that?

A. Yes, sir.

Q. Were you friendly with him after that?

10 A. Yes, sir.

Q. Have you told anybody that your lip was badly cut, because Melnik struck you at the time of the murder?

Mr. Cook—I object to the question on the ground that it is not cross-examination.

[Objection sustained.]

Defendant rests.

Katie Melnik, being recalled in behalf of the State, in rebuttal:

Examined by Mr. Berdine (by interpreter).

20 Q. Do you remember this Sunday that Paul Herman speaks of, when he called at your house and your husband spoke to him, after he had abused his wife?

A. My husband did not say to him that he would beat him; I did not hear it.

Q. Do you remember that Sunday?

A. Yes, sir.

Q. Were you present during all of the talk and conversation that your husband and Paul Herman had in the room, as he says you were?

30 A. Yes, sir; I was at that time in the same room, in which Paul Herman and my husband were.

Q. Did your husband threaten or tell Paul Herman that he would beat him?

A. No, sir; I didn't hear that.

Q. Well, was it said there?

A. I didn't hear it; it was not said; I didn't hear it.

Q. Did your daughter have a sore on her arm the

night that she was over to Harko's, or Herman's, when your husband struck her with the lash of the whip?

A. She didn't have anything; she had a clear arm.

Q. Was there any cut or any bruise on that arm?

A. No.

Q. And when she came home, was there any blood on it, or any mark on her arm that night?

A. No, sir; there was not anything; she had a clear, clean arm.

Q. Now, the Sunday that Paul Herman said that he 10 was at your house and talked with your husband, was he there more than one time, and if so, about how often?

A. He was there twice, but he stayed a long time, for an hour or two hours.

Cross-examination by Mr. Cook.

Q. The first time he called, on that Sunday, who was in the room?

A. I, and two men from Carteret, and a sister of my husband's; there was no one else.

Q. Now, when did Herman come again, that day? 20

A. After dinner.

Q. And who was there at that time?

A. There was no one present there but my godmother, to my child.

Q. Was your husband there?

A. He was.

Q. Was there any other men there?

A. There was no one else there.

Q. And were you in the room all the time?

A. I was there all the time. 30

Q. You didn't go out at all?

A. No, sir; I didn't go out at all.

Q. You heard everything that was said by your husband and by Paul Herman?

A. Yes, sir; I heard everything.

Q. Did they go out together?

A. They were in one room, sitting.

Q. Did they go out together?

A. Paul went away and my husband remained in the house.

Q. Didn't your husband go out with Paul?

A. No, sir; he did not.

Q. And he was in the house, and you were present all the time that Paul Herman was there?

A. Yes, sir; I was.

Q. Did your husband say anything to Paul Herman with reference to his hitting his wife?

10 A. Yes, sir; he said to him, "Why did you beat your wife like that?"

Q. Your husband said that?

A. Yes, sir; he did.

Q. What else did your husband say with reference to it?

A. Paul Herman said to my husband, he said, "If anybody would mix in his affairs, he would throw into him or into his father, a knife."

Q. What did your husband say?

20 A. My husband did not say anything to that.

Q. What relation was your husband to Paul Herman's wife?

A. It is a distant relation, some kind of relation; I come from another city; I don't know.

Q. Had your daughter had any difficulty with her arm, either one of them, at that time, or about that time?

A. No, sir; she did not have any.

Q. Did you see her when she came home from Paul Herman's house that night??

30 A. Sure, I saw her, she laid down in bed with me.

Redirect by Mr. Berdine.

Q. Was Mrs. Balevic at your house the day that Paul Herman came there, the Sunday?

A. Yes, sir.

Q. Do you recall whether your husband and Paul were drinking beer after the first visit?

A. Yes, sir; they drank beer; my husband took one

bottle of beer for himself and gave the other bottle to Herman.

Q. Was that the first or second visit?

A. The first.

Q. On the second visit did they drink?

A. The second time they did not drink.

Kate Balevic, a witness produced in behalf of the State, in rebuttal, being duly sworn according to law, on her oath saith:

Examined by Mr. Berdine (by interpreter). 10

Q. On Sunday, June 7th, of this year, the Sunday before Melnik was killed, were you at Mrs. Melnik's house?

A. I was.

Q. Did you see Paul Herman there?

A. Yes, sir; I was there when he came there.

Q. Well, did you see Paul Herman and Melnik drinking beer together?

A. No.

Q. Were their relations friendly or not friendly—that is, between Melnik and Herman? 10

A. They were.

Q. What did you hear or see or know about the conversation at that time about Herman beating his wife?

Mr. Cook—I object to the question on the ground that it is not rebuttal. The only question the prosecutor can put to this witness now is, whether Melnik did or did not say to Paul Herman that which Paul Herman testifies that he did say. That is the only subject that he can rebut at this time—did Paul Herman make the statement that Paul Herman charges that he made at that time, as I understand the situation now. 30

Mr. Berdine—I think we have the right to have the whole conversation on that particular occasion, because they have introduced it, and they have not given the whole conversation, and I think we have a right to have it all.

The Court—They introduced the conversation originally, and then the defendant was recalled, and he testified to a conversation which he claimed Melnik said that he would beat him. This, I understand, is rebuttal of all the defendant's testimony?

Mr. Berdine—Yes.

The Court—But it must be in contradiction.

Mr. Cook—Then I cannot object to it.

The Court—Confine yourself to rebuttal.

10 Mr. Berdine—I want to know all the conversation.

The Court—You may proceed, the objection is withdrawn.

Q. (Question repeated as follows): What did you hear or see or know about the conversation at that time, about Herman beating his wife?

Mr. Cook—I make the further objection, if your Honor please. I cannot see the relevancy of this testimony. If it was relevant at all, it was relevant on the direct case of the State. Now, the defendant has been
20 asked with reference to a conversation that he had with Melnik, simply with reference to the threat that Melnik was said to have made towards this defendant.

The Court—Did not the defendant give the whole conversation on his examination by you?

Mr. Cook—He certainly did, as to what he said took place. Now, if your honor please, I do not apprehend that the prosecutor can rebut that statement of the witness, by going into the entire conversation that occurred at that time. The prosecutor has the right to put the
30 question something like this: "Did you hear Melnik say so and so," as this defendant has alleged—that is rebuttal testimony—but to go into the entire conversation, as to what was said, I claim the State cannot do it at this time. Now, if it were a cross-examination, then the entire conversation would be the subject of cross-examination, but in the subject of rebuttal the prosecutor is bound to confine himself to the contradiction of this witness upon that particular point, that he testified

did occur, to wit, that this man, the deceased, said, "I will beat you for beating your wife."

The Court—That was not all he said in his direct examination, was it?

Mr. Cook—Yes, your honor, in recalling this witness.

The Court—The State is now for the first time undertaking to rebut all of his statements, not only what you recalled him to state, but all that he said in his direct examination, that is his examination in chief, as well as what he said when you recalled him.

10

Mr. Cook—There is no evidence before this court that this man was questioned at all, with reference to what occurred between the defendant and Melnik on the Sunday in question, it has not been referred to, and the only time it was referred to was when this defendant was recalled for the purpose of showing that these threats had been communicated to him, after the Sunday in question. There is no evidence on the part of the defendant in the direct case, touching on this conversation on this Sunday whatever, nothing, except when he was 20 recalled this morning, when he said that these threats were communicated to him.

Mr. Berdine—We are called upon to meet the defendant's testimony. It does not matter whether it was testified when he was first called, or when he was secondly called, that does not matter. We have not had any opportunity of meeting it until counsel for the defendant announced that the defendant's case was closed. The State has already shown that the defendant said he would put his knife into anyone that interfered in his 30 domestic relations—

The Court—I think it would be wiser to confine your rebuttal to what was testified to by the defendant after he was recalled.

Mr. Berdine—That is all we want of this witness then.

Mary Melnik, recalled in rebuttal, in behalf of the State:

Examined by Mr. Berdine.

Q. You stated you were home the Sunday Paul Herman came to see your father, and talked about his abuse of his wife?

Mr. Cook—I object to the question. There is no testimony of that character before the court at all.

The Court—She was not asked about that on the direct examination.

Q. (By Mr. Berdine.) Were you home on the Sunday
10 that Paul Herman states he went to your house, and they had a talk about Paul Herman striking his wife?

A. I was outside the yard; I heard Paul Herman come into the house; I did not hear anything they said, what papa said to Paul, or Paul say to papa; I did not hear any of that; I was outside.

Q. The night that you testified that your father struck you with this lash?

A. Yes.

Q. While you were at Harko's or Herman's house—
20 do you recall that?

A. Yes.

Q. Did you have a sore on your arm?

A. No, sir; I did not.

Q. Did blood come from your arm that night?

A. No.

Q. In any form whatever??

A. No.

Q. Was there any blood on your arm in any form whatever?

30 A. No, sir; I had my arms clean; no blood or nothing; no sweat or nothing on them.

Q. The defendant, or one of his witnesses, has stated, in effect, that you cried out, because of the pain due to this lashing, this day, that your father gave you?

A. No, sir; I was crying because I was ashamed.

Q. Ashamed of what?

A. Because papa hit me, and I had a right to stay home, and I came to Paul Herman's house, and I had nothing on my arm, any sore or anything of that kind;

my arm was perfectly clean, and I was crying when my papa hit me, because I was ashamed that he hit me; I did not cry because it hurt me; it did not hurt me.

Q. There was nothing on the strap or anything that would cause any bleeding or wound on your arm, was there?

A. No, sir.

Cross-examination by Mr. Cook.

Q. You were crying at the time your father hit you with the whip, were you not? 10

A. Yes, sir; I cried afterwards.

Q. What made you cry?

A. It did not hurt me, but I got so ashamed, that I was whipped, that it made me cry.

Q. Ashamed of what?

A. That papa hit me.

Q. And that is the only reason you cried?

A. Yes, sir.

Charles Walling, recalled in behalf of the State, in rebuttal, saith: 20

Examined by Mr. Berdine.

Q. The night that you arrested the defendant, Herman, immediately after the murder, was there any wound or trouble with his face in any form or shape?

A. No, sir.

Q. Did he complain to you of any wound about his face, or trouble or pain to it, in any form?

A. No sir.

Q. Did he make any complaint about himself at all?

A. No, sir. 30

Q. Or what had been done to him?

A. No, sir.

No cross-examination.

The State rests.

Paul Herman, being recalled in his own behalf, in rebuttal, saith:

Examined by Mr. Cook (by interpreter).

Q. On the Sunday that you visited Melnik's house, did you say to Melnik, in the presence of his wife, that anyone who interfered with your family, that you would cut him with a knife, or jab him with a knife, or make any threat of any character?

A. No, sir.

10 No cross-examination.

Defendant rests.

Case closed.

Argument.

**CHARGE TO THE JURY, BY THE HON. JAMES
J. BERGEN,
Justice of the Supreme Court.**

Gentlemen of the Jury:

The defendant stands charged before you, with the crime of murder, and your sole duty is to determine, 20 whether, under the evidence, the State has made out a case which justifies his conviction. The law you must accept from the court, for if I commit an error, the defendant has an opportunity to have that corrected. But the questions of fact in the case you are to determine irrespective of what I may say with reference to them; and in considering the evidence, if I omit anything, or misstate any fact, that you are to correct. You must approach this case, gentlemen, with the presumption that the defendant is innocent, that is a presump- 30 tion which every man accused of crime is entitled to at

the hands of a jury, and that presumption continues through the whole case, unless it is overcome by evidence, and you are satisfied of his guilt beyond a reasonable doubt. Not only as to the defendant's guilt does this doubt apply, but as to the grade of the offense. But a reasonable doubt does not mean that every uncertainty in a case must be dispelled, it is rather that condition of mind where the juror after considering and comparing all the evidence, finds that there yet remains in his mind a doubt of the defendant's guilt; that is, 10 that he has not an abiding conviction of the defendant's guilt. If a juror has no doubt, or has in his mind an abiding conviction that the defendant is guilty, then the reasonable doubt, which the law requires, would not exist.

In order to convict the State must satisfy you of the death of the deceased; the cause of the death, and that this defendant is responsible for the act which caused death.

The evidence in this case shows, that on the tenth day 20 of June last, the deceased was cut by the defendant with a knife, or some sharp instrument; that he was taken to a hospital and there on the nineteenth day of June following, died. Dr. Suydam has testified as to the nature of the wound, and that the wound which he received on the tenth day of June was fatal in its nature, and was the cause of the death. So, if you believe this evidence, and I recall no contradiction, it would seem that the deceased was killed by being cut in the abdomen with a sharp instrument. Now, did the de- 30 fendant stab the deceased? In other words, did he make the wound which caused the death? That is a question for you to determine. You have the testimony of the persons who were present, who described the encounter, and the fact while they did not see the knife, or the cutting, that immediately the man was cut, they saw that he was holding up his bowels to prevent their protruding, and that blood was running through his fingers, and Officer Walling, as I recall it, testifies that the

defendant took him to the place where he had put the knife; the knife with which he said he had done the cutting. I do not understand that it is seriously disputed in this case, that the defendant did the cutting, in fact he admits it himself, when called as a witness, but undertakes to justify it, but to that I will refer later. So if you believe the evidence, gentlemen, you would be justified in finding that Melnik was stabbed by this defendant, in this county on the tenth day of June last,
10 and that the wound resulting from the stabbing was the cause of his death, for as to those three elements of the case there seems to be but very little contradiction.

Now the next question for you to determine, if you find the defendant committed the act, is the grade of the offense.

Under the law in this State, if this defendant, having previously formed in his mind an intent to take life, deliberately carried out that previously formed intent, and did take life, and in so doing acted with premeditation and deliberation, that would be murder in the first
20 degree.

If you find from this evidence that there was no deliberation, or if you have, from the evidence, a reasonable doubt upon the question of deliberation, then if you find that he intended to kill, and that he perpetrated the act without deliberation, it would be murder in the second degree.

Whether, if he killed this man, he did it deliberately, so as to bring it within the legal definition of murder in
30 the first degree, as established by the statute of this State, is a question of fact for you to determine. Premeditation does not require a long space of time between the formation of the intent and its execution. A man may form an intent and instantly execute it with deliberation. In this case, as I recall the evidence, the deceased started to go home, he was in this house where all these parties were gathered, and the defendant was standing near the door, out of which the deceased desired to go. The witnesses present seem unable to recall any of the conversation be-

tween the two parties. It does appear, however, that the deceased slapped or struck the defendant in the face, and that almost immediately he was cut or stabbed in a vital part. The defendant says that he had the knife in his pocket. Well, gentlemen, if that knife was open in his pocket, ready to be used, and taking into consideration that it is an ordinary pocket knife, such as is generally carried closed, that would be a fact which you would be entitled to take into consideration, as to when the defendant formed an intent to kill, if he did. He says that the knife was closed in his pocket, and that after he was slapped in the face, he opened that knife with his left hand; that he was being held by two other persons and drew the knife to defend himself. You have heard that testimony, and it is for you to determine its truth. 10

Upon the grade of the offence, also, I am requested to call your attention to the fact that there was some evidence that these men had been drinking, and that the mind of the defendant was so affected by the liquor he had been using that he was incapable of deliberating. If the defendant had the capacity to form an intent, and the degree of intoxication was not sufficient to prevent the formation of an intent to kill, or the premeditated and deliberate execution of that intent, then it would not excuse the crime. 20

But if he was so intoxicated that his mind was incapable of premeditation and deliberation, and his reason was deprived of the power to think and act with deliberation, then it would reduce the crime to that of murder in the second degree.

Now, gentlemen, is there any evidence in this case which shows that this defendant was so intoxicated that his mind, or mental condition, was such that he was unable to reason and deliberately carry out a previously formed intent to take life? That is a question for you to determine. Whether he had formed the intent to take life is another question you must determine. But you are entitled to consider what he did, what his acts were, as indicating his intent. Intent is often only the 30

operation of a man's mind, that it is not always disclosed by words, and you must be convinced by the evidence regarding his acts in ascertaining whether he intended to take life, whether he had formed in his mind the intent to take life. For instance, if one should draw a pistol and place it against a vital part of a man's body, and then discharge it, without saying a word, you would be justified in inferring from that act, that he intended to do what his act would naturally result in, that is, to
10 take life. So when this defendant uses a knife, and stabs a man in a vital part, it is for you to say whether or not, from that act, you have a right to infer, that he intended by his act to take life; that when he drew that knife and stabbed the deceased, he had formed in his mind an intent to kill. If he had, it was murder. If he then executed that formed intent, deliberately and with premeditation, then it is murder in the first degree, under the law of the land.

Nor, gentlemen, is it necessary for the State to prove
20 a motive. The want of a motive, of course, should always be taken into consideration by a jury, but where the criminal act is clearly proven, it is not necessary that the State should prove a motive, because as in the matter of intent, a man's motive is often concealed in his mind, and if a person could successfully conceal his motive, and it was necessary to prove a motive, then in cases of wilful and deliberate murder, the person who perpetrated the act, in the absence of the ability of the State to show the motive, would always escape. It is
30 not necessary, I charge you, that the State should prove a motive, if the criminal act and agency is clearly presented by the evidence to the jury.

On this point too, gentlemen, I charge you, that under the law of the State, it is your duty, when you render your verdict, if you find the defendant guilty, to declare the grade of the offense, either murder in the first degree or murder in the second degree. Or, if you find the defendant not guilty, then he is entitled to a verdict of acquittal.

The principal defense set up here, however, is a justifiable homicide, because of the act being perpetrated in self-defense.

In order to justify one in taking the life of another, in what is called self-defense, the party must be in danger of grievous bodily harm. If a man is struck with the fist, and he has the opportunity to withdraw, it is his duty to withdraw, he has no right to take the life of another unless to protect his own life, or to protect himself from serious bodily harm. So before you can excuse this defendant upon the ground of self-defense, you must be satisfied that he had reason to apprehend serious or grievous bodily injury. Now, gentlemen, did that situation exist there? Of course, if the deceased had drawn a revolver and pointed it at him, he would have had a right to assume that he would suffer grievous bodily injury unless he protected himself. Did he have a right under the circumstances of this case to assume that he was in danger of grievous bodily injury? That is a question of fact for you. Of course, if you say that his life was in danger from that slap in the face, or that there was anything in the conduct of the deceased to indicate that he was likely to apprehend an act which would produce a grievous bodily injury, then he had a right to defend himself, but in the absence of that apprehension he had no such right.

The case, under the rules of law which I have given you, gentlemen, is very largely a question fact, entirely within the province of the jury to determine. It is your sole duty, as I said before, to determine the question of fact, applying the rules of law given to you by the court, and when you have reached that conclusion, it is your duty under the oath you have taken, to fearlessly declare the result to which your minds are led, and to declare the verdict of which you have an abiding conviction of the truth.

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