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Opinion

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New Jersey Court of Errors and Appeals

Writ of Error

THE STATE OF NEW JERSEY,
Prosecutor,
vs.
SALVATORE AGNESI,
Defendant.

10

WARD & MCGINNIS,
Attys. of Defendant,
2nd Nat. Bk. Bldg.,
Paterson, N. J.

20

The answer of the Justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State in a certain schedule to this writ annexed, as within we are commanded.

30

WM. J. GUMMERE,

C. J.

A

Writ of Error

NEW JERSEY, ss.:

THE STATE OF NEW JERSEY:

[L. S.] To: THE JUSTICES OF OUR SUPREME
COURT OF JUDICATURE:

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GREETING:

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Because of the record and proceedings and also in the giving of judgment upon a certain indictment against Salvatore Agnesi, late of the City of Paterson, County of Passaic, for murder (*pro ut* the said indictment and the several counts therein) whereof before a certain jury of the County of Passaic upon an issue taken between the State of New Jersey and the said Salvatore Agnesi, and upon said indictment the said Salvatore Agnesi was convicted of murder in the second degree whereby manifest error and injury intervened to the great damage of the said Salvatore Agnesi, the records and proceedings of which being removed to the Supreme Court of Judicature by writ of error, said judgment was in all things affirmed whereby manifest injury and damage was done to the said Salvatore Agnesi 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 Salvatore Agnesi, do command you that if judgment be thereon given, then that you distinctly and openly, send under your seal, the record and proceedings aforesaid, with all things touching the same, to our Judges of our Court of Errors and Appeals in the last resort of all causes at Trenton, on the 20th day of July, 1918, and this writ, that the record

B

Writ of Error

and proceedings aforesaid being inspected, we may further cause to be done thereupon for correcting that error, what of right and according to the laws and customs of New Jersey ought to be done.

WITNESS, EDWIN ROBERT WALKER, Chancellor,
and President Judge of our Court of Errors and Appeals in the Last Resort of All Causes, at
Trenton, this 2nd day of July, 1918. 10

THOS. F. ~~MAIN~~ *Martin*

Clerk.

WARD & MCGINNIS,
Attorneys.

20

30

C

Writ of Error

NEW JERSEY SUPREME COURT.

10	STATE OF NEW JERSEY, <i>Defendant in Error,</i> <i>vs.</i> SALVATORE AGNESI, <i>Plaintiff in Error.</i>	}	On Indictment. In Error to Pas- saic Court of Oyer and Ter- miner. Order on Affir- mation of Judgment.
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20 This cause having been duly argued at the Feb-
ruary Term, 1918, of this court by Ward &
McGinnis, of counsel for the plaintiff in error, and
Michael Dunn, Prosecutor of the Pleas, of coun-
sel for the defendant in error, and the court hav-
ing considered the same, and finding no error in
the record or proceedings in the Passaic Court of
Oyer and Terminer:

30 It is on this twenty-second day of June, in the
year of our Lord, one thousand nine hundred and
eighteen, ordered and adjudged that the judgment
of the Passaic Court of Oyer and Terminer,
removed by the writ of error in this cause, be
affirmed with costs; and that the record be re-
mitted to the Passaic Court of Oyer and Terminer
to be proceeded with in accordance with this judg-
ment and the practice of said court.

Entered June 22, 1918,

On motion of

MICHAEL DUNN,

*Prosecutor of the Pleas and Attorney of
Defendant in Error.*

D

Writ of Error

I, ENOCH L. JOHNSON, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of a rule entered in the minutes of the Court in the above stated cause.

[L. s.] In testimony whereof I have set
my hand and the seal of said Court 10
at Trenton, this eighteenth day of
July, A. D. nineteen hundred and
eighteen.

ENOCH L. JOHNSON,
Clerk.

20

30

THE UNIVERSITY OF CHICAGO
LIBRARY
CHICAGO, ILL.

NEW JERSEY SUPREME COURT.

Writ of Error

NEW JERSEY, ss.:

THE STATE OF NEW JERSEY:

[L. s.] To the Honorable JAMES F. MIN-
TURN, Judge of our Passaic
Court of Oyer and Terminer, in
and for the State of New
Jersey:

GREETING:

10

Because in the record and proceedings and also
in the giving of the judgment upon a certain in-
dictment against Salvatore Agnese, late of the
City of Paterson, County of Passaic, for murder
in the second degree (pro ut the said indictment
and the several counts therein) whereof before
you he has been indicted, and is thereof convicted
by a certain jury of the county, taken between the
State of New Jersey and the said Salvatore
Agnese as it is said, manifest error hath inter-
vened to the great damage of the said Salvatore
Agnese as from his complaint we have received
information, we being willing, in his behalf to cor-
rect the error in due manner if any there shall be,
and that speedy justice be done to him, the said
Salvatore Agnese, command you that if judgment
be thereon given, then that you distinctly and
openly, send under your seal, the record and pro-
ceedings aforesaid, with all things touching the
same to our Judges of our Court of Errors and
Appeals in the last resort of all causes at Trenton,
on the 22nd day of December, 1917, and this writ,
that the record and proceedings aforesaid being
inspected, we may further cause to be done there-
upon for correcting that error, what of right and

20

30

~~Justices of the Supreme Court of New Jersey~~
~~Appeals in the last resort of all causes at Trenton,~~
~~on the 22nd day of December, 1917,~~
~~and this writ,~~
~~that the record and proceedings aforesaid being~~
~~inspected, we may further cause to be done there-~~
~~upon for correcting that error, what of right and~~

Writ of Error

according to the laws and customs of New Jersey
ought to be done.

WITNESS: WILLIAM S. GUMMERE, Chief Justice of our
New Jersey Supreme Court, at Trenton, this twenty-
third day of February, nineteen hundred and eighteen.

Ward & McGinnis,
Attorneys.

THOMAS F. MARTIN
William C. Gebhardt,
Clerk.

Return to Writ of Error

STATE OF NEW JERSEY

PASSAIC COUNTY, to wit: Be it Remembered,
 That at a Court of Quarter Sessions, held at Pat-
 erson, in and for the said County of Passaic, on
 the First day of October in the year of our Lord
 one thousand nine hundred and seventeen, being
 the day on which the Grand Jury heretofore sum-
 moned to come before the Court of Oyer and Ter-
 miner and now sitting in and for said County,
 desires to present bills and no Justice of the
 Supreme Court being present at the Court House 10
 in said County, before the Honorable WILLIAM W.
 WATSON, Judge of the said Court of Quarter Ses-
 sions in and for the said County of Passaic,
 according to the form of the statute in that case
 made and provided; by the oath of

- | | | |
|----------------------|------------------------|----|
| 1. Robert J. Burke, | 12. Samuel Percey, | |
| Foreman; | 13. Harold Danielson, | |
| 2. Thomas B. Smith, | 14. John Frawley, | |
| 3. Frederick Abele, | 15. William J. Holmes, | |
| 4. Henry A. Oster- | 16. Robert J. Edwards, | 20 |
| mann, | 17. Peter W. Blowers, | |
| 5. James J. Zisette, | 18. Samuel Meredith, | |
| 6. Henry M. Earl, | 19. Robert Boyle, | |
| 7. William Van Loo, | 20. John H. Quinn, | |
| 8. James J. Cowley, | 21. Leonard Roughgar- | |
| 9. John C. Krieger, | den, | |
| 10. James Steel, | 22. Dwight Ashley, | |
| 11. Garret Martin, | 23. Bernard McGrane, | |

good and lawful men of the said County of Pas-
 saic, duly summoned and then and there sworn 30
 and charged to inquire in behalf of the State of
 New Jersey in and for the said County of Passaic;
 it is presented in manner and form following, to
 wit:

Return to Writ of Error

The Bills herewith presented are true Bills.
 ROBERT J. BURKE, MICHAEL DUNN,
Foreman. *Prosecutor.*

 COURT OF OYER AND TERMINER,

IN AND FOR THE COUNTY OF PASSAIC—SEPTEMBER
 TERM, A. D. NINETEEN HUNDRED AND
 SEVENTEEN.

10 PASSAIC COUNTY, to wit: The Jurors of the
 State of New Jersey, in and for the body of the
 County of Passaic, upon their oath PRESENT that
 Salvatore Agnesi, late of the City of Paterson in
 the County of Passaic aforesaid, on the Eleventh
 day of July in the year of our Lord, one thousand
 nine hundred and seventeen, with force and arms,
 at the city aforesaid, in the county aforesaid and
 within the jurisdiction of this Court, in and upon
 one Gaetano Galizio, in the peace of God and of
 this State then and there being, an assault did
 20 make, and him the said Gaetano Galizio did then
 and there wilfully, feloniously, and of his malice
 aforethought kill and murder contrary to the
 form of the statute in such case made and pro-
 vided, and against the peace of this State, the gov-
 ernment and dignity of the same.

MICHAEL DUNN,
Prosecutor of the Pleas.

Witness: JOHN TRACEY.

30 THEREUPON the said Court of Quarter Sessions
 did receive such Indictment and the Clerk of the
 said Court of Quarter Sessions did receive the
 same in the said Court; and also did thereupon

Return to Writ of Error

make entry thereof in the minutes of said Court at the then session of said Court, and afterwards to wit at the same session of said Court it was on motion of Michael Dunn, Esquire, Prosecutor of the Pleas for said County of Passaic aforesaid, ordered that the aforesaid indictment against Salvatore Agnesi be delivered to the Court of Oyer and Terminer for trial. And afterwards, to wit, on Wednesday, the Third day of October, in the year of our Lord one thousand nine hundred and seventeen, at a session of the Court of Oyer and Terminer aforesaid, being as yet of the term of September in the year of our Lord one thousand nine hundred and seventeen, before the Honorable James F. Minturn, Associate Justice of the Supreme Court of the State of New Jersey, according to the statute in such case made and provided, comes the said Salvatore Agnesi in his own proper person and under the custody of William B. Burpo, Sheriff of the County of Passaic (in whose custody in the gaol of the County aforesaid he had been before committed for the cause aforesaid), being brought to the bar here by the Sheriff aforesaid, to whom he is also here committed, and having heard the Indictment read and forthwith being commanded of and concerning the premises in the said Indictment above specified and charged upon them how he will acquit himself thereof, he saith he is not guilty and thereof for good or evil he puts himself upon the Country, and Michael Dunn, Esquire, Prosecutor of the Pleas for said County of Passaic, who prosecutes for the State of New Jersey in this behalf doth the like.

Therefore let a jury come before the Associate Justice aforesaid, at Paterson, in the County of Passaic aforesaid, at the same term of the Court of Oyer and Terminer on Tuesday, the Twenty-third day of October, next ensuing, of twelve good

Return to Writ of Error

and lawful men, each of whom shall be a citizen of this State, and resident within the County of Passaic aforesaid, above the age of twenty-one years and under the age of sixty-five years, by whom the truth of the matters may be better known, and who are not of kin to the said Salvatore Agnesi, to recognize upon their oaths whether the said Salvatore Agnesi be guilty of the murder in the Indictment aforesaid specified, or not guilty, because as well the said Michael Dunn, Esquire, Prosecutor as aforesaid, who prosecutes for the State of New Jersey in this behalf, as the said Salvatore Agnesi has put himself upon the said jury, and the same day is given to the parties aforesaid at the same place.

And thereupon on Tuesday, the Twenty-third day of October, in the year of our Lord one thousand nine hundred and seventeen, at a session of the Court of Oyer and Terminer aforesaid, being as yet of the term of September, in the year of our Lord one thousand nine hundred and seventeen, before the Honorable James F. Minturn, Associate Justice aforesaid, come as well the said Michael Dunn, Esquire, Prosecutor of the Pleas aforesaid, who prosecutes as aforesaid, as the said Salvatore Agnesi under the custody of the Sheriff being brought to the bar here in his own proper person by the said Sheriff, and the jurors of the said jury, by the Sheriff of the County of Passaic aforesaid, for this purpose empanelled, and returned, to wit:

- | | |
|----------------------------|-----------------------|
| 1. Charles H. Volkman, | 6. Kern Keys, |
| 2. Alfred Murray, | 7. William H. Gould, |
| 3. Charles V. Quackenbush, | 8. Leonard W. Prall, |
| 4. John Pritchard, | 9. Luke Walsh, |
| 5. David W. Bamber, | 10. Thomas Trengrove, |
| | 11. John Fenwick, |
| | 12. Frank Shoon, |

Return to Writ of Error

being called, come, who being chosen, tried and sworn to speak the truth of and concerning the premises upon their oath say that the said Salvatore Agnesi is guilty of the felony and murder aforesaid on him above charged in the manner and form aforesaid, as in and by the said indictment is above supposed against him, and that they designate and find that the degree of the said murder and felony is murder of the second degree and that he is guilty thereof, and afterwards, to wit, on Saturday, the First day of December, in the year of our Lord one thousand nine hundred and seventeen, being as yet of the term of September aforesaid, it was demanded of him, the said Salvatore Agnesi, if he hath or knoweth anything to say wherefore the Court here ought not upon the premises and verdict aforesaid proceed to judgment and execution against him, who nothing further saith unless as he hath before said, whereupon all and singular the premises being seen and by the Court here fully understood it is considered by the Court and the sentence of the law is that the said Salvatore Agnesi be confined in the State Prison, at hard labor, for the maximum term of thirty years and the minimum term of twenty years.

JAMES F. MINTURN,
J. S. C.

STATE OF NEW JERSEY, }
County of Passaic, } ss.

I, JOHN J. SLATER, Clerk of said County, and Clerk of the County Courts thereof, Do HEREBY CERTIFY, that the foregoing is a transcript of the record and proceedings in the case of Salvatore Agnesi, convicted of Murder in the Second Degree, in our Court of Oyer and Terminer, on the Twenty-third day of October, A. D. Nineteen Hun-

Return to Writ of Error

dred and Seventeen, as the same is taken from and compared with the original, recorded in Book of Records of the Court of Oyer and Terminer, and now remaining on file and of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Courts and County, at Paterson, this Fifteenth day of December, A. D. Nineteen Hundred and Seventeen.

JNO. J. SLATER,
Clerk.

[L. s.]

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30

PASSAIC COUNTY OYER AND TERMINER.

THE STATE vs. SALVATORE AGNESI, <i>Defendant.</i>	Before: Hon. JAMES F. MIN- TURN, J., and a jury.
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10

PATERSON, N. J., Oct. 3, 1917.

APPEARANCES:

MICHAEL DUNN, Esq., Prosecutor,
MUNSON FORCE, Esq., Assistant Prosecutor,
For the State.

20

JOHN M. WARD, Esq.,
Hon. PETER MCGINNIS,
For the Defendant.

On this day the defendant was produced before the Court in the custody of the Sheriff, and arraigned through the Interpreter, Frank Romano, on the following indictment. That is to say:

30

"That Salvatore Agnesi, late of the City of Paterson, in the County of Passaic aforesaid, on the Eleventh day of July in the year of our Lord, one thousand nine hundred and seventeen, with force and arms, at the City aforesaid, in the County aforesaid and within the jurisdiction of this Court, in and upon one Gaetano Galizio, in

Arraignment

the peace of God and of this State then and there being, an assault did make, and him the said Gaetano Galizio did then and there wilfully, feloniously, and of his malice aforethought kill and murder, contrary to the form of the statute in such case made and provided, and against the peace of this State the government and dignity of the same."

10 The defendant, through his Counsel, entered a plea of Not Guilty.

The Prosecutor then moved the Court that a date be set for the trial of the issue of traverse thus joined, and that a list of jurors be drawn to be served upon the Defendant. This motion was granted and Tuesday, October twenty-third, A. D. 1917, at nine o'clock in the forenoon, was set as the date and time for the trial.

20 The Court then directed that the names of the talesmen be drawn and served upon the defendant as required by the statute; also, that the defendant, the Prosecutor and the Court be furnished with a transcript of the minutes of the proceedings taken on the trial, to be supplied in sufficient time to be used if necessary upon the trial.

The Court also directed that a copy of the indictment be served upon the defendant.

30 The Court then directed that the defendant be returned to the custody of the Sheriff to be confined in the County Jail until the date of the trial, at which time the Sheriff is directed to produce him in Court.

The Court thereupon adjourned until Tuesday, October twenty-third, A. D. 1917, at nine o'clock A. M.

State's Opening

PATERSON, N. J., Oct. 23, 1917.

The Court convened this day for the trial of the issue joined under this indictment.

Present:

HON. JAMES F. MINTURN, J., Presiding.

Of Counsel:

10

MICHAEL DUNN, Esq., Prosecutor,
MUNSON FORCE, Esq., Assistant Prosecutor,
For the State.

JOHN M. WARD, Esq.,
HON. PETER MCGINNIS,
For the Defendant.

The Defendant being produced before the Court in the custody of the Sheriff, the trial proceeded as follows: 20

A Jury was empanelled and sworn.

Mr. Force: If the court please and Gentlemen of the Jury for the second time within four days a jury of this county is called upon to sit in a homicide case, a case in which the defendant is charged with taking the life of his fellow man. It makes one pause to think sometimes whether or not there is something wrong in our system of laws or in their application or otherwise that squares itself with these repetitions of the violation of the law in the highest degree— 30

Mr. Ward: Now if your honor please I do not wish to interrupt counsel, but I think right

State's Opening

at the outset it should be noted that this is improper referring to another case or referring to repeated violations of the law.

The Court: I will not limit the counsel in that respect. I believe it is discretionary.

10 Mr. Force: In this particular case, gentlemen of the jury, the defendant Salvatore Agnesi is charged with having on the 11th day of July of this year making an assault on Gaetano Galizio and him then and there wilfully, feloniously and of his malice aforethought did kill and murder.

20 At No. 13 Ellison Street of this city there is a building which stands some distance back from the street line running back from the street a number of feet, in fact there may be said to be two buildings adjoining or it may be that it is one continuous building. At least there is a building in the front, a pretty large one, and then going through the alley or passageway which is there we pass by this building, which is a wooden building, and further on down the alleyway to the right of it we come to a brick building in the rear. This brick building in the rear it is in which this tragedy occurred on the 11th day of July of this year.

30 At that time Gaetano Galizio was boarding at the home of the defendant, or the defendant's wife. While asleep there in the bed, at about three o'clock in the morning, the window of the bedroom in which he slept,—he slept right near in a corner of the bedroom with a window by his bed, and that window was opened by the defendant, who got in there, and there it was that this crime was committed, as the statements show.

At that time the defendant Agnesi was living with his sister, nearby in the vicinity of where his

State's Opening

wife, and these statements show you that he retired to bed about ten o'clock or in that neighborhood, undressed, and that about two o'clock, or thereafter, he arose and dressed himself and went down to this place that I have indicated where Galizio was, pried open and raised the window in the bedroom right near the door which projects out and got in there, and, as I say, saw the defendant there, pulled out his gun and shot him while he lay in bed, I presume, asleep.

10

There were three shots fired at him at that time or three bullet wounds in his body; one on the right side about sixth rib on a line with axilla, and this bullet perforated the lower portion of both lungs, producing hemorrhage in the thoracic cavity and was found lying against the inner right chest wall. Another bullet was found to have entered the right side about four inches below the one previously mentioned and this bullet perforated the liver and was found lying in the abdominal cavity. The third bullet struck the man right in the jaw, fracturing his jaw bone and glancing off.

20

Both the chest and the abdomen were filled with blood as the result of the two first wounds mentioned, and they were the cause of his death.

We will show you that the defendant after the commission of this act, in fact before he went in, I think it will appear, that he took off his shoes and was in his bare head. He came out after it was over, or, before it was over rather, his wife, who was sleeping in another room, another bedroom, with a kitchen between the two bedrooms, was attracted by the noise of the shot. She jumped up and screamed and as she came in he fired at her, I think the evidence will be, but did not hit her.

30

It will appear that a neighbor living in the front, hearing the shots and the noise then came out and

State's Opening

saw a man running out of the alleyway with his coat turned up around his neck or the back of his head and escaping. On account of the condition of the weather, it then being dark and rainy, this neighbor was unable to recognize this defendant. The shot also attracted the attention of a police officer and one of them came down there and saw the man lying there and saw the effect of the shot upon his body and that the man was bleeding
10 badly, and all these circumstances and the other evidence will clearly show that this man was asleep and in his bed at the time when the attack was made and that the wife of the defendant was in the other room.

The State will show that the defendant then went out of the alleyway as I have stated, made his way to Mill Street, this place was on Ellison Street, not very far from Mill Street, and he then went up Mill Street through various streets until
20 he reached Lakeview, when he got on a car bound to Hoboken, where he was arrested by two of the Hoboken police, who will tell you that they saw him on the car and what they observed of him, that they became suspicious and asked him where he came from, and they will tell you what he said. They found the gun on him and arrested him and turned him over to the Paterson police and he was taken, that same morning, I think, about eight or nine o'clock or thereabouts, it may have been
30 a little later than that, up to the hospital where the man who had been shot was and he was there identified by the man who was shot as the man who came there and shot him. This identification was in the presence of the police.

Subsequent to that identification and on the same day the Recorder was called upon to take the state of this man who was shot and lying sick in the hospital and this man was there and identi-

William L. Whitmore—Direct

fied and the deceased said that he came in and shot him while he was lying in bed.

Now, gentlemen of the jury, if these facts are true there does not seem to be any other alternative for the State in this case but to demand at your hands a verdict of murder in the first degree. It may have been that this man had some idea of jealousy in his mind or something of that kind. That we do not know. But we do know and do state that from the facts that are in our possession the State thinks that the attack made by this defendant upon this deceased man at that time was entirely unjustified in the law and he was without legal justification or provocation and that he set about deliberately and planned this crime, which he afterwards executed, by going down there with a loaded revolver, as we will show you in the progress of the case that he went down there to kill. 10

Now I repeat if these facts are shown to you, gentlemen of the jury, you will be, I think, more than inclined to believe the contention of this State that this crime was deliberately planned and just as deliberately and carefully executed. 20

WILLIAM L. WHITMORE, sworn on behalf of the State, testified as follows:

Direct examination by Mr. Dunn:

Q. Mr. Whitmore, you are a civil engineer and surveyor? A. Yes, sir. 30

Q. And reside in the city? A. Yes, sir.

Q. I call your attention to the map upon the board; did you make that map? A. Yes, sir.

Q. Will you kindly come down to the map and explain some of the different matters upon it? Just what does it represent in the first place? A.

William L. Whitmore—Direct

It represents the dwelling at 13 Ellison Street.

Q. Just tell us what the first curb line is there behind that No. 13. A. A coping along the walk, to the rear of the yard.

Q. What is the character of the material used in that walk? A. A concrete walk; the whole yard is paved with concrete.

10 Q. You have got living apartment marked there; what is that? A. An apartment occupied by other people.

Q. Where does this walk lead to? A. To the rear of this building.

Q. What is this building made of? A. It is of brick, a brick building with cement facing on lower story.

20 Q. And you have marked there, I see, on that rear projection, bedroom, kitchen, bedroom; can you tell us the dimensions of the bedroom, the rear bedroom? There is a scale on the map, too. A. Yes, $\frac{1}{8}$ inch to a foot. 10 ft. 9 by 8 ft. 3, that's the rear room.

Q. Just put it on there. A. 10 foot 9 by 8 foot 3. (Marking map.)

Q. Now, are there any windows in that room? A. Yes.

Q. Where do they front or open into? A. On the yard, this is the yard.

30 Q. And how close is the first window as you go into that cellar door? A. The cellar door is directly under the window in the kitchen.

Q. And what is the nature of that work? That I see you have delineated on the map surrounding the cellar door? A. The cellar doors are iron and there is a concrete opening around there. This is the window over the door.

Q. And how do the cellar doors set, is it on the flat or on the slope? A. Slightly elevated.

William L. Whitmore—Direct

Q. What do you mean by elevated, which end is elevated? A. The end nearest the house.

Q. So the cellar doors are on the slope? A. Yes.

Q. Can you tell us the width of the windows near the cellar door? A. 27 inches.

Q. And the height of that window? A. About 50 inches from the ground or pavement on the ground.

Q. That is the window sill, is it? A. Yes, sir. 10

Q. Then what is the height of the window frame? A. I didn't measure that.

Q. You did not measure that? A. No.

Q. The other window, what size is that? A. That's the same size.

Q. The same size as the other, this one (indicating)? A. Yes, sir.

Q. Did you notice whether there was a window, —is that sash divided into two parts? A. Yes, two parts. 20

Q. Is there a window there,—first, let me ask you this: How do you get into the kitchen? A. Why, through the door.

Q. Where is the door, indicate with your pointer. A. Right here (indicating).

Q. What else; what windows are there in the kitchen, how many? A. One window, right here.

Q. Just point it out, indicate with your pointer the location of that window. A. Right there.

Q. And that opens out into what? A. The yard. 30

Q. What else did you find in the kitchen, at the time you made this diagram? A. The gas range here I located, and the sink and the dish closet.

Q. What is this opening here? A. That is the door leading to the bedroom.

Q. Any bedroom in there? A. Yes.

Q. Where is it located? A. In the corner here, that comes out in the yard.

William L. Whitmore—Direct

Q. I notice you have marked it down—what is that? A. That is the stairway leading to the cellar.

Q. How high above the surface of the ground is the window near those stairs? A. About 15 inches.

10 Q. How high is the sill above the ground to the windows that leads into there (indicating)? A. The window sash is about 46 inches and the opening is 49 from the ground.

Q. What is the character of the yard, where I notice you have the stairs? A. There are the stairs leading to the second story.

Q. Is it all open and light through here? A. Yes, sir.

Q. Are there any windows on the west side of the building? A. No, sir.

20 Q. On the map, this is north and south (indicating)? A. Yes.

Q. And this is Ellison Street (indicating)? A. Yes, sir.

Q. In the bedroom, the rear bedroom, when you were there, was there any furniture there? A. Yes.

Q. What?

Mr. Ward: I object because it don't appear as to when he was there.

30

Mr. Dunn: We will show that.

Mr. Ward: Well, show it now.

By Mr. Dunn:

Q. When were you there? A. On July 14th.

Q. Did you know or hear that time that a crime

William L. Whitmore—Cross

had been committed at that place? A. Yes, sir.

Q. Did you know there had been a crime committed there?

Mr. Ward: I object to the question as hearsay.

Q. You knew there had been a crime committed there?

10

Mr. Ward: I object to the question also as being hearsay.

The Court: I do not think I will allow that.

Q. Did you make any measurements of any furniture there? A. Yes, sir.

Q. What? A. A bed.

Q. How was the bed stationed when you were there? A. Northwest end of the room.

20

Q. Will you kindly indicate on the map here where it stood? A. Right here.

Q. And what was its size? A. 3½ feet wide and 6 feet long.

Q. Any other furniture? A. Yes, a closet; up there in the corner.

Q. Any other furniture there? A. There might have been a chair.

Q. And in this room that you have marked "living room," is that a parlor? A. No.

30

Q. Now, when you were there and saw that bed, what direction was the head and foot of the bed in, if you can tell us? A. The foot was located towards the south, toward the kitchen.

Q. And the head? A. Toward the north.

Q. Was there anything else in that room? A. Not that I know of.

Q. Now, how high up can you tell us did the

William L. Whitmore—Direct

cellar—or rather how high above the cellar door was the southerly window to the bedroom? A. Repeat the question, Mr. Dunn.

Q. How high above the cellar door was the southerly window? A. The cellar door was directly under the kitchen.

Q. Can you tell us the distance of the window shown here to the outline or what we have marked cellar door? A. Two or three inches.

10 Q. Supposing that to be the top of the cellar door, how far is it from there up to the top of the cellar window? A. About 40 inches.

Q. 40 inches? A. Yes.

Cross-examination by Mr. Ward:

Q. As I understand you, this cellar door is on a slope? A. Yes, sir.

20 Q. And is directly under the window that leads into the kitchen? A. Yes, sir.

Q. So a person walking up the cellar door came right up to this window? A. Yes, sir.

Q. And the top of the window is about 40 inches above the cellar door? A. Yes, sir.

Q. Now, the door to the bedroom isn't under the kitchen door? A. No, sir.

Q. It is where? A. Off to the right.

30 *By Mr. Dunn:*

Q. Now, I ask you how far from the slope of the cellar door is this window? A. About 40 inches.

Q. About how far is the top of the window from the cellar door? A. About 40 inches.

Q. Now, when you called at the house did you make any examination of any woodwork or partition, if any? A. Yes, sir.

Dr. Gerald Vanshot—Direct

Q. Where did you notice them? A. Between the kitchen door on the partition.

Q. What were they? A. They looked to me like bullet marks.

Q. Could you tell us which way the bullets entered it; had they gone through the partition? Which direction? A. Through the partition marked cellar.

Q. What is the nature of the partition? A. Ordinary partition. 10

Q. Was it lath or boards? A. Lathing boards.

Q. That is all.

DR. GERALD VANSHOT, a witness sworn on behalf of the State, testified as follows:

Direct examination by Mr. Dunn:

Q. Doctor, you are a practicing physician and surgeon in this county? A. Yes. 20

Q. And did you assist the County Physician in making an autopsy upon the body of Galizio? A. Yes, sir, on July 12th.

Q. Where did you make that autopsy? A. In the morgue of St. Joseph's Hospital.

Q. What time on July 12th; do you remember what time it was? A. In the afternoon.

Q. And what did you find as the result of that autopsy? First, I will ask you what you found as the result of an inspection of the body? A. The inspection of the body showed a bullet wound on the right side, sixth thread, and another bullet wound four inches lower. 30

Q. On which side? A. On the same side, and a bullet wound in the chin.

Q. Indicate, please. A. (Witness indicates on his chin.)

Dr. Gerald Vanshot—Direct

Q. Indicate on your body also, doctor, about where the bullet wound in the side, the higher one, was located and where the lower one was located.

A. About here, the higher one was and the other one about here (indicating).

10 Q. Now then, you made an autopsy, what did you find as a result of that autopsy, as to those different bullets? A. The upper bullet had reversed itself on the lower part of the lungs and fractured one of the ribs on the opposite side and split there against the rib.

Q. The ball did? A. Yes, the bullet did.

Q. Now have you that bullet that was then found and extracted? A. Yes, sir, this is the one against the rib.

Q. And this is the one that had entered the upper part, on the right side? A. Yes, sir.

20 Q. Where was that found? A. It was found against the opposite side, on the left side on the inside of the thoracic cavity.

Q. Indicate what course the ball took, if you can, from your autopsy? A. I think that the bullet was about level.

Q. What do you mean by about level? A. I mean it entered about the sixth rib and it was found about the sixth rib on the other or opposite side.

30 Q. So that it passed directly through the thoracic cavity, puncturing the right lung, and then the left lung, and then lodged in the liver? A. Fracturing the rib.

Q. What else did it pass through, will you just tell us? A. None of the other organs except that it caused a pulmonary hemorrhage, and that is what the man died of.

Q. And the other bullet that entered lower down, did it? A. Yes, and passed through the liver and was found in the abdominal cavity.

Dr. Gerald Vanshot—Cross

Q. Have you that bullet? A. Yes, that is the one.

Q. Is this that bullet? A. Yes, sir.

Q. What damage had that bullet done? A. Well, it lacerated the liver.

Q. What else, if anything? A. Nothing else; there was no injury to the intestines. The bullet was not found because it went through the external part and struck the inferior maxillary of the jawbone and fractured it and glanced off in all probability, and I did not find that bullet. 10

Q. From the examination of the body that you made, will you just tell us about what angle the higher shot on the right side was fired; could you tell anything from your autopsy from what angle the gun must have been held at, the one lower down I refer to now? A. I couldn't tell for the reason that the bullet was found loose in the abdominal cavity and the location of the bullet would not indicate the direction of the shot; in the other one it would because the bullet fractured the rib. 20

Q. What was the cause of death? A. Pulmonary hemorrhage.

Q. Caused by what? A. Caused by a bullet wound and by the laceration of the lung and this profuse hemorrhage, the thorax was entirely filled with blood and so was the abdomen.

Q. Could either have resulted in death; one did, but would the other also? A. That is problematical; that lower shot the man might have recovered from, so long as there was no injury to the intestines. 30

Cross examination by Mr. Ward:

Q. Will you just indicate to the jury on your side there just where this one bullet entered? A. Right about there (indicating).

Dr. Frank Gery—Direct

Q. Indicate on the other side just where it was found. A. It was found right about there (indicating).

Q. Right about like that? A. Yes, sir.

Q. That is, it entered on the right side where you had your finger and passed through the body and was imbedded against the left side about the same distance above? A. Yes, about the same distance up.

10

Mr. Dunn: I offer the bullets in evidence.

Mr. Ward: I have no objection.

(Bullets are allowed in evidence and marked Exhibit A-1, two bullets.)

20 DR. FRANK GERY, sworn on behalf of the State, according to law, testified as follows:

Direct examination by Mr. Dunn:

Q. Doctor, you are a physician? A. Yes, sir.

Q. Were you at St. Joseph's Hospital on the 11th of July last? A. Yes, sir, I was.

Q. In what capacity? A. House surgeon.

Q. House surgeon? A. Yes.

30 Q. On that day, do you remember a patient being brought to the hospital by the name of Salvatore Agnesi [Gaetano Galizio]? A. Yes, sir.

Q. What time of day did the man come there, or was he brought there? A. I think it was about half past three in the morning.

Q. What time did that patient come in the hospital? A. I say I think about half past three in the morning.

Q. Half past three? A. Yes.

Q. Will you just describe to the jury what he

Dr. Frank Gery—Direct

was suffering from when brought there? A. When he was brought in he was suffering from severe shock and upon examination I found that he had a hemorrhage in both lungs and also had a wound in the lower,—down on the right side, which the doctor in the autopsy found had pierced the liver; we put him to bed and he apparently was growing worse and worse all the time; we then called in the visiting surgeon and he examined him and found that nothing could be done for him.

10

Q. How many wounds did you find upon the body then? A. Three.

Q. On what location? Will you indicate to us? A. One was on the right side, high up—

Q. What do you mean, high up? A. Fifth or sixth rib, and the other one was three or four inches below that and the other one was directly in the center of the chin.

20

Q. Who brought the patient there, do you recall? A. I don't, no.

Q. And what happened to the patient? A. After arrival, you mean?

Q. Yes, how long did he live? A. He died in the morning, I think, about ten or eleven o'clock, somewhere around there.

Q. That morning or the next day? A. I am not sure, I didn't look at the record. I think he died that same morning.

30

Q. What say? A. That same morning, I am not positive.

Q. You did not look at the records? A. No.

Q. What did you attribute the cause of his death? A. Hemorrhage of the lung.

Q. Due to what? A. Due to the piercing of blood vessels by something.

James Carr—Direct

Q. By what? A. Due to piercing of the blood vessels by something, apparently a bullet.

Cross-examination by Mr. Ward:

Q. Where this bullet entered, Doctor, was it a clean wound? A. A clean punched hole, yes.

Q. Anything else about it that would attract your attention? A. No.

10 Q. Both of them clean punched? A. Both were clean.

JAMES CARR, a witness produced on behalf of the State, being duly sworn, testified as follows:

Direct examination by Mr. Dunn:

Q. Mr. Carr, you are a police officer of the City of Paterson? A. Yes.

Q. Have been for some time? A. Yes, sir.

20 Q. And were you on duty on the morning of July 11th, 1917? A. Yes, sir.

Q. In what section of the city? A. I was on the Cross and Ellison Street.

Q. In the morning did you have anything special attract your attention? A. Yes, sir.

Q. At what time of the morning was your attention attracted? A. Around four or five minutes past three in the morning.

30 Q. And what was the result of the matter you say that attracted your attention, what was it? A. I heard a woman holler and screaming.

Q. Where were you at that time? A. At the corner of Cross and Ellison Streets.

Q. And was that on your post? A. Yes.

Q. And what did you do after you heard the hollering and screaming? A. Just then a man came running down toward me and told me there was a man shot.

James Carr—Direct

Q. Who was the man that came running toward you? A. Philip Boma.

Q. Where did he live? A. Same building, 13 Ellison Street.

Q. What did you do then, after you got that information? A. I notified the police headquarters and went up to the house and found a woman in the room where the man was shot.

Q. Who was the woman that you found there at the house when you went in there—you said you went to the house? A. Yes. 10

Q. And you found a woman in the room where the man was shot? A. Yes, sir.

Q. Just describe to the jury what you found in that room when you got there. A. There was quite some smoke in the room when I entered and I walked over to the bed where the man was lying and I seen blood coming from the center of his chin and right side and lower down.

Q. Now will you explain to the jury just how the man was laying in the bed when you arrived? A. He was resting on his left arm, partly up, like that. 20

Q. On his left arm? A. On his left arm and I asked him if he knew who shot him.

Mr. Ward: I object.

Q. Just tell us what you saw? A. He was resting in that position. 30

Q. And you saw blood from these three places you spoke of; now what else did you see; did he have any covers on him?

Mr. Ward: I object to the leading form of the question.

Q. What covers did he have on him when you

James Carr—Direct

got there? Just describe what you saw. A. He had a light bed cover over him and the cover was burnt here on the upper part and the lower part was too large holes.

Q. Now do you know what became of that bed cover that morning? A. I do not.

Q. You saw it afterwards? A. Well, I saw it in there that day.

Q. And did you see it afterwards? A. I did not.

10 Q. Well now, what did you do then? You found the man there, what did you do next? A. Just then Detectives Cross and Kinney and Officers McCormack and Keedon came.

Q. And what was done? A. These two officers put the man on a chair and put a cloth over him and we took him out to the patrol.

Q. Where did you take him? A. St. Joseph's Hospital.

20 Q. Who took him there? A. Officers McCormack and Keedon.

Q. What did you do then? A. I notified headquarters where I sent the man and then I came back to the house.

Q. Did you make an inspection of the house? A. Yes.

Q. Now what did you do after you went to the house in reference to the window? A. I found the bedroom window open——

30 Q. Did you notice how many windows there was in the bedroom? A. I just noticed this one window.

Q. Which window was it? A. Right over the cellar door, right close to the entrance from the rear yard.

Q. And did you notice any other window open? A. I did not.

Q. And then what else did you notice about the room, the rear bedroom? Did you notice any-

James Carr—Direct

thing else about that as to marks of shooting or anything of that kind? A. I noticed a bullet hole through the partition.

Q. Now where was that bullet hole through that partition? A. It went through the bedroom into the kitchen.

Q. Can you locate it for us, about where it was with reference to the door passing from the kitchen to that bedroom? A. I should judge about thirty inches from the door. 10

Q. And how high would it be from the floor? A. It would be twenty inches or more.

Q. You did not measure. A. I did not measure it.

Q. Well, did you notice any other bullet marks in the partition or doors? A. I did not.

Q. Well now then, tell me what did you do then after the patient was sent away and you made this inspection? Did you learn there as to how this happened? A. I asked this woman—— 20

Mr. Ward: I object.

Q. Never mind what she said. You learned from somebody who had been there? A. I did.

Q. What did you do after you learned the fact as to who had been there? A. The other officer and myself went to 14 Passaic Street where we were told this man was stopping. 30

Q. Who went with you? A. Officer Keedon and McCormack and Detective Kinney and Cross.

Q. What did you find there? A. I found the front door wide open and so we walked in and I opened a bedroom door where there was a child laying in its bed and the other bedroom door was open and his sister was sleeping there and she woke up and inquired about this——

James Carr—Direct

Mr. Ward: Now never mind.

Mr. Ward: Never mind.

Mr. Dunn: He has not stated his name.
He said he inquired about this man.

Mr. Ward: You know that is improper,
whether he used the name or not.

10

Q. What did you do? A. We searched the house to see if we could locate this man and we could not.

Q. What did you find in reference to—what parts of the house did you go into? A. Into the bedroom.

20

Q. What did you find in the bedroom that you went into in that house? A. Found a bed with a young child asleep in it.

Q. Did not find the man there? A. No, we did not.

Q. Did you find anything as to where he had been? Did you find anything to indicate that he had been there? A. Only what we were told.

Q. Did you find anything to indicate that he had been there? A. Only what we were told.

30

Q. If you did not find him there, what did you then, what did you do next? A. We came out and I went back to the station and Officer Fitzpatrick and I went through several different streets to see if we could locate him. Later on I went back to the house.

Q. Were you able to locate him in the street? A. No.

Q. After that you went back to the house? A. Yes, sir.

Q. What did you learn, did you learn anything

James Carr—Direct

else in reference to the matter after you got in the house? A. No.

Q. When you first went down to the house were you in the bedroom, the first bedroom that you reach as you go in from the street, the southerly bedroom? A. Next to the kitchen.

Q. Just come down here a moment and tell us on the map with the pointer so that the jury can see what you mean. Do you understand this diagram? Just look at it for a moment, and see if you can get it. This is Ellison Street, this is the walk going in, this is the rear part, and this is the front part. Just see if you can locate yourself and point out on diagram, the kitchen and bedroom you say you went through. A. (Indicating.) This is it. 10

Q. When you went in there where was the man that was shot, where was he? A. Lying in bed.

Q. Where was the bed located? A. In this corner. 20

Q. Where was the head of the bed? A. Facing toward the north.

Q. Where was the foot? A. Toward the south.

Q. Did you notice what kind of a bed was it? A. A small single bed.

Q. Did you notice anything about the bed as to its covers, etc., the covers upon the bed quilts, if anything? A. No, I noticed just light covers.

Q. Did you notice anything about the sheets that were on the bed and over the man when you got there? 30

Mr. Ward: Objected to; he has not said there were any sheets on there; he said there was a blanket when he went in there.

Q. Was there a sheet on the man when you got there? A. Yes, sir.

James Carr—Direct

Q. What did you notice upon that sheet when you got there? A. Two large holes burnt in.

Q. Where were those holes that were burnt in with reference to the wounds on the man? A. One was on the right side about here (indicating the lower part of the abdomen) and the other was lower.

10

Mr. Ward: We object to this line of examination without showing the sheet. The State has the sheet, and I think it is the best evidence.

Mr. Dunn: We shall be very glad to produce it.

Q. Did you afterwards see the sheet at the police station? A. I have seen it after I left the house.

20

Q. I show you this sheet, take hold of it, will you kindly look at it and state whether those are the holes that you speak of as having seen at the house? A. Yes, just as I spoke of.

Q. Where was the larger hole that was burned in the sheet as you went in there? A. Seems to be up here (indicating).

Q. And the other? A. That seems to be lower.

Q. And you don't know when the sheet was sent away from there? A. I don't know.

30

Q. You went off to search for the man? A. Yes, sir.

Q. Did you find him? A. No, sir.

Q. Who did you find in the house when you got there when the man was there, who did you find in the house, you spoke about Di Bona, who else did you find there? A. There was two women in the house.

Q. Who were they? A. One woman—I don't

James Carr—Direct

know the other woman, but one was the woman of the house, the wife of this man.

Q. What is her name? A. Angelina.

Q. Nicolina? A. No, Angelina.

Q. Agnesi? A. Agnesi, yes.

Q. She was there? A. She was there, and another lady, and I don't know the other man.

Q. What is her name? A. Angela.

Q. Agnesi? A. Yes.

Q. She was there? A. Yes, I didn't know the other man. 10

Q. Now just tell us where she was when you got there, this Mrs. Agnesi? A. She was in the bed there hollering and yelling.

Q. What else did she do? A. Nothing.

Q. Did you go in the other bedroom? A. Yes, sir.

Q. What was the matter with the bed? A. Mussed up.

Q. What did that indicate to you? A. That one person had been lying in there. 20

Q. And when you went in there and what can you say how it had been occupied? A. I couldn't say anything about that only the bed was very small and looked as if one man had been lying in the center of it.

Q. Then when the man had been taken away you tried to find the other man? A. Yes, sir.

Q. You didn't find him? A. No, sir.

Q. Did you find anything there on the apartment on the floor—bullets? A. I didn't, but another officer did. 30

Q. You saw him pick them up? A. I did.

Q. Just look at these and tell me if they look like the same that you saw that night? A. I did.

Q. Who had them? A. Officer Fitzpatrick.

Q. Where did he find those bullets? A. In the center of the floor I think.

James Carr—Cross

Q. Where did he pick the other one up? A. I couldn't tell you, I only saw him pick up the one.

Q. But he showed you the two? A. Yes, he showed me the two.

Q. You saw Mrs. Agnesi there; how was she dressed when you went there? A. She had light clothes on, I didn't notice.

10 Q. You say light clothes, what do you mean by that, light in color or light in weight? A. They were light in color.

Q. You knew her before that? A. Oh, I did, yes.

Q. How long had you known her before that? A. I guess about five or six months.

Q. What? A. Five or six months.

Q. Before that? A. Yes.

Q. Then you went out from there and I believe you said you could not find him? A. Yes, sir.

20 *Cross-examination by Mr. Ward:*

Q. You did not hear the shots, did you? A. No, sir, I did not.

Q. When you went down there, the first thing you noticed was that this window above the cellar door was open, the window leading into the kitchen? A. I did.

30 Q. Then you went into the bedroom and the woman was there with this man, is that right? A. Yes.

Q. She was dressed in light clothes,—they might have been night clothes, might they not? A. They may have been.

Q. The man was lying on the bed resting on his left arm, was he? A. Yes, that's right.

Q. In a partially raised position, was he? A. Yes.

Q. I presume the sheet was more or less crum-

James Carr—Cross

pled up like that, wasn't it? A. Well, it was mussed up a little.

Q. I notice the blood is quite a distance away from where the bullet evidently went through the sheet, isn't it? A. Yes, but the clothing was just as I have told you.

Q. I say, it was all crumpled up like in that position (indicating)? A. Well, more or less, a little.

Q. And the two bullet wounds were only about four inches apart, that is right, ain't it? A. I don't know, I did not see the bullet wounds. 10

Q. Do you know when you took him up to the hospital that the bullet wounds were only about four inches apart? A. I didn't go to the hospital.

Q. But they were quite some distance apart, the distance between those two bullet holes? A. Yes, they are.

Q. That blood you see, did you see that on the sheet at that time? A. Why certainly. 20

Q. And that apparently came from the wound on the side, did it not? A. I suppose so.

Q. So the sheet up where the blood is was near his side, near the bullet wound as well, is that correct? A. Yes, partly.

Q. Mr. Carr, this woman was hollering and crying, weeping, wasn't she? A. I did not take particular notice of her eyes, but she was crying.

Q. Crying and lamenting. wasn't she; of course you know what lamenting means? A. Yes; I told you what the woman was doing; she was all excited and hollering and screaming. 30

Q. You had known this woman before, had you not? A. Yes.

Q. You had known her when she and this man were living together on Van Houten Street? A. On Ellison Street.

James Carr—Cross

Q. On Ellison Street up some distance? A. 45 Ellison Street.

Q. You had known her on an occasion when her son had asked you to have this man arrested, had you not, for threatening his life?

Mr. Dunn: I object, it is not cross-examination.

10

The Court: I will overrule that as leading and immaterial.

Mr. Ward: I ask an exception.

The Court: I will allow it.

JAMES F. MINTURN, (L.S.)
J. S. C.

20

Q. You know the son, do you not, the young man in uniform here? A. Yes, I know the young man.

Q. On your direct examination you were asked if you had known this woman before and you stated yes; now, what was the occasion of your knowing her before? A. Yes, I have known her.

Mr. Dunn: I object.

The Court: I will overrule it.

30

Mr. Ward: I ask an exception.

The Court: Exception allowed.

JAMES F. MINTURN, (L.S.)
J. S. C.

Q. Was the time that you referred to as knowing her before the time when this young man came

James Carr—Cross

to you and complained of this Galizio, the dead man, and claiming that he was living with his mother improperly?

Mr. Dunn: I object.

The Court: I will overrule that question.

Exception asked for and allowed.

10

JAMES F. MINTURN, (L.S.)
J. S. C.

Q. When had you known this woman before?

A. Well, I had known her about four or five months, as I just stated.

Q. Under what circumstances had you known her?

Mr. Dunn: I object as immaterial.

20

The Court: What is your object, Mr. Ward, in asking the witness these questions, to prove your case?

Mr. Ward: No, but I think the door has been opened and on direct examination and I should be permitted to ask the witness.

The Court: I will overrule the question.

30

Exception asked and allowed.

JAMES F. MINTURN, (L.S.)
J. S. C.

By Mr. Dunn:

Q. Will you just point here to the window that

James Carr—Cross

you say was open when you first arrived there at the scene?

Mr. Ward: I object; the witness has already done it twice on direct examination and once on cross. He indicated and stated the window over the cellar door leading to the kitchen.

10

The Court: Is there any doubt about that?

Mr. Dunn: Yes, there is.

The Court: I will allow it.

A. The one over the cellar door.

Q. The window leading into the kitchen? A. Yes.

20

Q. Which window opens into the bedroom? A. The one over the cellar door.

Q. Was there a window open in the bedroom?

Mr. Ward: I object.

Q. Where was the window over the cellar door leading to or where does it open into; look at the diagram and tell us which window it is that you found open? A. That one there (indicating).

30

Q. Where does that lead to? A. Into the bedroom.

Q. Then you did find a window open leading into the bedroom?

Mr. Ward: I object to the question as leading.

The Court: He has already answered that.

James Carr—Cross

By Mr. Dunn:

Q. Was there a window in the kitchen open also? A. I did not notice any.

Q. You didn't notice that? A. No.

Q. Where did that window lead to, what room (indicating)? A. The bedroom.

Q. Now how many windows did you notice when you got in the bedroom? A. Only one window open.

10

Q. One window down? A. Yes, sir.

Mr. Ward: I object to the question.

The Court: Is there any doubt about that fact?

Mr. Ward: It seems not.

The Court: Then you can cross-examine the witness as to what the officer says.

20

Cross-examination by Mr. Ward:

Q. Officer, you didn't notice any window but the window you found open? A. That is the only one I found.

Q. And that is the window you say was directly over the cellar door? A. I didn't say directly.

Q. Haven't you indicated on this diagram that it was directly over the cellar door? A. I said that.

30

Q. And that was the window that led where? A. I said in the bedroom.

Q. Didn't you, when you entered that place—as you went in that place, didn't you say that window was open? A. After I went in the place I seen the window open.

James Carr—Cross

Q. Before you went in that place didn't you see that window open? A. No; I rushed right in.

Q. You are anxious to favor the State in this case, are you not?

Mr. Dunn: I object to that.

The Court: I overrule the question.

10 Mr. Ward: If your honor please I wish to show the prejudice that this witness entertains which is not based altogether upon his attitude in the court room.

Mr. Dunn: That is the only thing we are dealing with.

The Court: Do you think that that is an important question.

20 Mr. Ward: Yes, if your honor please, I think in view of the fact that this man has changed his statement that it becomes important.

The Court: I will allow the question if you think there is any importance in it.

By Mr. Ward:

30 Q. You are reluctant to give evidence that may assist the defendant in this case, aren't you? A. No, I am practically telling the truth as far as I understand it.

Q. You have been in frequent consultation with the prosecutor about this case? A. Why, yes, I gave my statement.

Q. And yet when you were asked about a cer-

James Carr—Cross

tain incident by one of the representatives from the office of the counsel for the defendant your reply was that you would not say anything or tell anything, wasn't it? A. It was not any fit place to say anything, even so, I just came in.

Q. Why wasn't it a fit place to make an inquiry of you? A. It was in the police station last evening.

Q. And yet you refused to give any information to the representative from the office of the counsel for the defendant in this case? A. Is that what she told you? 10

Q. Is not that the truth? A. The young lady merely asked me what I knew about it and I went on upstairs.

Q. And you refused to give any information or to tell her what you knew because you had been talking to the prosecutor, didn't you?

Mr. Dunn: He had not seen the prosecutor yet. 20

Mr. Ward: Never mind, Mr. Dunn, you know that is improper.

Q. Isn't that what you said? A. I said to the young lady that I was going right upstairs.

Q. Didn't you state to this young woman that you would not give her any information about this case because you had been in consultation with the prosecutor? A. I guess not. 30

Q. You did not? A. That is what I told you first, right off.

Q. But you did not give her any information, did you? A. She was not there when I came downstairs.

Q. You did not give her any information, did you? A. I did not.

Edward McCormack—Direct

DR. FRANK H. GEARY, recalled as a witness on behalf of the State, testified as follows:

Direct examination by Mr. Dunn:

Q. Give us the time of the death of Mr. Galizio.
A. Five A. M., July 12th.

10 EDWARD McCORMACK, sworn as a witness on behalf of the State, testifies as follows:

Direct examination by Mr. Dunn:

Q. You are a member of the police force of the City of Paterson? A. Yes, sir.

Q. Were you on duty in the neighborhood of 13 Ellison Street on the morning of July 11th? A. I was not on duty there at the morning, but I was on reserve.

20 Q. Do you remember a call to 13 Ellison Street that morning? A. We got a call from Officer Kerr to 13 Ellison Street.

Q. What time did you get that call? A. Between three and three-five in the morning.

Q. Did you go down to 13 Ellison Street? A. Yes, sir, we did.

Q. Who went down there? A. Officer Keating and myself.

30 Q. Who did you find there when you got there? A. We found Officer Kerr and he asked us into the house. We went into the house and found a man lying in bed.

Q. Just describe what condition he was in—you say he was lying in bed? A. He was lying in bed in a bedroom off the kitchen with his head toward Van Houten Street and his feet toward Ellison Street.

Q. Now, when you say you went to the kitchen, after you went in the kitchen, did you go to the

Edward McCormack—Direct

right? A. We went in this way— We came in this way.

Q. And then went to the right? A. Yes.

Q. And what was the matter with the man as he lay there in bed? A. They told us the man was shot.

Q. What did you see that indicated to you he had been shot? A. I saw one bullet wound here on the chin.

10

The Court: Is there any doubt about that?

Mr. Ward: No.

Q. Now, what did you do after you found the man in the bed? A. Why, we just wrapped a sheet around him, and picked him up and set him in a chair, and carried him from the house to the patrol wagon, and drove as fast as we could to St. Joseph's Hospital.

20

Q. When you went in there, do you know how he was in bed, did he have any covers on him? A. The best of my knowledge is he was laying partly on his back with that sheet over him.

Q. Look at that sheet (indicating), is that the sheet that was over him? A. I could not tell you that. We were in such a hurry to get him to the hospital that Officer Kinney and myself did not take note of that.

Q. You don't know whether that was the sheet he went to the hospital in or not? A. No.

30

Q. Now, did you have any more to do with the case after that? A. After we came back to the house Officer Close and Officer Kinney were there. And then we went from there to the station house and Sergeant Ryan ordered me to the wagon to bring Officers De Lucci and Pirolo and take them from their house to the hospital, which I did, and

Robert Close—Direct

they took the statement after that which I witnessed there and we brought them back to their house, and then I went back to the police station.

Q. That completed your journey? A. That completed my journey.

Q. Now, when you got there, in response to the call for reserves, you went in the kitchen door? A. Yes.

10 Q. And did you observe whether or not there were any window open? A. I did not, sir.

Q. Did not? A. Did not; because as I stated before, we were in such a hurry to get the man to the hospital, we did not take any note of it.

NO CROSS EXAMINATION

ROBERT CLOSE, a witness produced on behalf of the State, being first duly sworn, according to law, testified as follows:

20

Direct examination by Mr. Dunn:

Q. You are a member of the police force of the City of Paterson? A. Yes, sir.

Q. And were you on post on the morning of July 13th? A. Yes, sir.

Q. And did you go to this number on Ellison Street? A. Yes, sir.

30 Q. And did you go there in company with some one? A. Yes, sir.

Q. Who? A. Officer Kinney and two plain clothes men carried the man out.

Q. Was anybody there when you got there? A. Yes, sir.

Q. Who? A. Mrs. Agnesi and several other people, several Italians.

Q. Then what did you hear had occurred?

Robert Close—Direct

Mr. Ward: Object to the question as hearsay.

The Court: Objection sustained.

Q. See the man bleeding?

Mr. Ward: I object to that as a conclusion.

The Court: I think I will allow that.

10

Q. Did you enter the building? A. Yes, sir.

Q. What did you find there? A. I entered the kitchen and saw a man that was bleeding carried out.

Q. Where was that? A. In the second room.

Q. What condition did you find the bed in and what size bed was it? A. Regular size and iron.

Q. Double bed or single bed? A. Single bed.

20

Q. And what did you find on it? A. A sheet with blood on it.

Q. And I show you this sheet and ask you if that was the sheet with the blood on it? A. I think that sheet was wrapped around the man.

Q. When did you next see the sheet? A. This morning in police headquarters.

Q. What next did you do there? A. I interviewed the people in there.

30

Q. And did you see the bed in the north room? A. Yes, it was mussed up as if it had been occupied.

Mr. Ward: I object to the question on the ground it is a conclusion.

The Court: I will let it stand.

Robert Close—Direct

Mr. Ward: Will your Honor allow me an exception?

The Court: Certainly.

Q. What else did you do? A. I investigated the bedroom and kitchen.

10 Q. Was there a hole there through the partition? A. Yes, there was.

Q. What kind of a hole was it? A. It was a burnt hole through the partition.

Q. Will you indicate on the map where the hole was? A. The bed stood in here and here was the kitchen.

Mr. Ward: The north is here.

20 Mr. Dunn: I object to counsel for defendant interfering with the examination at this time.

Mr. Ward: May I have it indicated on the map which window?

The Court: Yes, you may have that.

Mr. Dunn: I will bring that out, your Honor, right away.

30 Q. Did you notice any window there? A. Yes, sir.

Q. And was it open? A. Yes, sir.

Q. Was that near the cellar door? A. I didn't see the cellar door that night.

Q. Can you indicate any other window open? A. Yes, in the kitchen.

Q. And where in the kitchen was the window

Robert Close—Direct

open? A. On the south side of the door you entered.

Q. Indicate on the diagram. A. I don't know, only it was on the south side.

Q. Did you notice anything on the outside? A. I did not notice anything on the south side.

Q. Do you know anything about that blanket? A. That blanket was in the man's bedroom.

Q. Which man's bedroom? A. I don't remember. 10

Q. You didn't take it up to police headquarters that night? A. No, sir, I did not.

Q. What did you do in the way of finding or searching for the defendant? A. After getting all the information we could at the house Officer Kinney and I—we had our Ford automobile there, but we couldn't find anything and couldn't find him, and then we went back to the police station and made our report. 20

Q. Did you see him later in the day? A. No, sir. But we got a telephone call.

Mr. Ward: I object to that.

Q. And you didn't see him later in the day? A. No, sir, I never saw him since until this morning.

Q. Never saw him? A. No, sir.

Cross-examination by Mr. Ward: 30

Q. You got a telephone message to come down to the police station? A. No, sir, I was there on duty.

Q. And you saw him carry him out? A. Yes, sir.

Q. And where was that? A. In the little alley way.

Robert Close—Cross

Q. And you saw them carry him out? A. Yes, sir.

Q. And you went in the kitchen, and you saw him in on the kitchen floor? A. Yes, sir.

Q. Never saw him after that? A. No, sir.

Q. You never saw him after that? A. No, sir.

Q. Leaving the apartment or entering the front was there any light? A. There was a light in the kitchen.

10 Q. There was a light in the kitchen, was there? A. Yes, sir.

Q. Which window did it come out of? A. Which window did the light come out of?

Q. Yes. A. I don't think it came out of any window, I didn't notice it coming out of any window.

Q. You didn't take notice of any light coming out of any window? A. No, not as I was in the house, no.

20 Q. The alleyway was dark? A. Yes, sir.

Q. Then how did you notice this blood on the sheet and these shots? A. Because the sheet is white and I noticed the spots.

Q. So that in the dark with the sheet laid upon the man while they were carrying him out as you were passing him going in you noticed the spots on the sheet? A. Yes, sir, you could see it very easily, he was sitting in the chair and they had the chair in their arms and this sheet was right around him.

30 Q. And you noticed the window on the south side of this door as you entered the kitchen? A. I did not say the south side. I can go down to the map and give you an idea of it.

Q. Never mind coming down here. Is that your best impression? A. My impression is that there

Robert Close—Cross

was a kitchen window open and it was near the door and as I entered the door I saw the kitchen window open.

Q. On the south side of the door you said? A. I think so.

Q. Don't you know there is no kitchen window on the south side of the door? A. I am not so sure, I cannot say sure exactly, but I know a window in the kitchen was open.

Q. How long were you making the examination? A. About 15 minutes.

10

Q. You say you only noticed one window in the bedroom where this man had been? A. Yes, sir, that was the window I investigated.

Q. You went down there to make an investigation, didn't you? A. Yes, sir, and we did make an inspection, only an inspection.

Q. Have you any recollection of this blanket at all? A. Yes, sir, I recognize that blanket as being on the bed in the man's apartment.

20

Q. Crumpled up? A. It was lying on the bed.

Q. Crumpled up or what? A. It could not have been rumpled up very bad because you could see plainly there was holes in it that had been burned.

Q. You could see there were holes where it had been burned? A. Yes, sir.

Q. The sheet that you saw was the bottom sheet and that was stretched all the way across the bed, is that right? A. That is my recollection and there was blood marks across it.

30

Q. By the bottom sheet you mean the sheet that is directly over the mattress? A. It appeared to me there was a sheet there, but whatever it was on the bottom of the bed had blood on, I did not take notice what it was when we inspected it.

Q. Was there a sheet there or not? A. That is a question in my mind.

Charles Pirola—Direct

Q. You saw the blood, why didn't you see the sheet that it was on? A. Whatever was lying there had blood on it. It was dark in the room and I did not make a special effort to notice it or anything else. I was looking for the man and when I found he was not there why we made a quick inspection of who it was and what it was and we went out.

10 Q. Did you notice any smoke in the room when you got in there? A. No, sir.

Q. That had all gone out? A. Yes, sir.

CHARLES PIROLA, a witness sworn on behalf of the State, upon oath testifies as follows:

Direct examination by Mr. Dunn:

20 Q. Officer Pirola, you are a member of the police detective force here in Paterson? A. Yes.

Q. And you recollect the night of this shooting down at 13 Ellison Street? A. Yes, that morning.

Q. What time were you on duty there that morning? A. I was not on duty.

Q. What time were you there; you were on duty if you were there? A. I was there shortly after four o'clock.

30 Q. When you got there, what did you see in reference to the house and the crime? A. We went to 13 Ellison Street and went into the rear and we entered the house and we noticed blood spots on the floor.

Q. Blood spots where, on the floor? A. On the floor of the bedroom where the shooting had taken place. I noticed these holes in the bed coverings and I took the coverings and wrapped them up to take them to the police station, which we did.

Charles Pirola—Direct

Q. I call your attention to that sheet and ask you whether that is one of the pieces of bed clothing that you took to the police station that night?

A. Yes, sir, it is.

Q. Were those burned holes in it and those blood spots on it the same as we have them here now? A. Yes, sir.

Q. Where did you get the sheet, where did you find it? A. I took it from the bed where Galizio slept.

10

Q. Where was it located, in what room? A. It was in the end bedroom on the first floor of the rear of 13 Ellison Street.

Q. By the end, do you mean to the right as you enter in the kitchen? A. Yes, sir.

Q. Will you just come down here and point out on this diagram for us—have you seen this diagram before? A. No, sir.

Q. Well, this is Ellison Street and here are the living apartments and the rear of 13 Ellison Street and this is the stairway going up and this the stairway going down to the cellar; there is the kitchen and here the bedroom. A. Here is where the bed was, right here (indicating).

20

Q. That is, the bed was pointing to the northwest corner of the room? A. Yes.

Q. How large a bed was it? A. It was a small bed, but whether it was a one size or a size and a half I won't discuss, but the mattress may have been larger than the bed.

30

Q. Where was this sheet when you went into the room? A. It was lying on the bed.

Q. How did it lie on the bed with reference to the bed? A. It wasn't just in an orderly manner; it was kind of disturbed, but I noticed the one corner burned and I thought it was shot through and so I lifted up the cover and looked at that.

Charles Pirola—Direct

Q. Did you find this also? A. Yes.

Q. Where did you find that? A. In the bed.

Q. What part of the bed was this on, was it at the foot or head or side of the bed? A. It laid in a disorderly manner; it was not spread over the whole bed, but it laid as if it had been overturned.

10 Q. When you got there that morning, about four o'clock, what, if anything, can you tell us as to the windows that were open in any of the rooms, if you noticed any? A. I noticed this window (indicating) open, this window here, in this bedroom here; that I did notice open. (Referring to the window in the southerly bedroom.)

Q. Did you notice any other window open? A. I can't say that I noticed any other window open.

Q. Did you while there,—I show you this knife. Did you find that knife? A. Yes, sir, I found this knife and a pipe, a smoking pipe.

20 Q. Where did you find this knife and pipe? A. Near the window that I pointed at last, on the outside of the house near that window I pointed to last.

Q. That is, near the window in the southerly bedroom? A. Yes, there was some bags of cement stacked up by the house and a little box to sit on and right near that box I found the knife and the pipe.

30 Q. You don't know who they belong to? A. Yes, I do.

Q. Whom did they belong to? A. They belonged to Mr. Agnesi.

Q. The defendant? A. Yes.

Q. How do you know they belonged to him? A. I found the knife belonged to him afterwards. I had seen him at other times smoking a pipe of that shape and when I looked over the premises I

Charles Pirola—Direct

made up my mind it was his and lately he identified it at the police headquarters and also the knife.

Q. Now then what did you do with them, brought them, the knife, that is, to the police station and delivered it to Mr. Gall and he has had it since? A. Yes, sir.

Q. Now did you find anything, officer, that you brought there? A. We brought on the morning of the 14th, Prosecuting Detective Drew, Captain Tracy, Whetmore and myself went down to the premises again to look them over and we looked in her bedroom—— 10

Mr. Ward: What morning?

The Witness: On the morning of the 14th.

Mr. Ward: I object to that. 20

The Court: When did this crime happen?

Mr. Ward: On the morning of the 11th.

Q. We don't care about that. Well, then, did you find anything that you brought to the police station, anything else? A. No, sir.

Q. Did you find these bullets there? A. No, sir.

Q. Don't know anything about them? A. No, sir. 30

Q. Now, that night when you went there, first on the morning of the 11th, did you go into her bedroom? A. Yes, sir.

Q. What can you tell as to the condition of her bed that night? A. Why, one side of the covers were raised on one part and the pillow was disturbed—it is a double bed, a large bed, and the

Charles Pirola—Direct

covers were off on one side, you could see where a head had been laying on the pillow, as if it was used on one side.

Q. Now then, did you make an examination or inspection as to the bed in which the injured man lay? A. Yes, sir.

10 Q. What can you say to us as to your observation there as to how that had been occupied? A. Well, when I got there the bed was pretty well disturbed, the clothes were all disturbed and we could not tell how many had been laying there, you could not say.

Q. Well now, when did you first see Agnesi after this night of July 11th? A. I saw him the same morning again.

Q. Where? A. The police headquarters.

Q. What time? A. I should judge around 10 o'clock, between 10 and 11.

20 Q. And where did you go, did you go to any place with him? A. With him?

Q. Yes. A. No, sir.

Q. Well now, how did you come to see him there at the police headquarters? A. Because he had been arrested, we had been working all night trying to get him and he had been arrested by Detective Fullen and Cornelli of the Hoboken police department and they notified us and he was brought back here.

30 Q. What was done when he was brought back here? A. He was taken to Captain Tracy's office where he made a statement.

Q. What was done with him after he was brought back here? Was he taken to a hospital by anybody? A. I believe——

Q. Do you know? A. No, I don't know.

Q. Say so, then.

*Charles Pirola—Cross**Cross-examination by Mr. Ward:*

Q. Mr. Perullo, you mentioned a pipe, what became of that pipe. Do you know? A. I don't know. I think it was given back to him to smoke.

Q. Does it look like this pipe? A. It does. It looks like that.

Mr. Ward: I would like that marked for identification.

10

Q. And then this knife, you say he identified it as being his? A. Yes.

Q. And will you come down here and indicate to the gentlemen of the jury whereabouts you found these things in connection with this diagram? A. Found them right about here (indicating near the bedroom at the southerly end of 13 Ellison Street.

Q. There are two windows leading into that bedroom? A. Yes. 20

Q. And where were the bags of concrete? A. Between these two windows, here were the bags of concrete.

Q. And there is a little bench in the yard? A. Yes, nailed up, you could sit on it.

Q. And the bags extended down here to the concrete coping? A. Yes.

Q. How high were these bags of cement? A. The height of a bag of cement I should say would be about 20 inches. 30

Q. And this pipe and knife was there? A. They were a few inches from one another and they laid there on the ground.

Q. Near the window which was open? A. Yes, near here (indicating) the window adjacent to the concrete coping. Yes.

Joseph Cornelli—Direct

JOSEPH CORNELLI, a witness sworn on behalf of the State, testified as follows:

Direct examination by Mr. Dunn:

Q. You are an officer in Hoboken? A. Yes, sir.

Q. What office do you hold? A. Detective Sergeant.

Q. And did you occupy on the 11th of July of this year that position? A. Yes, sir.

10 Q. And on the morning of July 11 did you receive any notice or information concerning this case? A. Yes, sir.

Q. And in pursuance of the notice that you got what did you do? A. Detective Fullen and myself, we received a telephone call from Paterson that there had been a shooting—

Q. What did you do? A. We took a car to cover the Paterson car going to the Hoboken Ferry. We got on this car and under the description we noticed this man sitting about four seats away from the front door of the car.

20 Q. What time of the morning was that? A. The telephone was received at 4:35 and we arrested him at 5 o'clock.

Q. And this car was going toward Hoboken? A. Hoboken Ferry.

Q. Where did you get on the car? A. At First, between Bloomfield and Washington, almost near Washington.

30 Q. Just tell us now what you did in apprehending the defendant. A. When we got in this car under the description, he was the only Italian in the car and under the description we got I went in and sat in front of this man and I started to question him; I asked him where he came from and he answered that he came from Rutherford. I told my partner to find out from the conductor, I whispered to him.

Joseph Cornelli—Direct

Mr. Dunn: Never mind what you whispered to him, what did your partner do?

Q. What did your partner do? Never mind what you whispered to him. A. My partner found out that he did not get——

Mr. Ward: Wait a moment, we object to that.

10

Q. Don't tell us anything that passed between you, what did you do after that, you or your partner. Never mind what was said, just what you did. A. I formed my opinion that he was the man who had done the shooting from what I heard and when the car stopped he went to get out and I asked him his name and he gave me another name.

Q. What name did he give? A. I don't remember now, but it was not the name Agnèsi, Salvatore Agnesi, that was not the name that he gave. And as he went to get out I noticed his coat pocket was swollen out that way (indicating) kind of puffed out. I says to him, "What have you in that coat?" and he was going to get out and I grabbed him and as I was putting my hand in the pocket he said, "It's all right," and he put his hand in before me and he gave me the gun.

20

Q. I show you this pistol and ask you if that is the pistol he gave you and in turn passed over by you afterward to the Paterson police? A. Yes, sir, a British Bulldog, 7 chamber.

30

Q. And this envelope in which it is contained. A. Yes, sir, a 7 chamber pistol and two bullets inside.

Mr. Dunn: I offer it in evidence, and the envelope, too.

Joseph Cornelli—Direct

(Admitted and marked "State's Exhibit S-50 and S-51 of this date.")

Q. There are two bullets in the chamber now?

A. No. There were then two bullets in the chamber.

Q. And did you notice whether those bullets had been snapped or not and missed? A. No, sir, I did not.

10

Q. Then, what did he say when he handed the pistol to you? A. I told him, "You are the man. We want you. You are after doing some shooting in Paterson." He says, "Yes, I am the man you want. I am glad it is all over." And while going to the station house he told me of this man ruining his family. He says that this man is a godfather of his that had got the good graces of his family and had got in there and he took his wife away and he had been glad that it was over with. That he had shot both of them, "and I hope they are dead." And he says that he went away to Philadelphia and that he had such a bad breakdown that somebody told him that his family was living with this godfather, his wife, and he says that "I could not rest. I had to go and settle it. And I am glad it is over."

20

Q. What was done with the prisoner when you picked him up? Where did you take him? A. We brought him to headquarters.

30

Q. Then what was done? A. We notified the Paterson police.

Q. Then what? A. Then the following morning why a couple of men from Paterson came over and took the prisoner back.

Q. And you gave them the gun, you gave those parties the pistol? A. Yes, the pistol was, of course, turned over.

*Joseph Fullum—Direct**Cross-examination by Mr. Ward:*

Q. When you mentioned his name as Agnesi, then he said yes, that was his name, is that as I understand it? A. I asked him——

Q. When you said to him you said, "Your name is Agnesi, you are the man who did some shooting." A. No. I asked him what his name was and he gave another name that I don't remember.

Q. After that you said, "No, your name is Agnesi"? A. No, there was not anything of that kind said at all. I simply said you are the man we want for shooting and when I went for to get the gun he said, "Yes, here is the gun. I am Agnesi." While we got from the platform of the car. 10

Q. Then he gave you his name? A. Yes, Salvatore Agnesi.

Q. Then he told you about this man having ruined his family? A. Yes, sir.

Q. And he told you about this man being the godfather of his children? A. Yes, sir, he said that his godfather had gotten into the good graces of his family through being godfather and that he got his wife away and that he could not live with her. He said that he had went to Philadelphia so as to forget his trouble and that some one there had told him that he had seen his wife and this fellow living together and he said that that had gotten on his mind, and that he was a regular wreck, and he says, "I went down to kill him." 20 30

JOSEPH FULLUM, sworn as a witness on behalf of the State, testified as follows:

Direct examination by Mr. Dunn:

Q. Officer, you are connected with the Police

Joseph Fullum—Direct

Department of what city? A. Hoboken.

Q. And were you on July 13th of this year acting in that capacity? A. Yes, sir.

Q. Connected with the Detective Bureau? A. Yes, sir.

Q. You heard Officer Cornelli testify upon the witness stand a moment ago? A. Yes, sir.

Q. And were you out with him on that mission that morning? A. Yes.

10 Q. Did you discover this defendant here, sitting at the table and arrest him that morning, you and Officer Cornelli? A. Yes.

Q. Where did you get on the car? A. On First Street, between Bloomfield and Washington Streets.

Q. What time did you get on the car? A. About 8 minutes to 5, 5 or 8 minutes to 5.

20 Q. How did you come to get on the car? A. We received a telephone message from the police department describing,—giving a description of this man, and Detective Sergeant Cornelli and myself got on the car, and he was the only man on that car answering that description, and Detective Sergeant Cornelli went over to the seat and sat in front of him and asked him where he got on the car, and he responded and said at Rutherford; and Detective Sergeant Cornelli told me to go and speak to the conductor.

30 Q. Never mind what you said to the conductor. Tell us what else occurred at that time. A. When the car stopped at the terminal, at the ferry, Detective Sergeant Cornelli noticed his coat bulged out, and Detective Sergeant Cornelli said to him, "What have you got there?" and he took out a revolver from his pocket, a 7 chamber British Bulldog revolver, and he handed it to Detective Sergeant Cornelli and the Sergeant told him then, "You are the man we want," and so on our way

Joseph Fullum—Cross

to police headquarters he said, "I am glad it is all over, I am glad I killed her," meaning his wife. Then Detective Sergeant Cornelli was talking Italian to him and I could not understand him, but at headquarters he gave the name of Salvatore Agnesi.

Q. Then the Paterson police came down and got him that morning and brought him back to Paterson? A. Yes, sir.

Q. And this pistol that I show you which was marked a moment ago, did you find that? A. Yes. 10

Q. Did you notice how many cartridges were left in the pistol? A. Two.

Q. Did you note how many had been snapped and didn't go off at all? A. No; I didn't notice that.

Cross-examination by Mr. Ward:

Q. I noticed you say the sergeant said his coat pocket was bulging a little? A. Yes, sir. 20

Q. And then he asked him what he had in his pocket and he showed him a revolver? A. Yes, sir.

Q. When you say you told him it was all over he said he was glad because he had broken up his home? A. Yes, sir.

Q. What else did he say? A. I don't remember; that was in Italian.

Q. Did he say the man was still living? A. I think he said he went to the hospital. 30

By Mr. Dunn:

Q. What else did you find on his person besides this revolver? A. The pocket book with a ten dollar bill in it.

The Court: These things were taken from his person?

William Kinne—Direct

A. Yes, sir; these things I think we took from his pocket.

Q. And did you take these bullet from his pocket? A. Yes, sir.

Q. What calibre are they? A. 32, I think.

Q. They were in his pocket, too? A. Yes, sir.

Q. And they were handed over to the Paterson police? A. Yes, sir.

By Mr. Ward:

10 Q. The prosecutor on direct examination asked you whether or not the pistol had been snapped a couple of times? A. That I couldn't tell.

Q. These that I now hand you have not been snapped, have they? A. Not that I know of.

Q. You notice these two, they have not been snapped? A. I think not.

Q. I am not familiar enough to tell you, but I thought you may be able to tell. A. Well, I would say they have not.

20 Q. That is all.

WILLIAM KINNE, a witness produced on behalf of the State, being first duly sworn according to law, testified as follows:

Direct examination by Mr. Dunn:

Q. You are a detective on the Paterson police force? A. I was until the first of September.

Q. Were you on the 11th of July? A. Yes, sir.

30 Q. And were you down to this place of the shooting on the 11th of July? A. Yes, sir.

Q. And did you have anything to do with this case? A. Yes, sir.

Q. What time did you get there? A. About three-fifteen.

Q. And you were with Officer Close? A. Yes, sir.

Q. Did you see the dead man? A. Yes, sir.

William Kinne—Direct

Q. Where was he? A. They were taking him out through the alleyway.

Q. Did you notice what they had covered him with? A. It looked to me like a sheet.

Q. Did you notice any windows open? A. I noticed one.

Q. Where was that? A. In the bedroom.

Q. Where was it, on the side? A. South side of the kitchen.

Q. What did you find in there? A. bed and a chair. 10

Q. What was the condition of the room there?
A. A bed with a sheet on.

By the Court: Is this not a repetition?

Mr. Dunn: Only as to this one point.

Q. Were you afterwards called down to go to Hoboken? A. Yes, sir. 20

Q. Who did you find when you got down there?
A. Salvatore Agnesi.

Q. What time did you get over there? A. About eight or half past eight.

Q. Did you have any conversation with him on the way up? A. Yes, sir.

Q. What was it? A. He said that this man was bearing down his mind and that he couldn't sleep so that then he got up and went over and took off his shoes and he lit a match to see if they were in bed together and they were and that he shot the man three times and that two times he had shot at his wife and that the bullets snapped and he was sorry of it. 30

Q. What else did he say? A. He asked me if the man was dead and I said no, that he wasn't, and when we got to Hackensack I telephoned from Hackensack to the Paterson police quarters to find

William Kinne—Direct

out if he was dead and he told us no, but to take him to the hospital and see if the man could identify him and we arrived at the hospital at about ten or ten-thirty and took him in and had him identify him.

10 Q. Which hospital did you take him to? A. St. Joseph's. So I arrived at the hospital about 10:30 a. m., 10:20 or 10:30, and we proceeded with this man and took him in the hospital and had him identified by the man who was shot.

Q. What hospital? A. St. Joseph's Hospital, on Main Street.

Q. Who was there when that happened? A. Detective Lord, Sergeant Lord, Keppler, and Officer Taylor and I as far as I can remember.

Q. Who was there when you called to see him, those people? A. Yes, sir.

20 Q. Now, tell us how the identification was made? A. We took him to the hospital and this man was lying in bed and Detective Sergeant Lord asked him, this man was lying in bed who I believe was Galizio, what was shot, asked him if he knew this man, and he said, "Yes, that is the man who shot me."

Q. What did the defendant say when he said that? A. He never said a word.

30 Q. When you were over at Hackensack and he knew— after you had learned that the man was still living, did you have any talk with him about that, did he say why he went down there to Ellison Street? A. Why, he said that before, that this man was a boarder there, and that was the reason he broke up his home, and he went up to this house to shoot this man because the man broke up his home, and his sister told him he had to get another place to go to, he could not stay at his sister's house any more on Decker Street, that is all he said.

William Kinne—Direct

Q. He would have to get another place? A. Yes, sir. She had no room in her house for him.

Q. Were you at the sister's house that morning? A. Yes, sir.

Q. Before going to Hoboken? A. Yes, sir.

Q. What for? A. To see if we could find him. We learned that is where he was living.

Q. What did you find whe nyou got to that house that morning as to whether he was there or not? A. We walked right in the house, the front door was open, and also the door from the hall into the kitchen, that was open, neither door was locked, and we had a searchlight with us and we saw two bedrooms off the kitchen, the first was occupied by a boy and the bed had been used, and by that time a man or a woman hollered, I would not say which one, "Who was there," and we told them it was the police officers—

Q. Never mind about that. You did not find him? A. No, sir.

Q. That was at the sister's house? A. Yes, sir.

Q. That is where they said he had been, did they say he had been there? A. He said he had been in bed that night, in fact she said he was in bed then.

Q. What did he say about that? A. He said he was there.

Q. After you got him home, and he was identified by Galizio and committed to the jail, then what was done? A. We fetched him right down to headquarters and arraigned him.

Q. That morning when you went there first did you go in the rear bedroom? A. Yes, sir.

Q. And what did you observe as to the condition of that bed? A. That bed had the appearance of being slept in.

Q. What indicated to you that it had been slept in? A. The covers were turned down in front

William Kinne—Cross

and the pillow had been used, but the indications were that only one party slept in that bed.

Q. From your observation of the bed in the front room where the shooting took place, what observation, if any, could you make there when you got there at 3:05 a. m.? A. Where Galizio was shot, the room?

10 Q. Yes. A. Well, that was a small bed and from what you could see of that bed the covers in the back of that bed were not pulled down from the side, but they were tucked down in the bed yet.

Q. They were down in the side of the bed? A. Down in the side of the bed, this was pulled down, but this had not even been pulled up from the side.

Q. That is, along the side next to the wall? A. Next to the wall.

20 Q. Which side were they pulled out? A. The front side. That indicated that one man, one person, had been in the bed.

Mr. Ward: We object to that.

The Witness: I don't know how many was in there. I say only that it indicated that.

Mr. Ward: Just indicate what you saw.

30 The Witness: I said only that it indicated that.

Cross-examination by Mr. Ward:

Q. You noticed only one window open down there? A. Just one window.

Q. Was Pirolo with you at that time? A. No, sir.

William Kinne—Cross

Q. Pirolo got there first or did you? A. I could not say. I don't know what time Pirolo got there.

Q. Weren't you there when Pirolo came? A. No, sir.

Q. You went there with Close? A. Yes, sir.

Q. You made this very hasty examination? A. Well, I should judge we were there maybe 20 minutes.

Q. You went out to get the man then? A. Yes, 10
sir.

Q. The real thing that was on your mind was to try to get this man before he ran away? A. That's it.

Q. That is why you did not linger there? A. That is right, we did not linger there.

Q. That is why you did not linger for a closer observation there? A. That is the fact.

Q. Where was the lamp, the light? A. I did not see no light. 20

Q. Was there any light there? A. There was a very bright light in the kitchen.

Q. A bright light? A. In the kitchen. A very bright light.

Q. Gas? A. Gas.

Q. There was no gas lights, however, in the other bedroom? A. They didn't have to have any gas here. There was gas across from the bedroom and the door——

Q. Just answer the question? A. There was 30
no light in either bedroom that I saw.

Q. There was no light in the bedroom where the shooting took place? A. No, sir.

Q. There was no light in the room, and you could not see this other bed that you have described? A. There was no light in the room, but I could see the bed.

Q. But there was no light in the room where

William Kinne—Cross

you saw this other bed as you have described? A. No.

Q. What window did you see open? A. The window in the bedroom.

Q. Which bedroom? A. The room where this man was shot.

Q. Any smoke in the room at that time? A. I didn't see a particle of smoke.

10 Q. None at all? A. None at all.

Q. That had all gone out if there was any in there? A. Yes, sir.

Q. Was there any smoke in the bedroom at that time? A. Not a particle.

Q. None at all? A. None at all.

Q. That had all gone out, had it? A. Yes.

20 Q. And when you went into the bedroom towards the front, Ellison Street, you did not observe closely to see if that window was open or not, did you? A. No, I did not.

Q. Mr. Kinney, when you came back to this man Agnesi, the defendant, you say he said at that time that he could not sleep that night? A. Yes, that's what he said.

Q. And he told you that this man was the godfather of his child, did he? A. No.

Q. He told you this man had been a friend of his, didn't he? A. Yes, that he was a friend and was living down there as a boarder.

30 Q. This man, the defendant, speaks very poor English, don't he? A. He spoke pretty good English that morning for me, good enough for me to understand; he talked very plainly, good, very good; he did not need an interpreter, counsellor.

Q. Is it also so that his English is very broken? A. The English he used to me was very plain.

Q. Very plain? A. Plain enough for me to understand the words he used.

William Kinne—Cross

Q. Almost as plain as you and I? A. Oh, no, no.

Q. And he told you also that this man had taken his wife away from him? A. No.

Q. Did he say the man had broken up his home? A. He told me that, but he didn't say he had taken his wife away.

Q. Did you know anything about this affair up to this time? A. No, nothing.

Q. He told you when he went down there that night he found this man and his wife in bed together? A. Yes. 10

Q. And as he said he saw this man lying in bed with his wife, did he? A. Yes, that is what he said.

Q. Did he tell you about using this thing here to open the window? A. No, nothing about that.

Q. Did he tell you he used a knife for that purpose? A. No, and I didn't even ask him how he got in. 20

Q. Did he tell you about going in one bedroom first and looking around in there? A. No, nothing about that.

Q. He said nothing of that kind, eh? A. No, nothing like that.

Q. When he was brought to the police station, he gave a statement there, did he not? A. Yes, sir.

Q. And up to that time, the time that he gave this statement to the police, he had not seen any of his friends or been in communication with anybody, had he? A. I know that he had not. 30

Q. He hadn't? A. No, sir.

Q. At the time he told you, or when he came in that house and entered this bedroom and saw this man in bed with his wife he had not been in communication with anybody or any of his friends? A. No, sir, not while in my presence from the time of leaving Hoboken.

William H. Young—Direct

WILLIAM H. YOUNG, sworn on behalf of the State, on oath testified as follows:

Direct examination by Mr. Dunn:

Q. You are recorder of the city of Paterson?

A. Yes, sir.

Q. And were acting in that capacity on the 11th and 12th of July, 1917, were you? A. Yes, sir.

10 Q. Do you remember this shooting by Agnesi of Galizio? A. Yes, sir.

Q. Did you see this man Galizio after the shooting? A. Yes, sir.

Q. Where did you see him? A. I seen him at the hospital.

Q. What time and what day? A. It was on the 11th of July.

Q. The 11th of July? A. Yes.

Q. Where was he at the time that you saw him?

20 A. At St. Joseph's Hospital.

Q. Where was he at the time? A. He was in bed.

Q. In bed? A. Yes.

Q. Who was with you at the time you went to the hospital? A. Mr. Lord, Mr. Keppler and De Luccia.

Q. Lord, Keppler and DeLuccia? A. Yes.

Q. Did you have any conversation with the injured man at that time? A. Yes.

30 Q. And what was his condition when you arrived at the hospital? A. He seemed to be suffering and groaning and mumbling to himself and saying that he knew he was going to die,—he was dying.

Q. What did you do with reference,—did you take a statement from him? A. Yes, I did.

Q. Before taking that statement what did he say to you as to his condition? A. He told me he

William H. Young—Direct

knew hec ould not live and was going to die and was dying then.

Q. Then you took the statement? A. Yes.

Q. Have you that statement there with you? A. Yes, sir.

Q. Signed by him and sworn to before you? A. Yes.

Q. Witnessed by whom? A. Lord, Keppler and DeLuccia.

Q. They were present with you at the time? A. 10
Yes; at 9:22.

Q. You wrote it down in your handwriting, did you? A. Yes.

Q. And after so doing, was it read over to him? A. Yes.

Q. And understood by him and then sworn to? A. Yes, sworn to.

By Mr. Dunn:

Q. I ask you to read the statement. 20

Mr. Ward: I object to the statement.

The Court: I will allow Mr. Ward to examine him on it.

Examination by Mr. Ward:

Q. Judge, did this young man speak in Italian or English at the time? A. Some English and some Italian. 30

Q. He is pretty hard to understand;—he was hard to understand in this condition, was he not?

A. Well, no, he seemed to be perfectly clear in what he meant to say, but, of course, his English was not very good.

Q. His mind was concentrated to some extent, was it not on account of the strain he was under and suffering pain? A. Yes.

William H. Young—Direct

Q. When he spoke in Italian. What was done then? A. When I asked him questions he would say in English,—some part of it I possibly did not understand and I would have the same question repeated by DeLuccia, who would explain to me in Italian what he said.

10 Q. So that there were parts of the questions that you asked him that he apparently did not understand? A. He did not respond in English.

Q. There were questions, some questions part of which he did not apparently understand, isn't that true? A. Yes, sir.

Q. Did you put the questions and answers down? A. No, I took it in narrative form.

Q. So that you did not put his exact language down, did you? A. Just as I got it from him.

Q. Answer my questions, Judge. Did you put his exact language down? A. As far as I could.

20 Q. For instance when you would ask him the question and he answered the question, would you put down his answer in the exact language in which he gave it? A. I just took it in narrative form.

Q. Did you say that he said that he was in pain, did he say that? A. No, I don't think he did, but you could tell he was in pain.

Q. And you say that he said he was dying? A. Yes.

30 Q. Did he say that in Italian or English? A. In English.

Q. You didn't ask him then if he thought he was dying? A. No, I don't know as I asked him that direct question.

Q. You just heard him say that? A. Yes.

Q. Do you remember his exact words? A. He said I am dying, I am dying, I know I am going to die.

William H. Young—Direct

Q. I am dying, I am dying, I know I am going to die? A. Yes.

Q. What was the first thing that you asked him, as near as you recollect? A. I don't remember that, that was five or six months ago.

Q. Do you remember if you asked him if his name was Gaetano Galizio at that time? A. Yes, that, and where he lived and so on.

Q. You didn't ask him anything about his belief in God, did you? A. No, I don't think I did. 10

Q. Nothing of that kind? A. No.

Mr. Dunn: You may read the statement, Mr. Young.

Mr. Ward: I object to the reading of the statement.

The Court: I will admit it and grant you an exception. 20

(Mr. Young reading:)

"My name is Gaetano Galizio. I live at No. 15 Ellison Street, Paterson, N. J. I was boarding there with a person by the name Nickolani Agnesi. I have been there for two months. My age is 37 years. I married my wife in the old country. I have two children. About 3 a. m. on Wednesday morning I heard a noise at my bedroom window and there were fired at me,—the first shot fired at me hit me on the stomach. I opened my eyes and saw it was Salvatore Agnesi. He then fired two more shots at me, one of which struck me in the chest, and the other on the chin. I then heard Nickolani screaming, who was in another bedroom, and I heard two more shots 30

William H. Young—Direct

fired by him. I saw his face after shots were fired. I recognized it was Salvatore Agnesi. While taking this statement he is constantly repeating I am dying. This statement is made while the man is upon his death bed and when he is saying I am dying, he has threatened me before the trial before Recorder to shoot me.

10

(Signed) Gaetano Galizio.

Sworn and subscribed before me
this 11th day of July at 9:22
at St. Joseph's Hospital.

William H. Young.

William H. Lord.

Adolph Keppler.

20

Nicholas DeLuccia."

Q. Nicholas DeLuccia is a detective who speaks Italian? A. Yes.

Q. And he was present with you at that time?
A. Yes, sir.

(Said statement marked Exhibit A-2 on behalf of the State.)

30

Exception asked for and granted.

JAMES F. MINTURN, (L.S.)
J. S. C.

NO CROSS EXAMINATION

JAMES BROOKS, called and did not respond.

HOWARD GALL, called and did not respond.

Mr. Dunn: I want to prove by Howard Gall who had been the custodian of these things——

Mr. Ward: We will admit that.

Mr. Dunn: I want to prove certain admissions by Mr. Brooks.

The Court: Of course they admit his guilt. 10

Mr. McGinnis: It is to unimportant that I don't see why we can't close the State's case.

The Court: Is Mr. Brooks in the neighborhood?

A Court Officer: He was here five minutes ago. While Detective Kinne was on the stand he was here. 20

Mr. Dunn: It is near the hour of adjournment and I don't think we will lose any time if your Honor——

The Court: We have lost time because if Brooks was here we could examine him.

The Court: How far is Brooks from here now? 30

Mr. Dunn: I don't know.

The Court: Where does he live?

Mr. Dunn: (Ask where he lives.) That would be a mile and a quarter from here.

Opening for Defense

Mr. McGinnis: It is not the defendant's fault that he is not here.

The Court: Gentlemen of the Jury, we will take a recess until two o'clock; in the meantime you will be accompanied by the Sheriff and you are not to discuss this case with anyone.

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The auditors here have a habit when I say something about an adjournment of making such a noise I can't do anything with the jury and something will have to be done to stop that.

(RECESS UNTIL TWO O'CLOCK)

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AFTER RECESS

JAMES BROOKS, called and did not appear.

The Court: Call your next, Mr. Dunn.

Mr. Dunn: We cannot take the court's time any longer, and we rest.

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The Court: I wish the prosecutor would give me the names of the witnesses subpoenaed who have not appeared.

(STATE RESTS)

MR. WARD OPENS FOR THE DEFENSE AS FOLLOWS:

If the Court please, and Gentlemen of the Jury,

Opening for Defense

in opening the case this morning the State through its assistant prosecutor said that they would expect from your hands a verdict of murder in the first degree. We shall break that barrier down and say that after you have heard the defense in this case we believe you can do nothing but acquit this defendant.

The circumstances that we will prove to you beyond all doubt, I think, will force you to the one conclusion and that is that Salvatore Agnesi, the defendant in this case and as mentioned in the indictment, is innocent. We will show that the defendant is a man of unimpeachable character, that he came to this country some twenty-seven years ago. In regard to these dates I may not be exactly accurate, but he will give you the exact dates and time. That he had never been in the slightest trouble or difficulty since he came here and that about twenty-one years ago he married his present wife, referred to on the stand as Nicolina Agnesi, and that as a result of that union, I think, six children were born, of whom one survives, the other five having died, and that one child has grown almost to manhood; and we will show you that this young man, I think he is eighteen years of age at the present time, volunteered and is stationed in the South with the Fifth Regiment, or what remains of the Fifth Regiment, he volunteering, not having been drafted, and is a soldier in the United States Army.

We will show you that during all of the years of his married life the only trouble or difficulty in which Agnesi ever got into or was implicated in was through this man who was afterwards killed. We will show you, gentlemen of the jury, that this man who was killed was a man of a desperate character; we will show that some fifteen years

Opening for Defense

ago he was implicated in a shooting affair on Cross Street here in the City of Paterson; I believe it was about fifteen years ago, and at that time he shot a man who is at present confined to the county jail and who we will produce before you as a witness. We will show you that shortly after this he left for Italy and while in Italy he almost killed his wife with an axe and as a result of that he served some little time in jail. We will
10 show you that shortly after that he was implicated with a shooting affair with his brother in the lower section of the City of Paterson.

We will show you that some fourteen or fifteen years ago he almost killed a man by the name of, —either the brother or the brother-in-law of this man, who has come on from Philadelphia to testify to that fact.

We will show you that he eloped at that time with this man's wife, run away, with her, and we
20 will show you that his whole career since he came to America has been one of crime and desperate action. That is the kind of a man that the deceased was. When he first came to America or shortly after he came to America, and before his general character was known by the defendant, Salvatore Agnesi, he became godfather to one of the children born to Mrs. Agnesi and a sort of a friendship sprung up between the man Galizio and Agnesi because of that fact; but when the desperate character of this man's conduct finally began to evidence itself, that friendship ceased
30 more or less, and for a number of years they perhaps saw each other only occasionally, perhaps just to say how do you do as they passed on the street. And then we will prove to you that about a year ago this man Galizio started to visit the home of the defendant and that that continued for some few months before the defendant became

Opening for Defense

suspicious of these things; that on one occasion the defendant Agnesi returned home and found that his wife was in some sort of a temper apparently before he had returned home from work unexpectedly; and that then for the first time it was called to his attention that this man Galizio had been making a habit of coming to his home during noon hour and seeing his wife. It is at this point, gentlemen of the jury, that we will show you that this trouble started, because shortly thereafter, after having called his wife's attention to this fact and objecting to this man coming to his home to see his wife, shortly after that the defendant Agnesi met upon the street the man who afterwards was shot, Galizio, and he took him aside and he told him that it had come to his attention that he was visiting his home in the absence of the defendant Agnesi and that Agnesi said to Galizio, "I want you to stop, I don't want you to come there when I am away," and I think it was on that occasion that the dead man Galizio took offense in a saloon and there said to him, "You are crazy about this thing and I want you to understand that I will go to your house when I want to. You can't keep me away from there, and if you try it will be serious to you," or "something serious to you," something like that, I don't remember just the exact words. Perhaps one or two weeks passed, and Galizio came to his home. I think it was on a Saturday night, and he saw Galizio leaving his home; I think that this was on a Saturday night, and he saw Galizio leaving his home, and he followed him and told him again that he must not come to his home during his absence or otherwise, that he would not have him there, and then Galizio told him that "Your wife has been with me more than she has with you, you cocoon," and as a result this

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Opening for Defense

man lost his temper, and it would have been a fight if it had not been that somebody came to their rescue and separated them.

10 Then he went home and upbraided his wife for what had been said to him, and he asked her to move from where she was living and go to some other place to live. She protested and said, "Let this man Galizio alone, as he is a bad man. Let it die down, because if you have any trouble he will
kill you. He said he would kill you," but for several months thereafter he was reconciled to his wife and they were living on Ellison Street, not the same place where the crime occurred, but up near Main Street.

20 Constantly he was hearing about Galizio, that he had been up to his home constantly, and he heard about the threats that had been made, and he heard about when Galizio would come home. He again protested to his wife, and she went away, and she remained away for a couple of days and did not come home, and then he met her on the street one day and asked her if there had been anything done with Galizio, and she gave him no satisfaction. She went back up to his brother's house and tried to find him and three or four days after he was eating his supper, and Officer Perolo came in to him and said a warrant had been sworn out for him on a non-support charge and he explained to Perolo—told him of having had trouble
30 with him and he asked him if he wanted him to go to the police station that night, and he told him to come to the police court the next morning.

Perola left. And Agnesi went downstairs and there found his wife either on the street or at some neighbor's house, I don't recall which. He persuaded her to come up to their apartment and there they had a serious talk and Agnesi made this proposition to her, that he would go to Phila-

Opening for Defense

delphia, that he thought perhaps he could make more money there and that the next morning she should appear in court and withdraw her complaint and then pack up the furniture, what furniture they had, and come to Philadelphia where he was.

She agreed to that. She said that she would do that, and that, gentlemen of the jury, as we shall show you, was done by Mr. Agnesi with the idea of getting his wife away from the baleful influence of this man Galizio. 10

The son, meanwhile, had been called to the colors. He was a member of the Fifth Regiment before that time, this all happened in the spring, and was in some encampment, and from time to time was visiting home.

Agnesi left and went to Philadelphia and as perhaps somewhat reflecting upon the character of this man, the next day he got a job. It was no difficult matter for him to procure employment. 20 He started to work, and the week passed, and he heard nothing from his wife. Then he wrote to his son and he asked him why his mother had not come on, and then he received a reply from his son that Galizio, the man who is now dead, was occupying the home on Ellison Street that Agnesi had left to go to Philadelphia and that Mrs. Agnesi, this man's wife, was keeping him there, and boarding him there, and that she would not go to Philadelphia. 30

He then wrote a second letter, or caused a second letter to be written to his son, I don't think that he reads or writes, in which he wants the son to fully explain the situation to him. And in reply to that letter, the second letter, we will show you that he received a communication from his son in which the son told him,—this was what was contained in the letter,—that the son some short

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time before that had gone to their home, the old home, and had found Galizio, the man who was shot, sitting at the table with Mrs. Agnesi, this man's wife, drinking wine, eating spaghetti and other things, whatever it may have been, and that the son had upbraided his mother and that the son had gone down and obtained Officer Kerr, who was here on the stand, and asked Officer Kerr to come back with to that home, and had attempted to get this Galizio arrested, and Galizio had replied that he was boarding there, and the officer said that he could not arrest him under those circumstances. This was all contained in the letter written by the son to the father. And the son went on further to explain that as soon as the officer had left that this man Galizio had followed the son, who was then in the uniform of the United States Army and had called him and had threatened to kill the boy or kill the father if they ever attempted to interfere with the affairs of himself, Galizio and Mrs. Agnesi, again. That was written by this boy to the father. We will show further than that, that although that is all the letter contained, or about what it contained, that this man Galizio on this occasion told the boy, "What do I care for you or your uniform? I will tear it from your back, and I will fill your back and uniform full of holes if you come spying around here on your mother and me. You stay away from here. I don't care for you or I don't care for your officers. I don't care for the whole blankety blank United States Army. I will kill them if they interfere with me." That he went on about the army and about this boy and told this boy to report to his father that he had better keep away from that spot.

The boy went to his uncle that night, his mother's brother, and I think that we will be able

Opening for Defense

to produce the uncle here, who will corroborate the boy in this statement. I think that Galizio even made threats to the uncle that night.

Shortly after that this Galizio and Mrs. Agnesi moved from there up Ellison Street, towards Main, down to No. 13, and took this apartment that you have heard described here and then the boy wrote another letter to his father and told him to come on, that the home had gone and that they had moved, his mother and the man Galizio had moved further down Ellison Street quite some distance.

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Right after the next pay day Agnesi came back to Paterson and he went directly to the home. He was a peaceful man. He had stood all these things, much more, as we shall show you, than the average man had stood. He went to the home of his wife's brother, Mr. Mathieu, and made inquiry in a general way and found out the general situation. He came down from that home and went to a cafe on the corner of their street and saw Galizio, and, without any words taking place between them, Galizio immediately left, and we will ask you to infer, returned to Mrs. Agnesi, and Mrs. Agnesi must have reported to the police. She had never withdrawn this charge of non-support, and while Agnesi was in the saloon there an officer came down, I think it was Mr. DeLuccia, and one other officer, and arrested Agnesi on this old warrant for non-support. Agnesi went up to the police station and gave a cash bond of \$20. You can see, of course, that the charge was a minor one and quite insignificant. And then either on that occasion or afterwards he made a further complaint, or his son made a complaint, against the man Galizio for what Galizio had done, and we will produce the records of the Recorder's court to show you just what transpired at that

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Opening for Defense

time. But, as I understand it, when this matter came before the Recorder, Agnesi was exonerated, Agnesi was permitted to go, that is the defendant; but Galizio was fined because of his conduct. What the fine was I don't know, the records will show. But we will prove to you that at that time Recorder Young found that this man Agnesi still wanted to live with his wife, still wanted to remove his wife from the baleful influence of this man, still wanted to take her into the protection of his home, and that Recorder Young told this Galizio that he should stay away from this woman, warned Galizio to stay away, and that he told Agnesi, I cannot make your wife live with you if she won't," which of course is true.

10 We will show you that after that Agnesi wished his wife to live with him, but that she wanted articles of separation. We will produce two reputable lawyers on the stand to show you that even
20 while these articles of separation were being prepared it was Agnesi's wish, it was Agnesi's offer, that his wife return to him, that she go to Philadelphia with him so as to get away from this man, so that he could get away from this man, but she refused to do that.

He was going to return to Philadelphia and his son asked him not to. His son told him that perhaps he would go away shortly and he wanted his father home in Paterson. He was an American-
30 ized Italian boy. I guess he is American boy, born here in this country. And this boy asked his father to stay, and his father went to his sister for accommodations there, such as they were. His sister said he could sleep there.

And then the time of torment began, because from time to time he heard the threats this Galizio had indulged in. His friends came to him and told him to look out for this man. "Don't go near to

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him. Be careful of him. He kills. He shot others. He states that he is not afraid of anybody." And there is one significant fact that slipped my mind, gentlemen, that I want to call to your attention. I think we will be able to prove to you that some time during this time that Galizio showed a knife that he kept in this apartment and said that he was keeping it there for Agnesi, this man.

Now I hope you will be able to fully understand him. I might say that he speaks very broken English and is very hard to understand, and I want you gentlemen to bear with me because I want him to tell his story in English if he can, the best he can. 10

He says that he could not eat, that he could not sleep. He had some little property that he and his wife had bought and he used to go to those lots and do farming up there,—I believe he would go there Saturdays and Sundays,—and on one occasion the son, while there, reported to him that Galizio had said, "If I get your father up in those lots I'll fix him so that he will never come back." These threats were constantly coming from this man Galizio. 20

We will show you that the Saturday before the shooting took place, this man went down to Riverside somewhere to visit friends and that while there two different men came to him and told him of additional threats that had been made against him by this man Galizio, and that these two friends told him that Galizio again said, "I want the chance of getting this man Agnesi alone and I'll fix him so that he will never bother me again or have me arrested again," and with that in mind, when the defendant heard that, he went out and purchased the revolver that has been shown here, a second-hand revolver. I think he paid \$2.50 for it, and he says that thereafter he car- 30

Opening for Defense

ried that revolver for his own protection in his pocket.

On Monday he could not eat or sleep. Rather, after buying this revolver, the following Sunday, which was the next day, he went up to Little Falls where his son was on duty at camp, and when he greeted his son, or during the course of the conversation, he wept, and his son told him, "Father," or papa, whatever he called him, 10 "don't cry, perhaps mama loves you yet. I know that this man has said he would get me and get you and get her; I know he said he will kill you and maybe that is the reason she is not leaving this man. Maybe she is afraid to, and if I were you I would go to mother and talk to her and perhaps she will come back and live with you." On Monday that thought was always present in his mind. On Tuesday it was present in his mind. He will tell you about the difficulty he had in eating 20 and sleeping. Tuesday night he says he went to a moving picture show and that all the time he could not see the picture—he could see his wife and he could see his home broken and see what little he had gathered together gone. He went back home Tuesday night and went to bed, and as he says, "No sleep." He went to the room with his pipe and smoked and thought and thought. He came back and he went to bed again. Again, "No sleep." He did that perhaps two or three times, 30 and the last time when he came down to his bed he lay there, and as he has said, "One part of my head said 'got to her, go now,' and the other part said, 'I must wait.' " But finally he decided he would get up and go to his wife. He decided he would go at that very minute, and he got up as late as it was, dressed himself and he took with him the knife that you have seen here. I don't think there will be any point made on the part of

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the State that that knife was taken with any intention to do any harm. The knife itself is rather pointed, but I don't see how the State can make any point of it. Sometimes before that he had been over here (indicating) and the windows looked over into this yard, and he was informed that is where your wife is.

He hoped to tell you that his wife was not living in adultery with this man. He didn't want that and that is not what he wished for, but he went there with the idea of getting in, and he says that he believed if he knocked at the door this man might shoot him from the inside. He says, on the other hand, he believed that his wife might not let him in and drive him away, and that if he could only get to her and talk to her he, perhaps, could make her see the wrong; and so he came to this alleyway and climbed into this yard and there he stood upon some bags of cement,—that is why I brought out about the cement,—I think he tried the window first, or one window, and he couldn't raise it. He will tell you just which one it was. Then he went to another and he raised it and he got in, all the time afraid, he says. His revolver he had been carrying with him constantly. There is no question about his taking it that night. He had it four or five days, carrying it so as to protect himself. He says he took that revolver down there with the idea in mind that he would defend himself if his life was in danger, as he had a perfect right to do under the law, and as he got in this room he struck one match and he looked over here. He says it was a bedroom, and no one was in it.

That he came to this other door and whether he struck a match there or not, I don't know, but he ascertained there was no one in that room. And then this door was partially closed and then he

Opening for Defense

went in there. He had meanwhile removed his shoes, and he broke in there and he saw the bed and he saw the figure on the bed. And he says he then reached down and struck a match and held **it up, and he saw there this man who had threatened his life lying beside his wife, the mother of his child.**

10 And as he stood there in that attitude this Galizio raised up; he was laying there on his back or side, I don't know which, and he raised up. And for an instant, perhaps, they faced each other, and then this Galizio reached down and grabbed something, and as he swung it up this way he saw it was an axe, and then his fear became the greatest factor in his mind.

20 He threw the match away, and without any other thought but that this man would kill him as he had threatened, he quickly drew his revolver and indiscriminately and without any aim he shot, and he shot he doesn't know how many times. He left; he did go away; we will try to prove to you that he was afraid, not only afraid of this man Galizio, but this man's brother who since this trial has been set, has threatened one of the witnesses who was to appear for the defendant, and threatened to kill the witness in behalf of Agnesi. That he was afraid of this brother of Galizio.

30 We will show you that he was afraid of Galizio's brother because of the threats he had made. That he was afraid of the man, he did not know whether he had killed him or not. That he was afraid of him and afraid of his family.

He did go to the home, he did get his money, he did get on the car, he did go to Hoboken. There is not going to be any denial of this. He did deny his name; not his name, but he told the officer that he got on at Passaic, and with a desire of concealing it.

Opening for Defense

He will tell you that he did not complain to the authorities because when he complained before Galizio was fined and committed to jail. That is the reason he did not make another complaint.

He was arrested; he was brought back. We will show you, gentlemen of the jury, that from the time of his arrest to this trial he has told the same story, viz., that he got in there and that he saw his wife laying beside this man who had threatened his life, and in the same bed with his wife. There is no frame-up about this, gentlemen, no time for him to consult with his counsel; and we will show you another significant fact, and that is that the couple that lived right underneath this apartment, I think there is an apartment there, immediately after, he had not heard the shooting, but immediately after he heard this woman cry and he came upstairs and somewhere in this room he saw an axe, and that Mrs. Agnesi, this man's wife, took the axe, and took it down in the cellar. 10 20

Now, gentlemen, those are the facts we expect to prove in this case, and I think his Honor will charge you that if this man caught his wife in the act of adultery no matter what the other circumstances in the case are, it will reduce this crime to manslaughter pure and simple, and that would be our case, but we shall throw the gauntlet down, not on the theory that this man found Galizio and his wife laying in bed, but on the principle that the defendant was acting under threats that had been made and that he thought his life was in danger, and we shall ask and expect an acquittal at your hands. 30

Salvatore Agnesi—Direct

SALVATORE AGNESI, a witness produced on behalf of the defendant, sworn in his own behalf, testified as follows:

Direct examination by Mr. Ward:

Q. Salvatore, do you speak English? A. Little bit.

10 Q. Talk the best you can. If the Court please, can't we have the interpreter sworn so he will be here in case he doesn't understand?

The Court: I think that would be a very good idea.

(Frank Romano sworn as interpreter.)

Q. How old are you? A. 42.

Q. And where were you born? A. In Italy.

20 Q. How long have you lived in America, in the United States? A. 26 years.

Q. 26 years? A. Yes.

Q. What is your wife's name? A. Nicholina Angela.

Q. How many children have you had? A. Had six.

Q. How many have you got now? A. One.

Q. One boy, is that the one?—stand up. A. Yes.

Q. How old is he? A. 18.

30 Q. And the rest of your children are dead? A. Yes, sir.

Q. Have you ever been in any trouble before this, have you ever been arrested before this? A. No; I have a couple of times for drink, that's all. And only arrested twice for drinking a little bit.

Q. Ever any time in Italy? A. No, never.

Q. How long did you know Galizio? A. Fifteen years.

Salvatore Agnesi—Direct

Q. How long have you lived in the United States? A. 26.

Q. As long as you have been in America? A. Yes, sir.

Q. Was he ever a godfather for your children? A. Yes.

Q. Will you tell us what character of man he was?

Mr. Dunn: I object to the question. 10

The Court: You may be more discreet, you will have to show that it was in self-defense.

Mr. Ward: We can lay the foundation first.

The Court: Yes, sir. You may do that.

Q. When did Galizio first start to come to your house? A. Four months before we christened the baby. 20

Q. Now, after that, do you know whether he went back to Italy? A. After christening the baby.

Q. When did he start to come to your house or come often? A. When he stood up as godfather for christening the baby.

Q. How long ago, a month or a year, did he start to come to your house to see you? A. About two months after. 30

Q. Do you remember any time when you came home that your son told you something about Galizio? A. Yes, sir.

Q. How long ago was that? A. About nine months.

Q. About nine months ago? A. About nine months ago.

Salvatore Agnesi—Direct

Q. Where were you working at that time? A. Weidmann's.

Q. Why did you come home that time? A. No had work that time.

10 Q. What time did you go home? A. I come home about, it was about 11 o'clock and she was washing dishes, and about 11 o'clock my boy came in the house and my wife says what is the matter not working and he says maybe to-morrow I will get a job and she was going downstairs to get a little coal and my son told me that at 12 o'clock Galizio hadn't come home.

20 Q. In your house? A. Yes, in my house. He right away gave me some words in my head and my wife came in my house and I didn't say anything and I went back to work again and on Saturday I came home from work and then I took a walk around two blocks and I came back in the house and I saw Gaetano Galizio there and he said to me, "Hello, godfather," and I said, "Hello, godfather," then sent my wife for some beer and he drank two glasses of beer and I drank two glasses of beer and I said, "Godfather, don't go up to my house any more because the people will think you are going after my wife."

30 By Mr. Dunn: I think we ought to have the time as to when this conversation took place so that we may see how remote it is.

Mr. Ward: I think he said it was about nine o'clock, that this boy told him and that it was the following Saturday when this occurred.

Mr. Dunn: I object to that as immaterial and irrelevant. It has nothing to do with the case.

Salvatore Agnesi—Direct

The Court: Why do you go back so far, Mr. Ward?

Mr. Ward: Because we want to show that this trouble continued almost from that time on.

The Court: I can't see how I can allow the question; when do you say this was, nine months before this incident took place? 10

Mr. Ward: Yes, sir.

Mr. Dunn: I can't see how this is relevant, any conversation that might have been had nine months before; how can that be material or have any bearing on the situation that they admit existed on the morning of July 11th when, asleep in bed, he breaks into the house, through the window and this shooting occurs with this man in bed. 20

The Court: I take it they are trying to put a different phase on that situation. They are trying to show that the man in bed actually got up and attempted to assault this man.

Mr. Dunn: He goes over to this house, where his wife was living, separate and apart from him and gets into this window. 30

The Court: Is this his home?

Mr. Dunn: No, it wasn't.

The Court: Whose house was it?

Salvatore Agnesi—Direct

Mr. Dunn: It was her home, rented by her, this house, these people were living as counsel has said, under a separation, articles of separation if you please, formally signed after the trial in the Recorder's Court, he living with his sister and she living off by herself.

10

The Court: And your theory was that he was entering this house without any right or invitation?

Mr. Dunn: Yes, sir.

Mr. Ward: If he entered that house as he says for a peaceful purpose, which he undoubtedly was justified in doing,—

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The Court: What kind of a night was this? What time?

Mr. Ward: It was about one-thirty, I believe.

Mr. Dunn: It was 3:05 when the alarm came into the station.

30

The Court: If a burglar should enter your home at three o'clock in the morning through a window and you wanted to defend your home by taking some implement or a revolver for the purpose, do you think the burglar had the right to shoot you?

Mr. Ward: I don't think that is applicable in this case.

The Court: This man was living separate and apart from his wife, that is admitted;

Salvatore Agnesi—Direct

his wife had rented this home and the home was hers. What gave him the right to go there through the window to that home which was hers, at that hour of the morning?

Mr. Ward: A husband cannot be a trespasser upon the property of his wife even though not living together.

The Court: Then a husband may violate the law by breaking and entering the wife's separate domicile? 10

Mr. Ward: Yes.

The Court: Where is your authority for that? I would be glad if counsel would point out to me where a husband has that right under those circumstances. 20

Mr. Ward: If your Honor please, I think if this discussion is going to continue the jury should be withdrawn. I think this discussion prejudicial to the interests of the defendant.

The Court: The jury may be withdrawn.

(The jury was then withdrawn.)

The Court: Now, Mr. Ward, as I understand it, your defense is twofold; first, you propose to set up self-defense to justify this act, and, in the second place you propose to show that at the time this husband entered this house he found these two people in the act of adultery, or asleep in bed, and that under the circumstances he was justified if his passions were sufficiently aroused by that act, 30

Salvatore Agnesi—Direct

at least if he did shoot, his act was no greater than manslaughter.

Mr. Ward: Yes, sir. That is, if the jury should find that there was no self-defense there.

10 The Court: You promise all that with this situation, as I understand your address to the jury and your statement now, you say that this man and wife were living apart under articles of separation, that those articles of separation gave the wife the right to conduct her own business.

Mr. Ward: That we don't know; we don't know what the articles of separation were.

20 The Court: Ordinarily they do, don't they?

Mr. Ward: Yes. But I don't think that we have even the right to assume that in this case.

The Court: If they were living in a state of separation under articles executed by both of them——

30 Mr. Dunn: The articles are here if they wish to look at them and allow your Honor to be fully informed.

The Court: But the situation would resolve itself into the situation that she was mistress of this house and she had a boarder.

Mr. Ward: We do not say that she had a boarder, no.

Salvatore Agnesi—Direct

The Court: Well, say that she had this man, we will put it that way. Conceding that this tenant who was living in his wife's apartment, and who was living there, was conducting an illicit relation with his wife, and that at 3 o'clock in the morning this man goes in the window with a pistol in his pocket and if he found them together he could do whatever he thought proper under the circumstances; is that your theory? 10

Mr. Ward: No, that is not our contention at all.

The Court: What is your theory then?

Mr. Ward: Our theory is this; that this act acted practically on this man's mind that night until he felt that he could not longer put off an interview with his wife no matter what was the time, and he made up his mind that he would see his wife immediately. That he did not anticipate that he was going to find this woman in an adulterous position with this man. That he did not know. That his prime object in going there was to beg of his wife—that it was incidental to that that he took with him the revolver which he had been carrying with him for days for the purpose of protection. That is our contention. That when he got there he did find that his wife was in this adulterous conduct, that perhaps, or we cannot tell what might have happened if the paramour had not attacked or attempted to attack the defendant. We don't know. I don't think he knew. But before the horror of the situation illuminated his intelligence, or whatever term you might use, he 20 30

Salvatore Agnesi—Direct

saw himself in a position of great bodily danger, and that he shot in self-defense.

The Court: Do you think anybody who is legitimately in a house at 3 o'clock in the morning, and is in that house asleep and sees a man coming through the window at that hour in the morning has a right to assume that that party is not there on legitimate business, and to defend himself accordingly.

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Mr. Ward: Not in view of that written statement. But this man admittedly, or it seems to me it is perfectly fair to assume from the written statement that has been introduced here that this man Galizio saw Agnesi's countenance at that time. He says so by the statement. And that must have been by the illumination of the match, and of course I shall argue to the jury that it must have been before any shooting.

20

The Court: The question is what? My difficulty is this, I cannot see how the defendant can be put in the status of a man defending himself on the theory of self-defense when at 3 o'clock in the morning he opens the window in another man's house and enters it.

Mr. McGinnis: Not another man's house.

30

The Court: Well, his wife's house.

Mr. Ward: With all due respect to your Honor, that is entirely a question for the jury. The jury may differ with your Honor on that.

The Court: I shall have to charge the jury on the subject. What am I going to say to them on that subject?

Salvatore Agnesi—Direct

Mr. McGinnis: If I may interrupt, your Honor would not be justified, it seems to me, in saying to this jury that this man committed a crime in breaking in his wife's apartment.

The Court: I certainly will tell the jury that he had no right in this house. I might as well say it now as say it later to the jury. What is the question?

10

Mr. McGinnis: He had a right to go wherever his wife is if he wants to.

The Court: Under those circumstances I don't think he had, at that hour in the morning. What is the question?

Mr. Ward : It is a question in view of the fact that these rumors had come to him.

20

The Court: I may as well treat with this matter now as later, because I will have to deal with it in charging the jury if I do not deal with it now. I will rule out and exclude all testimony offered by the defendant showing threats by the deceased against this defendant and also testimony going to show the violent disposition of the deceased as the aggressor, and I base that conclusion entirely upon the theory that the act of so-called self-defense as I understand it from the offer of counsel was committed while the defendant was attempting to enter through the window of the premises of another where this homicide was committed at three o'clock in the morning, or while he was inside of the premises and on the floor at that time. Under those circumstances it is impossible for the

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Salvatore Agnesi—Direct

Court to conceive that the doctrine of self-defense applies to such a situation in which defendant clearly was the aggressor. That makes clear the position of the Court, and to that ruling the defendant may take an exception.

JAMES F. MINTURN, (L.S.)

J. S. C.

10

Mr. Ward: Yes, sir.

The Court: Then you may proceed with the rest of the case.

Mr. Ward: Your Honor will not then permit us to call these witnesses?

The Court: No, not on that question.

20

Mr. Ward: Then for the purpose of getting it on the record we might have to call the witnesses.

The Court: I don't think it is necessary unless you want to unnecessarily take up the time of the Court and waste your own time.

30

Mr. Ward: No, sir, we do not wish to do that at all. We simply wish to preserve the rights of the defendant.

The Court: I am placing the conclusion of the Court as plainly and frankly on the record as I can do it; if there is anything I have omitted in that statement that will make your position more clear to the upper Court, I will be glad to amend it. I want to give you the benefit of my views at this time so as to save

Salvatore Agnesi—Direct

your time and save your trouble and to save the time of the Court and jury, and at the same time give you the benefit of an exception upon which you can carry the whole question to the upper Court on appeal.

Mr. Ward: I might make this statement, in view of my opening; the theory upon which I urge the acceptance of this testimony is that at the time the deceased came to his death he was in the act of using an axe against the person of the defendant, and that certain statements had been made by the deceased before that time and certain threats with reference to taking the life of the defendant. 10

The Court: That would make no difference in my conclusion whether he used a knife or a revolver, or any other means of defending himself, at that time and place. 20

(Defendant excepts.)

Mr. McGinnis: Your Honor is familiar with the procedure, I presume, that permits us to appear properly before the Appellate Court without the necessity of calling witnesses? 30

The Court: Yes, that is what I want. I want to get the position of the Court frankly upon the record, so that no one can misunderstand it in the upper Court.

That confines the defense, as I understand it, to the one question, the situation when this man entered the window on that morning.

Salvatore Agnesi—Direct

Mr. McGinnis: You mean the adulterous situation?

The Court: Yes.

Mr. Ward: Does your Honor mean that you will eliminate entirely from the case the question of self-defense?

10 The Court: Yes. I don't think there is any self-defense in the case, upon your statement of the facts of the situation.

Mr. Ward: Now, with reference to this axe, the existence of this axe, the axe that was seen there, does your Honor exclude that as well? The axe that was seen on the premises after the shooting there?

20 The Court: The axe that was found on the premises?

Mr. Ward: Yes, sir.

30 The Court: It does not concern me any what this deceased used for the purpose of protecting himself. Whether he used an axe or a revolver, is immaterial to the judgment I have formed in this matter. As a matter of law, in my judgment, he was entitled to use anything he could find on the premises to protect himself against an invader of the premises.

Mr. McGinnis: That is the judgment of your Honor. But I don't know but that the jury should have the right to determine it. Does your Honor say that the jury shall not determine that?

Salvatore Agnesi—Direct

The Court: Yes, I say there is nothing for the jury to pass upon in that question, the question of self-defense does not enter into the case at all under the facts that you have presented as a defense. That simply leaves the defense to prove the exact situation of these parties at the time the defendant entered the window.

Mr. Ward: As to the adulterous conduct as well? 10

The Court: Yes.

Mr. McGinnis: Does that give us also the right to prove previous adulterous acts or facts from which the inference of adultery might be drawn? I would say that we have evidence showing that these people were living together against the repeated protests of the defendant and others, and of course we feel that we should have an opportunity to show them on the question of whether or not at the time that this defendant broke into this house or went into this house where his wife was that he could have reasonable grounds to believe that adultery was being committed. 20

Mr. Dunn: He would not even then have the right to do the shooting. 30

Mr. McGinnis: But it would reduce it to manslaughter under the law?

Mr. Dunn: No, it would not.

Mr. McGinnis: Absolutely. That is the law.

Salvatore Agnesi—Direct

The Court: I will allow the defendant to show any adulterous act on the part of this deceased with the defendant's wife and the disposition of the deceased in that respect. That, I assume, is the line of defense.

Mr. McGinnis: And, will your Honor grant us an exception to your various rulings in regard to the question of self-defense?

10

The Court: Yes.

JAMES F. MINTURN, (L.S.)
J. S. C.

(The jury is then brought back to the court room and the trial is resumed as follows:)

20 *Direct examination (continued) by Mr. Ward:*

(Through interpreter.)

Q. At the time you were just telling us about did Galizio say anything about your wife? A. When I found him in the house he says to me why do you come here, what do you come here for, and I says I come here to tell something to my wife.

30 Q. After you went downstairs did he say anything downstairs about your wife? A. I told Galizio don't come to my house because the people say that you have my wife.

Q. What did he say, if anything? A. He says I don't care.

Q. Now when did you next—— A. This was on Saturday and the next Saturday I went out where I had two lots and then when I came back I found Mr. Galizio in my house.

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Q. Go on. A. I got mad toward him and told him, "Don't come to my house because I don't want you here." He went downstairs. I went downstairs also. Galizio, he called me, this way, "Come here." And I walked on to the corner of Van Houten Street and Cross there and there is a saloon and he took hold of me this way by the saloon; he says to me, "I have your wife whenever I want her and if you don't keep still I kill you because she is no wife of your's. I have her whenever I want to," and then after that he grabbed me and pulled me in the saloon. If it was for the barkeeper, Marie Gregor and her husband, he would have killed me, but I ran away to my house because I was afraid of him. 10

Q. Is Mr. Gregor in court? Stand up, Mr. Gregor. Is this the man? A. Yes.

Q. Go on now. A. As I began to ride home I got frightened and I started to cry. This happened on Saturday and on Sunday I went up to the lot again and then when I came back I found Galizio at my house again. I ran up and he ran down. I went in my house and I found my wife all frightened and I asked her if Galizio had been by her and she said, No, another boy had been by her to see my boy and he wasn't there, and then I called Galizio and I told him not to go up to my house again, that I didn't want him there, and he said, "If you don't shut up I will cut your throat." Later on I go another time and I saw Galizio again and he told me another time, "Any time I want your wife I will take her where I want her," and I have lots of witnesses here to prove it, and I was afraid of him as he was so much bigger than me, and a lot of people around was afraid and I said to my wife, "Don't you see, he wants to kill me, let's move. I want to go away away from here." And I worked all week and the 20 30

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next week was pay day and I had twenty dollars and I said to my wife, "Let's move away from here because I don't want any trouble here because Galizio is now back in the yard and there are a lot of saloons around here and I was afraid to go in. And my wife said she was afraid to move and I said give me my \$20 back and I will look for rooms. This was on Saturday, but I couldn't find any rooms; this was on Saturday
10 and my wife hadn't come home yet and in the morning she came back and I asked her where she had been and my wife ran away and she was afraid of me, and she didn't come back again. And I put the key under the stairs and went up to the lots again because I didn't want to get drunk so I went back in the country. I came back and looked for my wife, but couldn't find her and I had nothing to eat yet and I went to Tom's place on the corner and I ate there for twenty-five cents,
20 meat. Then I went up in the place again and my wife wasn't there and she didn't come home all night, and as I did the night before, I locked the door and I put the key there again and my wife and my son knew where the key was and I went to work on Monday. When I came home on Monday I didn't find her home or nothing cooked and I went to work on Tuesday and when I came home at night and it was the same thing. The next
30 night I was afraid of myself and I went in the house and I was sitting there and I heard a knock on the door and I said, "Come in," and it was Charlie Parola, the detective. It was Charlie Parola, the detective. I asked him I say, "Hello, Charlie," and then this detective he told me that my wife had had me arrested, and I said to him, "Why did she have me arrested?" and the detective say to me, "Your wife says you put her out and you did not give her no money," and I told

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him Pasquale, that it was not true. Then I told him, this detective, to go downstairs because my wife is downstairs and to tell her that I have my pay yet in my pocket and that I have it here to give to her. Then my wife told the detective not to arrest me to-night, but to let me go for to-night. She says to-morrow morning if they will come and get him. I then called my wife and I said to Nikolina, "I am going now to Philadelphia so we can take away this trouble," that I am going to Philadelphia to my brother's to get a job. Then I said, "As soon as I get a job I will write a letter so you can come to me." My wife did not say yes or no, but she said more yes. Then I told my wife, "Now, Nikolina, you go to the police station and go and withdraw this charge against me because we are husband and wife and we like one another; we will go to Philadelphia and we will work and eat and stay together, and we have property with us also." So then I wrapped up some of my clothing and I went away that morning. The following morning I arrived in Philadelphia and I went to look for work and right away I got work in a dye house at \$15 a week. I worked there a week and right away I wrote to my wife here in Paterson and to my son.

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Q. Who wrote that letter? A. My son wrote me a letter.

Q. When you were in Philadelphia you said you wrote your son a letter. Who wrote that letter?

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A. A cousin of mine wrote this letter for me. I say in the letter to my wife, "Dear wife and dear son." This letter was written in English.

Mr. Force: I don't think the witness should tell what the contents of the letter were unless he produces it.

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The Court: What did you tell him, that you you would be home soon, or something of that kind?

10 A. Yes, your Honor, I wanted them both in Philadelphia. I wanted my wife in Philadelphia because I had a job there for \$15 and a half a week. I was awaiting the answer to this letter. Then my son answered the letter and wrote to me saying that my son had gone to visit his mother and found Galizio eating on one table with my wife and wine, meat and macaroni. I received this letter and somebody read it to me. As soon as they read that letter for me I fell down and the letter fell down, too. Then I wrote another letter to Paterson and say that I wanted to know everything. Then my son wrote to me saying that Galizio was too busy, every evening he was to my house. Then my son said to me in the letter if I come home Galizio will kill me. I then wrote another letter to my son saying, "Let me know who is this man, who is this person?"

20 Q. What do you mean by that? A. I wanted to know what was the trouble in my home, that is what I meant.

30 Q. Go ahead, what else? A. Then my son wrote me saying that this person was Gaetano Galizio, that he was always up to my house and if I came home he would kill me. Then I don't write no more, only two letters. Then my son again wrote to me a letter saying, "F'ather come home because Detective Pirola,—you come here and you will have Galizio arrested and he will get three years in jail." I did not answer that letter, but I waited for the Saturday and on that Saturday I got my pay and I came back to Paterson. When I arrived here in Paterson I went to Matthew Romeo's house in Brook Street.

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Q. Now, who was Matthew Romeo? A. My brother-in-law.

Q. Your wife's brother? A. Yes.

Q. Go on. A. Then soon as I arrive to my house Matthew Romeo started to cry and I asked him "Why do you cry?"—

Mr. Force: I don't see how this is relevant.

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Mr. Ward: For adulteress' conduct.

The Court: I will allow it.

A. —I say to him, "Why do you cry?" "Because I cry that Galizio stole your wife," and I started to cry, too, and I say to her "Sure?" and then she told me not to go to the house. "Don't go to the house, because if you go to the house he will kill you with an axe." I went out to look for my son on Ellison Street from Brook Street. I went on Ellison Street and when I got to Ellison Street I saw Galizio and Galizio he saw me and he run to my house, and he says, "Go on out," and he told my wife, "Go on out and have your husband arrested; he's here, your husband is here from Philadelphia; go on out and have him arrested." I was about twenty minutes in—about ten minutes in front of the saloon and then Detective DeLuccia came and another officer and they came and arrested me, and I asked them, "Why do you arrest me?" and they told me, "Your wife is having you arrested because a complaint was made here before." They brought me to the court and I saw there Gaetano Galizio and then I told him, "Are you such a good godfather that you betray me?" and him, he made a jump for me to grab me between the police officers. Then the

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policemen took me to the court. I had \$20, and I deposited \$20 and got out, \$20 cash bail. In the morning then we had the trial—no trial; the judge did not find me guilty that morning and they gave me the \$20 back and I went back again to Philadelphia. Then the trial was to come off on Monday in the police court and then I went outside and called my son in and we went in the police station and we made a charge against Gaetano Galizio because he was having my wife and that he was going to kill my son and that charge we made against Gaetano Galizio because he was going to take the uniform off of him and shoot my son. The charge that I made was going to have a trial the week from the day I made it, on Monday. I told the lawyer—I had a lawyer there in the police court—that I was going to work to make some money because I had no money; then the charge that my son made against Gaetano Galizio, he was right away arrested, then he was arrested and then he came out on bail. Then that trial was to come off on the same following Monday; then on Saturday I came back from Philadelphia and then on the following Monday when I came back on Saturday, the Monday was the trial, the charge that I had made against Gaetano Galizio myself. Then at the trial the judge asked me what was the matter, how it happened; then my wife told the judge that I beat her and not give her any money and that she wanted to stay alone. Then I told her what she wanted, what she feel like; then the judge say to me and to my wife, you stay away from your wife and Gaetano Galizio stay away from your wife, too. Because I was not right and I did not pay anything. Then Gaetano Galizio he pay about thirty or forty dollars for his arrest; five dollars fine and the rest he paid to the lawyer, and then after that he went again back to my wife.

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Then my wife's lawyer took us to their office; I said to my wife, "Let us go to Philadelphia. What do you want a separation for? We only have one son and we have a little property," and my wife said to me, "I want a separation." I always say I don't want it, I sooner have a divorce than a separation—separation I don't want. Then the lawyer gave me a separation and gave a separation to my wife, too.

Witness (continuing): I always said to my wife, "Let's go to Philadelphia, because this man will kill us and rob your money." This man went one way and my wife went the other—and my son. I wanted to go back to Philadelphia and I then said, "Don't go back to Philadelphia, you can find board around here and stay here." My wife said, "You have no home and I have no home," and I went to my sister and stayed there for two or three weeks. She hardly had a room for me and every night would pass my house, and I have a witness here for that, and I couldn't speak to her, and I never spoke to her because I was afraid of Gaetano Galizio. I went to work, but the people wouldn't speak to me because I was crying, and I was ashamed because he had two eyes and I didn't have any, and he said if he saw me speak to my wife he would kill me, and I cried day and night. This was on Saturday and I stayed there for two weeks. Two men told me on Salvatore, don't go up to the lots because Gaetano Galizio will kill you if he finds you up in the lots or any place he would find me. I was afraid of him because he was always saying he was going to kill me and my wife whenever he had any trouble on the street; he said he would kill us because he had lots of money. He also said there were four brothers and they weren't afraid of anybody. I was afraid to go up in the country because I was afraid.

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Q. When did you buy to revolver? A. On the same afternoon.

Q. Was it because of what this man said? A. Yes, sir. And I never had any trouble before at all.

10 Q. Was it the same Saturday that these men told you? A. Yes; I never carried no revolver, no razor or nothing. I never had no trouble, never. I carried it in my pocket for my protection because I am afraid. Then on the following day, on a Saturday, I went and saw my son at Little Falls. He was a guard, a soldier, up there, and I stopped with my son three or four hours, so I would not come down to Paterson because I was ashamed to show myself. When I went to my son I was crying, and my son, "Father, what are you crying for?"; then I told my son that Galizio is having your mother, and I am boarding, and I can't stay in that boarding house, I can't board, and all my friends they don't speak to me, because me face, I am ashamed. Then when I told this to my son he started to cry. Then my son says to me, "Father, you know what you can do?" Then he say to me, "Go to mother and speak to her, and see if she wants to come back to you again, because she write me a letter because she didn't want me to be a soldier," and my son say, "No, I want to be a soldier, I want to stay in it." I say to my son, "I am afraid to go to the house because he will kill me." My son said, "That will be all right. Go there when he is not home." Then I was with my son about four hours, and I bid him good-bye and came home. And I went to my home where I was boarding and my wife then passed me through Passaic Street. I saw her and she saw me. I would not speak to her and she couldn't speak to me. Then on the following Monday I went to work. Then on Monday night I again saw

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my wife. I used to see her almost every night, and then I thought that my wife wanted me, and I also wanted my wife back, because we were 22 years married and we have property together. I did not know myself what to do. Then on Tuesday I went to work again, always sick, I couldn't work. I couldn't rest and I could not eat because I was always thinking about my wife and my son, and that me and my son did not have no home. On Tuesday I went to work again. On Tuesday night I came home at 6 o'clock. I couldn't eat when I got in the house, and then I went to a moving picture show, and I came home at nine o'clock, and I sat on the stoop there smoking, and I had a watch and I looked at it, and it was six o'clock, and then after that I looked at the watch again, and I looked again. I laid down in the bed and could not get to sleep because I was always thinking of my wife and son. Then I got up again from the bed and I started to smoke a pipe on the porch. Then I looked at the watch and it was 11 o'clock. Then I went back to bed and I couldn't sleep. I looked at the watch again and it was 12 o'clock. Then I laid down and couldn't get to sleep because I was always thinking about my wife and my son and I could not get to sleep. Then right away I thought what my son had told me, to go to his mother, and to talk to her and say to her that she should come back to me. I was afraid to go there that night because it was 12 o'clock and because I was afraid of Galizio because he was always there in that house. Then I looked at the watch again and it was one o'clock in the morning. Then it came into my head again to go there, and I was afraid to go there; right away then it was one o'clock. I don't know. It must have been my Lord Jesus Christ of the Mother of the Lord that says to me, "Go there, go there," but I was afraid.

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It was raining very hard and again it was in my head, "Go, go." All at once, I don't know if it was the Devil or the Mother of God that said to me, "Go, go," and I took my coat and put it on and put on my shoes without lacing them, and I went. I had the revolver right here. I always carried a revolver because I was afraid of him, because he was going to kill me any place. As I got in the yard, because they lived in the rear, I took my shoes off. I then went into the yard in my stocking feet. Then I saw where the window was where they were living. Then I listened by the window to see if they were sleeping or not. And I took this putty knife and I went to the first window and tried to open it and that was locked. Then I went to the second window and went this way with the putty knife. That window opened. The window opened, not much but a little bit, a little bit at a time. Then I laid down this knife on the ground and I raised the window nice and easy a little bit at a time, and I had always had my ear to the window to listen because if they were awake why then they would have cut my head off, see, because I cannot go in through the door because the door was locked and I went through the window. I went nice and easy. Then I put my foot into the house first, and then a hand, and I went in. It was dark. There was no light there. I saw a bed there. There was nobody in that bed, in the first room.

Mr. Ward: Was that bed in the same room through which you had come in the window?

The Witness: Yes. Then nice and easy I found my way out into the kitchen because the kitchen is near to this room because I never was in that house, I never had been in there before,

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and I went nice and quietly looking for me way. Then I entered another room, I looked into the dark and I saw a bed. I did not see anything. I looked and I did not see nothing because it was dark in that room. Because I smoke and I carry matches in my pocket, I took out a match and lit a match. I lit a match and threw the light like this, and I held it up and then I see Gaetano Galizio and my wife in bed. Gaetano Galizio in bed, he got up right away and he made a motion down this way to take a axe. As he raised the axe of course I don't think, I don't think, I don't know what it is. I shoot, I don't know how many times, one, two, three, four, five times. The revolver was no good. And I ran out. I ran out the same window I came in. I then believed Gaetano Galizio was hollering, Gaetano Galizio was then hollering, "Run, Pellegrina, run, run." And I thought somebody was running after me and I got frightened. I ran out. Because I thought I had not wounded him because it was dark there. Then I ran out on Mill Street. When I got to Mill Street I wanted to go to my house again and I met a man there and then I went up Street. I was in my stocking feet and I had my shoes in my hand, it was raining hard. I had my stockings all wet and I took off my socks and threw them in the river.

Q. What time was that? A. About 3 o'clock.

Q. Where did you go then? A. I wanted to go to New York.

Q. Where did you go? A. I ran; I wanted to go home to my house.

Q. Where did you go? A. I went to Spruce Street and Grand Street and Main and to another street above, but I don't know the name of the street.

Q. Up towards Passaic? A. No, the street right

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over here, Grand Street, because I wanted to go on a car and it was three o'clock, and I walked along. I don't know what I was doing, I was wet and I was crazy.

Q. Did you take a car? A. Yes.

Q. Where? A. At Cook's shop, that is where I walked to.

Q. To look for the car? A. Yes, Lakeview.

10 Q. Where did you go to on the car? A. To Hoboken.

Q. When you got to Hoboken what happened to you? A. Two detectives came on the car and they asked me what was the name and I said "Salvatore Agnesi."

20 Q. And they said, "What have you here in your pocket"? A. Yes, and I had a revolver and I said, "I had to do it; I was forced to do it because I found my wife in bed with another man." They took me to the police station and I told them I didn't think I had killed this man, but I was afraid of his brothers and I was going to work in New York.

Q. When you got up, where did you have the revolver? A. In this pocket. (Indicating his right-hand coat pocket.)

Q. Why did you have the revolver? A. Because Galizio was going to kill me in the mountains or wherever he found me.

30 Q. How long was it that you carried it? A. Four days.

Q. When? A. Monday, Tuesday and Wednesday.

Q. Where did you carry it? A. In this pocket. (Indicating right-hand coat pocket.)

Q. Why did you carry it? A. Because I find this knife on the table of my sister and I took that with me; if the window should have been open—the window not locked—I would not have lifted it,

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but if I wouldn't have found it open, but if it was locked, I was going to open it.

Q. Why did you want to go down there? A. Because my son was going to speak to my wife and see if she would come back again.

Q. Why didn't you wait until the morning? A. Because I was afraid of Galizio.

Q. Why did you take this revolver with you? A. Because I was afraid. Because he was going to shoot me up in the lots and I had two witnesses and he was going to shoot me in the street and shoot me in the house at night time.

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Q. When you went out of your house that night, did you intend to kill or shoot Galizio? A. No, I was going there to speak to my wife because I was ashamed, there was people not speaking to me any more because Galizio he was staying with my wife and he was going to kill my wife, he was going to kill my son and he was going to kill me, and then I carried that in case he was to kill me to protect myself. He used to tell everybody he was afraid of nobody; he says, "My wife is done for, I can't go back to Italy any more and I am a soldier there, and I struck my wife with an axe.

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Q. When you got down to this house, 13 Ellison Street, where your wife was, did you know what room Galizio slept in? A. No, sir.

Q. How did you know they lived there in that place? A. Because I have a friend there, a godfather, not far away from there, and he told me to go up to this house and have a glass and have something to eat, and then I went because I have no family, I had nowheres to go, and then I went to this friend's of mine's house. He says to me, "Godfather," pointing his finger, "there is where they live," and as soon as he told me that I almost cried and I did not want to go there any more because it was not far away from my friend's

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house. I was thinking then that I would go to some other friend's house, and he was staying there with my wife.

Q. Now, when you got down there that night and went in this first room you say there was no one in that bed? A. Nobody in that bed.

Q. Did you know where Galizio was? A. No, sir, I did not know. I went in to see if there was
10 anybody there, but I didn't know who I find.

Q. When you went in this room where Galizio was, who did you see in the bed there? A. I saw my wife and Galizio. I lit a match.

Q. You say you lit a match. Show the jury how you lit the match. A. This is the bed, I was standing here, I took out a match and I struck the match and I held it in this left hand, and Galizio saw me. He got up and he took the axe and raised it and then I took the gun.

20 Q. When you held the match up did you see who was on the bed? A. I was so confused I don't recollect well. I saw it was my wife. I don't recollect——

Q. Wait a minute, and answer my question. Where was your wife? A. She was not in the first bed, she was in the next bed.

Q. Where was Galizio? A. He was in the other room.

Q. Were they in the same bed or not? A. Yes,
30 in the same bed.

Q. When you held that match up you say you saw Galizio grab something? A. Yes.

Q. What was it? A. An axe.

Q. Show the jury how he grabbed that, what he did. A. (Illustrating.) I light a match. That is bed. All dark. No light. That is match. Hold up. Galizio he see light. He take axe like this (indicating) and I got to shoot.

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Q. When you saw him grab that axe did you have your revolver in your hand or not? A. No. In pocket.

Q. What made you bring your revolver out of your pocket? A. Because, if I had not pulled out my revolver, he would have cut me to pieces like this.

Q. How near were you to him when he grabbed that axe? A. From here to there, about 5 feet.

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Q. When he grabbed this axe, will you just show the jury how he held it before you dropped the match? A. (The witness illustrates with his hand over his head.) He had it like this.

Q. Where was Galizio with reference to the bed at that time? A. He was this way, that is the bed this way, and that is the room this way.

Q. Was he on the bed or not when he grabbed the axe at you? A. Yes, on the bed.

Q. When you grabbed your revolver from your pocket and shot it, was there any light in the room? A. No, there was no light.

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Q. What had become of the match? A. All gone, because I don't see no bed.

Q. What became of the match? A. I throwed it down on the floor.

Q. Why did you drop it or throw it down? A. When he was going to strike me with the axe, a big axe, because it is my axe before, before this trouble, a big axe, about 5 lbs., and a long one, about that long (showing space about three feet).

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Q. Why did you shoot Galizio at that time? A. Because he was going to strike me with the axe.

Q. When you shot, after you fired your revolver, how soon after that did you go out? A. I went out right away.

Mr. Ward: I would like to make the offer

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while this witness is on the stand with reference to this man's reputation.

The Court: You may answer the question.

Q. Do you know whether or not Galizio had struck his wife with an axe in Italy?

10 Mr. Dunn: Objected to.

(Objection sustained. Defendant excepts.)

JAMES F. MINTURN, (L.S.)

J. S. C.

Q. Do you know whether or not Galizio ever shot his brother?

20 Mr. Dunn: Objected to.

(Objection sustained. Exception.)

JAMES F. MINTURN, (L.S.)

J. S. C.

Q. Do you know whether or not Galizio was ever convicted of shooting a man by the name of Santoro?

30 Mr. Dunn: Objected to.

(Objection sustained. Exception.)

JAMES F. MINTURN, (L.S.)

J. S. C.

Q. Do you know whether or not Galizio ever at-

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tacked Romare, a man from Philadelphia; whether he attacked him about 15 years ago and hurt him very severely?

Mr. Dunn: Objected to.

(Objection sustained. Exception.)

JAMES F. MINTURN, (L.S.) 10

J. S. C.

Mr. Ward: This is simply for the purpose of explaining to the jury why I do not prove it.

The Court: I understand what the purpose is, and I think you are right in putting the questions.

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Mr. Ward: Then as I understand in regard to all the other evidence with regard to the disposition of the man, it is overruled?

The Court: I overrule it for the same reasons previously given.

JAMES F. MINTURN, (L.S.)

J. S. C.

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(Defendant excepts.)

Q. When you were taken home to the police station in Paterson, did you make any statement there? A. Yes, but I don't remember what I said because I was so bewildered.

*Salvatore Agnesi—Cross**Cross-examination by Mr. Force:*

Q. Salvatore, how old did you say you were?
A. Forty-two years.

Q. When did you first learn that the man you shot was intimate with your wife. A. About 10 months ago, 9 or 10 months ago.

Q. You didn't see anything yourself, did you?
A. No, sir.

10 Q. All you know is what other people told you, isn't it? A. I saw with my eyes, too, when he ran away.

Q. Did you ever see him do anything with your wife? A. No, sir, I didn't see him.

Q. So then I again repeat, all you know about any wrong between the dead man and your wife is what other people have told you? A. I saw myself.

20 Q. You just said you didn't see anything; now what do you mean by that? What do you want us to understand now, that you did or did not? A. I didn't see him do anything, but I saw him running, and she was there.

Q. That is all you saw at any time, during all these months, is it? A. To him I told him many times, many a time I told him not to go to the house.

Q. That is the only thing you saw yourself, is it? A. Yes.

30 Q. When you first learned from others that something was wrong between this man and your wife, did you ask your wife or speak to her about it? A. Yes, sir.

Q. What did she say? A. My wife answered—my wife she said nothing.

Q. What, she didn't answer you when you asked her those question? A. She didn't answer me.

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Q. How often did you ask her about it? A. Plenty of times, lots of times.

Q. And every time you asked her she never spoke to you in reply? A. No, sir. I was working all the time. How could I watch her?

Q. I didn't ask you that. How many times did you ask her if these stories were true; every time? A. Because I never thought about it.

Q. And every time you heard these people speak of her, did you ask her about them and ask her if they were true? A. Yes; I always asked my wife because I love my wife and I didn't believe them. 10

Q. You never believed it until you saw her in bed with another man? A. No, sir.

Q. Before that did you believe it? A. No, sir.

Q. You never did believe it until you caught them together? A. No, sir, I did not believe it, but this man was a bad man.

Q. When did you go to Philadelphia the first time? A. In the month of June. 20

Q. Wasn't it in the month of May? A. No, June.

Q. What part of June? A. I don't recollect.

Q. Was it before or after the trouble you had in the Recorder's court? A. It was after.

Q. Did you have any quarrel with your wife during these nine months on account of the trouble between this man and your wife? A. No, sir, I never had a quarrel with my wife, but I began to suspect because Gaetano Galizio was not like him some men before because he used to go there while I was working. 30

Q. Isn't it true that you used to beat your wife unmercifully and that the police had to come in and separate you several times? A. It was because of Galizio would say that when she went to

Salvatore Agnesi—Cross

other places to wash she was doing things she hadn't ought to.

Q. And you would beat your wife? A. Sometimes.

Q. Only one time? A. On Saturday; you ask my wife, she is here.

10 Q. No, not that. Didn't you cut her head with a knife and she had to have it sewed up? A. No, sir, not a knife, with the shoes, one Monday morning. Galizio used to say to me when my wife was to go to wash, my wife got up and said she wanted to go to wash and I said no to my wife and my wife said she didn't want to go, and I just took off my shoes and threw them at her for fun.

Q. That was fun, was it? A. I just did it for fun.

20 Q. Wasn't it a customary thing, and didn't your wife have to go out and wash for her own living?

Mr. Ward: I object.

The Court: I will allow it.

A. No, sir. I worked. I worked for twenty years.

30 Q. Didn't your wife go out washing? A. She wanted to go out washing. She can't stay home, and she did not need to go out and wash, because we had about \$1,200.

Q. Now, the troubles you had with your wife, whatever causes there were, you finally signed an agreement with her to live apart, for her to live apart, and you to live apart, didn't you?

(No answer.)

Q. Haven't you said that you had your lawyer

Salvatore Agnesi—Cross

after that trial in the Recorder's Court and you and your wife agreed to separate and signed the papers to that effect? A. Yes, but I thought that separation wasn't anything because I didn't want a separation, I wanted a divorce.

Q. Yes, but you both agreed to it, whatever you wanted? A. I didn't want it.

Q. Didn't you sign your name to a paper? Didn't you agree, you and your wife, both? A. No, I didn't sign no paper. 10

Q. In Rosen's office, your lawyer, Jim Rosen? A. Yes, I signed, but I didn't know that it was a separation.

Q. But you signed, didn't you? Did you keep a paper that you signed? A. Yes, he gave me a paper.

Q. Where is it? A. I don't know.

Q. Did you give it to your lawyer? A. No, maybe I threw it away, because I don't know. 20

Q. Did you sign your name to that, make a cross? A. No, I can't write.

Q. Did you make your mark on it? A. I think it is.

Q. You think so? I am merely asking you whether you signed the paper and your wife signed it, didn't she? Yes or no, did your wife sign it? A. I don't remember.

Q. You don't remember? A. No, I don't remember like that. 30

Q. You don't remember? A. No, I don't remember that at that time.

Q. Whatever paper you did sign, if you did sign it, was it read over to you by the lawyer before you signed? A. No, the lawyer did not read it to me. I don't know that kind of a separation.

Q. Do you know Joseph A. Furrey? A. No, sir.

Salvatore Agnesi—Cross

Mr. Force: Will you please stand up, Mr. Furrey?

Q. Don't you know that gentleman there? A. Oh, yes.

Q. Was he there when this paper was signed by you and your wife? A. Yes.

Q. And was Mr. Rose there? A. Yes, sir; you mean the lawyer?

10 Q. Yes. A. Yes.

Q. He is a lawyer, isn't he? A. Yes, sure.

Q. After that, you understood at that time that you were to go your way and let your wife alone, did you not? A. Yes. And why did Galizio go to my house?

Q. However, you were to go your way, and she was to go her way? A. Yes, I went my way.

Q. And she went and hired another place, did she not? A. Yes, but with Galizio, not alone.

20 Q. You didn't go with her when she hired, did you? A. No, because she moved away from me.

Q. All you know is what other people tell you, is it not? A. No, no, I know.

Q. Do you know where she went and hired? A. Sure.

Q. Where? A. 13 Ellison Street.

Q. Did you go there? A. I go when I want my wife.

30 Q. I don't mean when you shot, but before, did you go there? A. No, sir, I did not go there because I was afraid of Galizio. I want my wife, that is all.

Q. Had you never been there before you went there at 3 o'clock in the morning? A. No, I had never been there.

Q. Did you hear how many rooms she had? A. No.

Q. How did you know she went there? A. I

Salvatore Agnesi—Cross

went to the house of another friend of mine and I seen where she was living.

Q. Was that daytime or nighttime? A. That was daytime.

Q. What day? A. On a Sunday.

Q. After you signed these papers? A. After I signed those papers.

Q. How long? A. About four months ago.

Q. You knew you had no right to go there then, didn't you? That is the reason you didn't go in, is it not? A. I never went there. 10

Q. You knew you had not any right to go there, and you say you knew you did not have any right to speak to her on the street?

Mr. McGinnis: Objected to, because we do not admit that he had ever agreed to restrain himself from speaking to his wife or visiting her. There was no such agreement. 20

Q. You knew you had not any right to go there, and you say you knew you did not have any right to speak to her on the street under the agreement between you?

Mr. McGinnis: Objected to on same ground, and on the further ground the question involves two different questions. We also press the other objection. 30

(Objection overruled. Defendant excepts.)

JAMES F. MINTURN, (L.S.)

J. S. C.

A. I never went to the house and I never spoke to her in the street.

Salvatore Agnesi—Cross

Q. Why? A. Because I was afraid of Galizio.

Q. Wasn't it because you had signed a paper with her not to do that, was not that the reason you did not go to her house, yes or no? A. No. It was because I was afraid, a hundred thousand times, of Galizio.

10 Q. You say you saw her around the street when she was alone passing your house, twice, didn't you? A. Yes, sir.

Q. Galizio was not around, was he? A. No.

Q. Why couldn't you speak to her then? A. I am afraid to speak to my wife.

Q. Why? A. Because I know maybe Galizio he kill me.

Q. You didn't see him around there at all; how would he know you spoke to your wife at all if he was not around there? A. Because the judge and lawyer tell me not to speak to my wife.

20 Q. That is the reason you did not speak to her? A. Yes.

Q. And it was not on account of Galizio then?

A. It was for Galizio also, because I could not go to the house and speak to my wife.

Q. So after you had left your wife and she had gone to live by herself or in her own apartment, you went to live with your sister-in-law, did you?

A. With my sister.

30 Q. While you were living there did you see your wife with Galizio? A. I seen my wife all the time pass in the street. Maybe my wife wants me again.

Q. Maybe she does and maybe she don't, but you can't tell. Did you see Galizio while you lived there those five days with your sister? A. Yes, I always see him on Ellison Street.

Q. Did you ever see him on the street? A. Yes.

Q. You passed and repassed him? A. Yes,

Salvatore Agnesi—Cross

passed. I don't go near him. I was far away, because he would kill me.

Q. How near were they? A. I was afraid to be in Ellison Street.

Q. How near to you were they, how near to him were you when you saw him? A. One block away.

Q. Did he see you? A. Yes, he saw me, but I did not want him to see me.

Q. He did see you whether you wanted him or not, but he did not try to do anything to you on the street? A. He no have a revolver to do anything. 10

Q. Did he ever try to do anything to you on the street after you left your wife? A. He went around saying that wherever he meet me he would kill me.

Q. Did you hear him say that? A. No, the witness told me that.

Q. Somebody told you that again, eh? A. Yes; I am afraid of him. He can't speak to me no more. 20

Q. Did you carry a revolver every day in the street with you? A. No, I only carried a revolver five times and that was the time he wanted to kill me up in the lots.

Q. You say he wanted to kill you or threatened you long before you got a revolver? A. Yes.

Q. For how many months before? A. Three or four months.

Q. Three or four months before? A. Yes. 30

Q. But he never did, did he? A. He didn't do it because I didn't want to have no trouble.

Q. So that while you were living up there people kept telling you about things about this man and your wife, did they? A. Sure.

Q. And you believed that he was living there unlawfully with your wife, did you? A. Yes, but he told me himself.

Salvatore Agnesi—Cross

Q. Did you believe it before you got the revolver? A. Yes, I suspected it and I believed it, and that is the reason I told him not to go to my house.

Q. Didn't you say awhile ago that until you went down there that night you didn't believe your wife had done wrong? Didn't you say that?

A. No, I didn't think she would betray me.

Q. Didn't you say that a while ago? A. Yes.

10 Q. Now you say you believe he was wrong even before you got your revolver? A. No.

Q. Didn't you just say that? A. No, I did not say that he was having my wife. I was working every day. I never saw him.

Q. Your son asked you to go and see your wife and try to make up, didn't he? A. Sure.

Q. He told you to go in the daytime when he was not there, didn't he? Did he, yes or no? A. No, he didn't say that, to go day or night.

20 Q. Didn't you saw awhile ago in answer to Mr. Ward's question talking about her, that your son told you to go and make up with mama, told you to go there, and you said you were afraid? A. Yes; I went there; I was afraid to see if my wife was in the bed or in the other bed.

Q. The question is, did your son ask you to do that? A. He was always home, how could I go?

Q. Did he work? A. Sure he worked. (Interruption.)

30 Mr. Ward: Your Honor, I think the witness should be allowed to answer without being interrupted by counsel.

The Court: I think the answer yes or no will nearly always be all that is required.

Mr. Ward: Are we not entitled to the whole answer?

Salvatore Agnesi—Cross

By Mr. Force:

Q. Is it not true that your son advised you to go and see his mother, your wife, to make up when Galizio was not there? A. No, sir.

Q. He didn't say that? A. No.

Q. Why didn't you go and see your wife and make up? A. Because I was afraid of Galizio all the time; I was afraid of Galizio.

Q. Why didn't you go when he was not there? 10
A. I never dared because I was too much afraid.

Q. You never inquired when you were home if he was working or not? A. I didn't inquire because I went to work the same as he did, and I was home Saturday and Sunday like him.

Q. If you had stayed off in the morning when he went to work, you could have seen your wife to talk to her, could you not, and ask her to stop it? A. My wife was going to work and wash.

Q. Every day? A. Yes. 20

Q. How do you know that? A. When she was living with me she used to go out and wash, too.

Q. Well, why didn't you go down and see your wife and make up? A. Because I was afraid of Galizio, all the time I am afraid of Galizio.

Q. Why didn't you go when he was not there? A. I never know because I was too much afraid.

Q. You never inquired whether he was home or working or not, or where? A. I didn't inquire because I went to work the same as he did and I was 30
home Saturday and Sunday, like him.

Q. Yes, but if you stayed off in the morning when he was working you could see your wife there, couldn't you? A. My wife was out to work, washing.

Q. Every day? A. Every day.

Q. How do you know? A. When she was living with me she used to go out and wash, too.

Salvatore Agnesi—Cross

Q. But you don't know she did after she lived alone? A. She used to go out washing. I have fifty witnesses to show she used to go out and wash, and can prove that.

Q. When people come to you and tell you about these things they make you very excitable, these things about your wife and the other man? A. I was afraid, certainly, but I got angry against Galizio because he was a friend of mine, to steal my wife.

Q. When you went to the moving picture show, had you had anything to drink? A. Nothing.

Q. Afterwards did you have anything? A. No, I didn't have anything.

Q. So the night you made up your mind to go down and see your wife at three o'clock in the morning, privately, you had not been drinking, had you? A. I hadn't touched a drop and I hadn't ate anything and I hadn't slept.

Q. Did anybody know you were going down to see your wife? A. Nobody.

Q. Didn't tell your sister? A. Nobody.

Q. She didn't know anything about it? A. Nobody but me, my head and my God. I had no home.

Q. You had a home with your sister; you mean you did not have your wife, don't you? A. I can't stay boarding.

Q. You went down there to see your wife at three o'clock in the morning and you went only to see your wife? A. I went down and went to my wife. I wanted my wife because I had twenty-two years married.

Q. The only reason that took you down there was to see your wife, is that right? A. Yes, I was going to ask my wife and I wanted her to go away from that house.

Salvatore Agnesi—Cross

Q. Was that the only reason that took you down there? A. Yes, because it was all my furniture, down there. I had it all. It belonged to me.

Q. How did you expect to see your wife private when you had to pry open the window? A. The best reason I went without shoes in the stocking feet.

Q. Why didn't you knock on the door if you wanted to see your wife? A. Because if I knocked Galizio would have killed me with the axe.

10

Q. Did you know where the axe was? A. Sure he knew it; I knew he would use it because it belonged to me.

Q. Did you tell him where the axe was? A. Sure; I knew he knew it.

Q. You lit a match when you went in? A. Yes, sir.

Q. Where did you look first? A. In the first room.

Q. Did you have a light all the time? A. Yes, sir.

20

Q. Did you go to the front room first because you knew he was in there? A. When I looked in the first time I saw nobody in the bed.

Q. Why did you look for your wife then? A. I knew that Galizio was there and I was looking for my wife.

Q. You say you knew he was there when you went down, didn't you? A. The first time I didn't think he was there.

Q. The time you went down three o'clock in the morning, did you know he was there? A. I thought he was.

30

Q. If you weren't sure why didn't you knock on the door there? A. That is the reason I was not sure.

Q. So when you didn't find your wife in the lower bedroom then you went in the kitchen, did you? A. Yes.

Salvatore Agnesi—Cross

Q. Was the light burning? A. It was dark.

Q. Then you walked from the kitchen right in the bedroom? A. Yes, sir.

Q. How far had you gone before you struck another match? A. Right near the door there.

Q. Right near the door? A. Yes, sir.

Q. Did you stand there very long? A. I stood there long enough to open the door and take the axe and shoot him.

10 Q. Did you go inside of the door until after coming out of the kitchen? A. I walked from the kitchen into the bedroom.

Q. How far did you go in the bedroom before you struck the match? A. I only walked in the bedroom about so far.

Q. Indicating a foot and a half? A. Yes, sir.

Q. That is all? A. Here is the bed and here is the door and I lit the match right here.

20 Q. That is this bedroom here (indicating)? A. Yes, sir.

Q. How was the bed standing; this is the kitchen and this is a bedroom and here is a bedroom and there is the kitchen, now which way did you go in? A. Through the window.

Q. There is a window and here is a window, which window did you go through? A. The second one, the second window maybe.

Q. Which one, the kitchen window or the bedroom window? A. The bedroom.

30 Q. Then you walked from there to the kitchen after you saw your wife? A. Yes, sir.

Q. And she was lying on this side? A. Yes, sir.

Q. Which side was the head? A. This way.

Q. Then the foot must have been this way? A. The foot was this way and here I light the match.

Q. And this is the window you came in? A. Yes, this way, I go this way. This was the kitchen room.

Salvatore Agnesi—Cross

Q. Which window, you mark it. A. The window—kitchen.

Q. Wasn't it this one (indicating)? A. Yes, I think so, the second one.

Q. The window you came in was your wife's bedroom, then? A. Yes, sir.

Q. You came through the window into the bedroom, didn't you? A. Yes, sir.

Q. And after you found your wife, over here, you walked up here through the kitchen through this other bedroom, didn't you? A. Yes, sir. 10

Q. You said the bed was lying over this way? A. Sure.

Q. Sure about that? A. Yes.

Q. Which way was the bed lying? A. Across that way.

Q. Is that the first or second match you lit when you got there? A. Only one match I got.

Q. You only lighted one match all the time? A. Yes. 20

Q. Was that in this room (indicating)? A. Yes.

Q. How could you see that nobody was in bed? It was dark, wasn't it? A. I opened the window and there was a little light came in.

Q. Did you make any noise in lowering the window? A. No, nice and easy.

Q. When you struck the match, in the bedroom, where you shot, what was the first thing you saw?

A. I saw Gaetano Galizio. He have hold of an axe, and he go to strike me. 30

Q. When you looked at him there, first, he was asleep, wasn't he? A. No, no.

Q. You looked at him and saw him there. Where was he lying, near to you? A. Yes, and his face was toward me to the front.

Q. He was lying nearer to you than your wife was? A. Yes, my wife was this way.

Q. She was against the wall? A. Yes, over.

Salvatore Agnesi—Cross

Q. Where did he get the axe from? A. This side (indicating).

Q. The side towards you, or the other side? A. Near my side.

Q. You saw him leaning under the bed to get something, didn't you? A. Sure.

Q. You waited for him to lean under and get the axe, didn't you? A. Sure.

10 Q. Did you speak to your wife? A. No, never.

Q. You came to speak to her, didn't you? A. That's all right.

Q. So that while looking at him leaning under there, couldn't you have said to your wife, "What are you doing here?" or something else like that? A. How long would it take him to do like that (indicating) to me? One o'clock or two o'clock in the morning there and me alone.

Q. Your wife was there, too, wasn't she? A. My wife run away.

20 Q. Your wife run away? A. Sure.

Q. How did she get past you? A. As I shot "bing, bing" I ran first.

Q. Did you shoot at anybody but him? A. No, only him; the revolver was no good; there were no more cartridges there. Two shots didn't go off.

Q. How many shots did you fire? A. I don't know; two or three; I don't know because of my head.

30 Q. Did you know enough to shoot? You had your head with you for that, didn't you? A. Sure.

Q. Is that the revolver? A. I think he make a new one.

Q. Is that your revolver? A. Yes, that is it.

Q. That is your revolver? A. Yes.

Q. That is the one you had to shoot with? A. It is no good.

Q. It is good enough to kill a man with? A. No,

Salvatore Agnesi—Cross

you cannot kill anybody. When I pull the trigger it don't shoot, it would not come.

Q. You did not speak to anybody, did you? A. No, sir.

Q. Nobody said anything? A. No, sir.

Q. Didn't you shoot at your wife, too? A. I don't know who I shot at. My head was gone.

Q. When Galizio leaned over to get the axe he stayed in the bed, when you shot him, didn't he? He was in the bed? A. (The witness stands up with his arms over his head.) 10

Q. Was he in the bed or not? A. He got up.

Q. Was he in the bed or not? A. (The witness lays flat on his back on the floor and illustrates.) He see that one light match and he come over this way with the axe and I shoot.

Q. Was he in the bed when he did it, on the bed? A. On the bed, yes.

Q. Did you say he was on the bed when he attempted to hit you or was he standing up? A. He was standing the way I indicated there because if he had caught me— 20

Q. He was standing up or lying down, just as you indicated? A. Just as I indicated, yes.

Q. Did you intend to shoot him if you went there and found him in bed with your wife? A. I don't know what my head.

Q. Did you intend to do that, did you intend to shoot him when you left your sister's house at three o'clock in the morning or thereabouts, did you intend to shoot him if you found him in bed with your wife, yes or no? 30

Mr. Ward: If the court please, I think we should have the whole of that answer and your Honor may rule it out if it is improper.

The Court: I think the prosecutor is en-

Salvatore Agnesi—Cross

titled to a direct answer, yes or no. That question is easily answered.

Q. Did you or did you not? Answer that question yes or no. A. I don't know what my head would do.

Q. You don't know whether you did or not? A. Yes.

10 Q. Do you know Mr. Brooks, James Brooks? (A man is requested to stand up.) A. Yes.

Q. Did you tell him after you were arrested and brought to Paterson in the station house that you intended to kill them both when you went down there? A. I don't remember. I don't remember saying that.

20 Q. Do you remember saying you would have shot them both only your revolver was no good, two shots would not go off? Do you remember telling him that, the policeman? A. I no say nothing to him.

Q. You did not say anything to him at all? A. No, I no say nothing.

Q. Sure, now? A. Sure.

Q. Wasn't you out in the big room with him alone, down at the station house? A. No, I don't say nothing to him, it was Charlie Paroli there, they took my picture there.

30 Q. Do you remember being asked down at the station house by the policemen how this occurred and telling them? A. I don't say nothing to nobody.

Q. Didn't you? Didn't you sign a paper down there in the presence of Captain Tracy and Mr. Paroli and Mr. Gall, three policemen, make your mark on a piece of paper down there? A. I don't remember.

Q. You don't remember? A. No. He put some-

Salvatore Agnesi—Cross

thing you know, when I go back, when I go for the will.

Q. Didn't you tell them what happened down there at the same time, the policemen? Now, yes or no, did you tell them? A. Yes, I told them how it happened.

Q. And didn't they put it down and didn't you afterwards sign it? A. I don't understand.

Q. You don't understand? What don't you understand? A. I had no sleep and my head was not there. What had happened and whatever they told me I don't remember. I had nothing to eat and then afterwards they gave me something to eat. 10

Q. Was it after you had something to eat that you signed this paper or before? A. Before.

Q. Do you recollect among other things telling them this: "I raised the sash and quietly crept inside. Struck a match"? A. I don't remember saying that. 20

Q. And saying that you saw Gaetano and your wife in bed, "And I blew out the match"? A. I don't remember.

Q. "Fired one shot"? A. I don't remember.

Q. "I wanted to kill them both." Do you remember that? A. No.

Q. You didn't say that, eh? A. I don't remember. I was crazy that time, shake like hell, because no eat, no sleep, nothing. 30

Q. Do you recollect also at that time saying that you found them asleep, clasped in each other's arms? A. I don't remember.

Q. And Gaetano was next to the wall? A. No, I don't know anything like that. It came to my mind after I got caught. I was crazy. I came to after they gave me to eat.

Patrick Cunningham—Direct

Redirect examination by Mr. Ward:

Q. Mr. Agnesi, when you left your sister's house that night, did you have any intention of shooting Galizio?

The Court: Tell him to answer that question yes or no.

10 A. No, I didn't want to kill him.

Q. When you were in your sister's house did you think or make up your mind that if you went down to your wife's home and found her in bed with Galizio that you would kill him, did you have any such thought as that, yes or no? A. No.

PATRICK CUNNINGHAM, sworn on behalf of the defendant, testified as follows:

20 *Direct examination by Mr. Ward:*

Q. Mr. Cunningham, you are connected with the Passaic County Clerk's office? A. Yes, sir.

Q. And have you the record there of the session of the Term September, 1904? A. Yes.

Q. Does that record disclose the conviction of Gaetano Galizio?

Mr. Dunn: I object to that.

30

The Court: I suppose he raised the question for a ruling now. I overrule the question.

Mr. Ward: Exception.

JAMES F. MINTURN, (L.S.)

J. S. C.

John F. Grossi—Direct

JOHN F. GROSSI, sworn as a witness in behalf of the defendant, testified as follows:

Direct examination by Mr. McGinnis:

Q. Mr. Grossi, you are the clerk of the Recorder's Court of the City of Paterson? A. Yes, sir, I am.

Q. And have charge of the records of that court, have you? A. Yes, I have. 10

Q. Have you the records in your possession showing the conviction of Gaetano Galizio for assault? A. I have.

Q. Have you your records with you showing the conviction of Gaetano Galizio for assault and battery?

Objected to by Mr. Dunn.

A. I have.

Q. Will you produce that record? 20

Mr. Dunn: I object to it.

The Court: I will exclude that, Mr. Ward, and overrule the question and allow you an exception.

JAMES F. MINTURN, (L.S.)

J. S. C.

Q. Mr. Grossi, were you present in court at the trial of this case against Gaetano Galizio? 30

Mr. Dunn: I object to it.

The Court: I will allow it.

A. I was.

Q. Did you at that time hear any conversation

James J. Rose—Direct

between Recorder Young and Gaetano Galizio with reference to his actions toward the wife of the defendant in this case?

Mr. Dunn: I object.

The Court: I will exclude that and allow you an exception, Mr. Ward.

10

JAMES F. MINTURN, (L.S.)

J. S. C.

JAMES J. ROSE, called as a witness in behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. Ward:

20 Q. Mr. Rose, you are a practicing attorney at law of the State of New Jersey? A. I am.

Q. And have been for how long? A. For over three years.

Q. Were you acquainted with Gaetano Galizio in his lifetime? A. No, sir.

Q. Were you acquainted with Mrs. Agnesi in the month of June last? A. Yes, sir; I have known her for over 20 years.

Q. You have known her over 20 years? A. I have.

30 Q. Do you recall doing any business for her with reference to her husband at that time? A. I represented her before the Recorder.

Q. Were you present at the trial of this man Galizio? A. Yes, sir.

Q. Do you recall at that time what the Recorder said to Gaetano Galizio?

Mr. Dunn: I object to that.

James J. Rose—Direct

The Court: I will exclude that, Mr. Ward, and grant you an exception.

JAMES F. MINTURN, (L.S.)

J. S. C.

Q. Do you recall at that time whether or not this man Agnesi complained because of Gaetano Galizio was living with his wife?

10

Mr. Dunn: I object.

The Court: I will exclude that.

Mr. Ward: I ask an exception.

The Court: Exception allowed.

JAMES F. MINTURN, (L.S.)

20

J. S. C.

Q. Thereafter were you present at anybody's office when any papers were drawn up? A. Immediately after the trial we went to Lawyer Furrey's office.

Q. At whose suggestion was that? A. I think Mr. Furrey and myself talked it over about getting them together again.

Q. And you went up to Mr. Furrey's office any time? A. He went up to Furrey's office and I took Mrs. Agnesi up there.

30

Q. Did you talk to them again? A. We tried to get them together, but it was impossible.

Q. What did Mr. Agnesi say? A. He said you have always promised to go away with me.

Q. Did Mrs. Agnesi promise to go? A. No, I think she only said he would not keep his promise.

Joseph A. Furrey—Direct

Q. Did he say anything in the afternoon? A. He was always saying, "Give me a divorce," and I said I couldn't give them a divorce, but we could give them a separation.

Q. Did they sign then? A. I guess we had to ring for about two hours before we got Mr. Agnesi.

Q. What was said about the papers? A. They talked for some time and I heard him say almost
10 in a whisper, "I will take you to Philadelphia."

Q. If she would leave home? A. Yes, sir.

Cross-examination by Mr. Force:

Q. There was a separation drawn? A. Yes, sir.

Q. And they did sign it? A. Yes, sir; after he found she would not come he grabbed the papers and I gave it to him and he signed it.

Q. And you were the trustee, Jim? A. Yes, sir.

Q. And you witnessed it? A. Yes, sir; they
20 made their marks and I signed their names and witnessed it.

Mr. Force: I now offer the paper in evidence.

Mr. Ward: I object to it.

The Court: I will exclude it at this time.

30 JOSEPH A. FURREY, a witness sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. Ward:

Q. Mr. Furrey, you are a practicing attorney in the common law court in the State of New Jersey and have been for how many years? A. Seven-
teen years.

Joseph A. Furrey—Direct

Q. Were you acquainted with Salvatore Agnesi in June last? A. I was.

Q. Did you represent him in Recorder's Court? A. I did.

Q. Do you remember when Mr. Agnesi made a complaint about his wife associating with this man Galizio? A. He did complain.

Q. And do you know what the Recorder told Galizio?

10

Mr. Dunn: I object.

Mr. Ward: This reflects of course and throws light on the adultery, entirely upon the adultery.

The Court: If that is so I will allow you to put the question.

Mr. Ward: Of course the only light is the inference that I intend to have the jury draw that this man was warned to keep away from this woman as in a divorce case there is always suspicion and they must be careful.

20

Mr. Dunn: My understanding is, according to the evidence as it stands now, even from the defendant himself, that there was any knowledge of improper relations known to him. Now then to ask whether something was said there, I don't see how that has any effect.

30

The Court: This was something that was said by the Recorder?

Mr. Ward: Yes, sir.

Joseph A. Furrey—Direct

The Court: To whom?

Mr. Dunn: To Galizio.

The Court: Oh, that is a different thing. I understood it was something the Recorder said to the defendant. I will exclude the question on that other ground.

10 Mr. Ward: It bears directly on this ques-
tion of adultery. The theory of the State is
that this woman was, apparently, not in that
room at that time with the deceased. Now it
is our theory that she was and it is our state-
ment to the jury that she was and it is my
contention that where this man was even
warned by the judge presiding over the Re-
corder's Court of the city of Paterson to stay
away from this woman that then, despite that
20 fact, he continued to live there, the jury may
fairly draw the inference that she was in the
room with him that night and that that rep-
resented an adulterous condition. It does
give light upon the actual facts of whether
she was or was not in the room that night and
whether or not that was an adulterous con-
duct.

30 The Court: I think I will exclude it.

Mr. Ward: Exception.

JAMES F. MINTURN, (L.S.)

J. S. C.

Q. After the trial, Mr. Furrey, was there a conference held at your office by these people? A. There was.

Joseph A. Furrey—Cross

Q. And were you present? A. I was.

Q. Was Mr. Agnesi and Mrs. Agnesi there? A. They were.

Q. Do you know whether he made any effort to get her to live with him again? A. He did.

Q. Will you just tell the court and jury about that? A. He spoke partly in Italian at times and partly in English and of course what parts I could not understand I had Mr. Rose there to explain to me so I would keep in touch and know what was going on, but he spoke sufficiently enough in English to satisfy me that he wanted his wife to come back and live with him. I think the proposition was made for them to go to Philadelphia in English and he was very earnest and very solicitous about having his wife go back and live with him.

10

Q. Was there anything said about her living with Galizio? A. He complained about her living with him.

20

Q. Did she say anything about that? A. Well, of course she denied this as far as I could understand from Mr. Rose.

Q. Just what yourself understood? A. I could not understand because she spoke principally in Italian.

Cross-examination by Mr. Force:

Q. You heard her say she could not trust him any more and would not go to live with him on that account? A. Well that was spoken in Italian.

30

Q. Translated by Mr. Rose, that is what you heard? A. Translated by Mr. Rose, yes.

Q. They finally did agree, didn't they, and this is the same paper or agreement that they signed, is it not (handing witness the agreement of separation)? A. That is it; yes, sir.

Caesare Palito—Direct

Q. You are the subscribing witness to this for all the parties to its execution? A. I am.

Q. And also Mr. Rose signed as trustee? A. Yes, sir.

Mr. Force: We will have this paper marked for identification.

10 (The said paper is marked "State's 70 for identification of this date.")

CAESARE PALITO, sworn as a witness on behalf of the defendant, testified as follows:

Direct examination (through interpreter) by Mr. Ward:

20 Q. You live in Paterson, New Jersey? A. Yes, sir.

Q. And have lived here for some time? A. 20 years.

Q. Did you know Gaetano Galizio in his lifetime? A. Yes, sir; I know him well.

Q. Do you remember any occasion about four or five months ago when you had a conversation with him in a saloon at 33 Ellison Street? A. Yes, sir.

30 Q. Will you tell the court and jury what was said on that occasion?

The Court: Is this a conversation with the deceased?

Mr. Ward: Yes, sir.

The Court: I will exclude that.

Zaroino Jakimo—Direct

Mr. Ward: Will your Honor permit me to tell you the object of it?

Mr. Dunn: It is hardly fair to have counsel state the substance of it.

The Court: I will allow Mr. Ward to enlighten me on the subject.

Mr. Ward: The object is to prove that Galizio stated that he had been in adulterous contact with Mrs. Agnesi. He admitted that to this witness. 10

The Court: Was the defendant present?

Mr. Ward: No, sir.

The Court: I will exclude it.

(Defendant excepts.) 20

JAMES F. MINTURN, (L.S.)

J. S. C.

ZAROINO JAKIMO (sworn through the interpreter as a witness on behalf of the defendant), testified as follows:

Direct examination (through the interpreter) by Mr. Ward: 30

Q. You live at 25 Ellison Street, Paterson, and have lived there for some time? A. Yes, sir.

Q. Did you know Gaetano Galizio in his lifetime? A. Yes, sir.

Q. Do you remember any occasion about six months ago when you heard a conversation in the

Zaroino Jakimo—Cross

saloon at 33 Ellison Street between Agnesi, the defendant, and Galizio? A. Yes, sir.

Q. Will you just tell the court and jury what that conversation was? A. Two weeks before this murder at 3 o'clock Saturday afternoon, I went to have a glass of beer at 33 Ellison Street and I found in there Salvatore Agnesi and Galizio. Salvatore Agnesi say this godfather he would not let me go at all, he would not let me alone. Then
10 Galizio said to Salvatore Agnesi, "Godfather, I am not afraid of you." He says, "You look like a cockroach in front of my eyes. Don't you recollect that I put horns on you fourteen or fifteen years ago?"

Q. Fourteen or fifteen years ago? A. Yes, sir.

Q. Go on. A. That is all.

Q. Do you know what the Italian expression, "Putting horns on a person," means?

20 Mr. Dunn: Objected to.

The Court: That is, you want to inquire as to the peculiar meaning of it in Italian?

Mr. Ward: Yes, sir.

The Court: I will allow that.

(Objection overruled.)

30 A. Because he was having his wife.

Q. Having whose wife? A. Agnesi's wife.

Q. Do you remember anything else that was said there? A. No, I don't remember no more. This happened five or six months ago.

Cross-examination by Mr. Force:

Q. Where do you live? A. 25 Ellison Street.

Zaroino Jakimo—Cross

Q. How long were you in the saloon that afternoon? A. About 3 o'clock.

Q. How long were you in there that afternoon? A. Just 5 or 6 minutes.

Q. Were they sitting down or standing up, drinking? A. Standing up.

Q. Drinking? A. No.

Q. Standing by the bar? A. No.

Q. Where were they standing? A. They were in the saloon talking between the two of them. 10

Q. You were drinking, you didn't pay very much attention to them, did you? A. I was drinking.

Q. You were not standing where they were? You were drinking? A. I was drinking my glass of beer and listening to them at the same time.

Q. Who spoke first when you heard them? A. Agnesi spoke first.

Q. Were they angry or friendly? A. He was about half angry. 20

Q. Had they been drinking, do you think? A. They were talking together.

Q. What else did you hear them say, anything? A. Nothing more.

Q. How long were they talking together there? A. After I got a drink I went out.

Q. How long were they talking together that you heard? A. Five or six minutes.

Q. It took all that time to tell what you said, eh? A. By that time I drank one glass. 30

Q. What did Agnesi say in reply to what he had been told? A. That is all.

Q. Did he speak at all, the defendant? A. Then Agnesi says this godfather will not let me go or let me alone, and Galizio said to Agnesi, "Godfather, I am not afraid of you. You are just like a cockroach to me."

Rosina De Lorenzo—Direct

ROSINA DE LORENZO, sworn on behalf of the defense, testified as follows:

Direct examination by Mr. Ward:

Q. Where do you live, Mrs. De Lorenzo? A. 47 Ellison Street.

Q. Did you live there at the time the Agnesis were living the same building? A. Yes, sir.

10 Q. Did you live there about a year ago? A. I lived there almost two years.

Q. About eight or nine months ago, do you remember whether or not you ever saw Gaetano Galizio around Agnesi's home? A. Well, I think it was one Saturday night. It was quite late, say maybe about 11 o'clock or so. I heard a noise—there were some empty rooms upstairs—and I wanted to find out who was up there because I lived right in under.

20 Q. Well, you heard a noise? A. Yes.

Q. What did you do? A. I went upstairs and I asked who was there.

Q. Were there vacant rooms above your room up there? A. Yes, sir.

Q. Did anybody answer you when you called? A. No, sir.

Q. Go ahead, what else? A. Then I asked in Italian and nobody answered me and then the son was coming up.

30 Q. Was that the soldier? A. Yes, sir. And he asked me to go upstairs because I was afraid and I called again and I got no answer and we asked again in Italian and got no answer. So then we went downstairs and stood there and said we would wait there until a policeman came and no policeman came. Pretty soon Mrs. Agnesi answered.

Q. Did you see Galizio there? A. Yes, sir.

Rosina De Lorenzo—Cross

Q. Where did he come from? A. He stepped in front of the doorway where I had my room, and he said, "I will fix every one of you," and he went like this.

Q. What did you see? A. I didn't see anything.

Q. Did he have his hand on his hip, like that (indicating)? A. Yes, sir; but I didn't see anything.

Q. Did you ever see Mrs. Agnesi after that? 10
A. She was in my house three or four times, sleeping there.

Q. Did you ever see anybody around there? A. I saw Galizio come there.

Q. What did you hear Galizio say? A. I heard him tell her, "Well, I thought I told you not to sleep in that woman's house."

Q. Did you ever hear him or see him there before? A. He was in the hallway there nearly every night. 20

Q. Before Mr. Agnesi went to Philadelphia?
A. Yes, sir.

Q. See him at any hours of the night? A. Yes, sir.

Cross-examination by Mr. Force:

Q. You didn't stay up every night all night to see, did you? A. Yes, sir.

Q. Or did he used to tell you? A. She said that Agnesi had driven his wife out and her husband had beaten her. 30

Mr. Ward: I object to that, it being hearsay.

The Court: I will allow it.

Tony Levardo—Direct

(Exception asked for and allowed.)

JAMES F. MINTURN, (L.S.)

J. S. C.

Q. Don't you know she has had to send out several times for a policeman to protect her from her husband? A. Yes, sir.

10

Mr. Force: That is all.

TONY LEVARDO, a witness produced on behalf of the defendant, being first duly sworn according to law, testified as follows:

Direct examination by Mr. Ward:

Q. Mr. Levardo, you live at 20 Ellison Street?

20 A. Yes, sir.

Q. You have lived there how long? A. Five years.

Q. Can you talk English? A. No, sir.

Q. Did you know Gaetano Galizio in his lifetime? A. Yes, sir.

Q. Did you know Agnesi when he went to Philadelphia? A. Yes, sir.

30 Q. Do you remember having any conversation or talk with Agnesi before that?

Mr. Dunn: I object to the question.

The Court: Was it in the presence of the defendant?

The Witness: No.

The Court: Then I will exclude it.

Gilberta Vantura—Direct

Q. Do you remember having a conversation with Galizio and him saying what he would do with Agnesi?

Mr. Dunn: I object to that question.

The Court: I will exclude it.

Mr. Ward: Will your Honor allow me an exception?

10

The Court: Certainly.

JAMES F. MINTURN, (L.S.)

J. S. C.

Mr. Ward: That is all.

NO CROSS-EXAMINATION

GILBERTA VANTURA, a witness produced on behalf of the defense, testified as follows:

20

Direct examination by Mr. Ward:

Q. You live in Paterson? A. Yes, sir.

Q. Did you know Gaetano Galizio in his lifetime? A. Yes, sir.

Q. Do you know what his reputation was for being a bad, quarrelsome man?

Mr. Dun: We object to that.

30

The Court: I will exclude it.

Mr. Ward: Exception.

JAMES F. MINTURN, (L.S.)

J. S. C.

NO CROSS-EXAMINATION

Carmelia Ventre—Direct

CARMELIA VENTRE, a witness sworn on behalf of the defense, testified as follows:

Direct examination by Mr. Ward:

Q. You live in Paterson? A. Sure.

Q. Did you know Gaetano Galizio in his life-time? A. Yes.

10 Q. Do you remember any occasion when you saw Mrs. Agnesi in your store? A. Yes, sir.

Q. Was Gaetano Galizio there at the time? A. He was by the door.

Q. Was he where he could hear what was said? A. Yes.

Q. Will you tell the Court and jury what was said by Mrs. Agnesi that time?

Mr. Dunn: We object to that if Agnesi was not present and Galizio was not present.

20

Mr. Ward: Agnesi was not there.

The Court: I will exclude that.

Mr. Ward: I will say that it was for the purpose of showing threats.

(Exception.)

30

JAMES F. MINTURN, (L.S.)

J. S. C.

ALBERT ERNEST AGNESI, sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. Ward:

Q. Albert, how old are you? A. 18.

Albert Ernest Agnesi—Direct

Q. And you are the son of Salvatore Agnesi and Nicolina Agnesi? A. Yes, sir.

Q. Were you born here in Paterson? A. Yes, sir.

Q. And at present you are a member of what unit of the U. S. Army? A. 104 U. S.

Q. And where are you stationed? A. Anniston, Alabama.

Q. Before that time you were a member of the 5th Regiment, I believe? A. Yes, sir. 10

Q. Did you know Gaetano Galizio? A. Yes, I did.

Q. Do you remember any occasion about 9 or 10 months ago when you came home from work and found your father at home? A. Yes.

Q. Do you remember what you said to your father at that time? A. Yes, sir.

Q. Will you just tell the court and jury what it was? 20

Mr. Dunn: I object to that; how is that material?

The Court: What he said to his father? I will allow that.

A. I said to him that my mother went down to get a pail of coal and I said to him, "She is mad at you because Galizio did not come up to the house," and he said, "He has been a nuisance around here for the last nine months." 30

Q. Did you know of your own knowledge whether or not he had been coming to your home? A. Yes, sir, he had.

Q. Had you seen him there? A. Yes, several times.

Q. After that, were you ever present when your father saw or talked to Gaetano Galizio, saw him

Albert Ernest Agnesi—Direct

on the street? A. I did once; I went to my home and pulled my father away.

Q. You pulled your father away? A. Yes.

Q. Do you remember what was said at that time? A. Yes, he told him to keep out of my home when he was not around, and he said when he is home it is all right to come up and have a drink for a treat, anything like that.

10 Q. Why did you have to pull your father away, what was said? A. I knew he was a bad man, and I would not want my father to go with a bad man, because if my father got mad my father would shoot him right on the spot.

Q. Do you remember after that whether or not your father wanted to move from that place on Ellison Street? A. Yes, sir; he had been saying for two months straight; he told my mother to move on account of this man.

20 Q. Where were you stationed about this time? A. The camp station, do you mean? About this time?

Q. About this time, in the spring of this last year? A. I was stationed at the High Bridge.

Q. And from there where? A. Cedar Grove.

Q. Cedar Grove, beyond Little Falls? A. Yes, sir.

Q. How often did you come to your home? A. Twice a week, every third day of the week.

30 Q. Do you remember when your father went to Philadelphia? A. Yes, sir.

Q. Who was present at that time? A. My mother, my father and Detective Paroli was up there at that time.

Q. Did Detective Parola go then? A. Yes, sir; after he went out my mother went out and my father started crying and I says, "What is the matter?" And he says, "She made a complaint against me."

Albert Ernest Agnesi—Direct

Q. Do you know whether or not at that time your father said anything to your mother about going to Philadelphia? A. Yes, sir

Q. What was said about that? A. My father says, after Parola went out of the house; he says——

Mr. Dunn: To you or to your mother?

The Witness: To my mother, and I was right there and he says, "I am going away to-morrow morning. I am going to Philadelphia and going to get a job out there. See if I can make some money, and I want you there in a week, so you go up to the court to-morrow morning and try to fix it up," and she says, "Yes, I will do it." 10

Q. She promised to do that, did she? A. Yes, sir.

Q. After your father left and went to Philadelphia, where did you and your mother continue to live? A. What did my mother do? 20

Q. Yes, did she stay there or not? A. She stayed right there one week and the week after my father went away I received a letter from him in which he says why don't mother come to Philadelphia? So I wrote back to him and told him that maybe she will come yet, I don't know when it will be. In that same week I came home to see my mother and when I went upstairs I seen Galizio and her, the two of them, at the table drinking, eating, et cetera, and so she said to me, "Do you want to eat?" I just went into the house. I says "No," and walked downstairs and stood there waiting for this man, if he should come out of the house and why he was up there, so Officer Kerr came past and I thought about taking him upstairs and see what he would say, and I told that to the officer and he came upstairs and he 30

Albert Ernest Agnesi—Direct

started to tell him if he don't get out of this house I will lock you up right away. He told him to get right out right away, and the officer went out and I went after him and he came down, too, and the officer went up a block and I went across the street talking with my cousins, and when my cousins went away he called to me. He says, "Listen here"——

10 Q. Who called you? A. Galizio.

Q. What did he say? A. He says, "Listen here"——

Mr. Dunn: I object to that, what Galizio said to him in the absence of the defendant.

The Court: I will exclude that.

20 Q. Did you write this to your father afterwards or not? A. Yes, sir; I wrote all this to my father in the first letter I sent him.

Q. Will you tell us what you wrote to your father?

Mr. Dunn: I object to that. That is not relevant or material what he wrote to his father.

The Court: I will allow that, substantially as he wrote it.

30

A. I wrote: "Dear father, the reason why my mother would not come is he is here again, that is holding her back. The other night I came home to see her and I seen both of them eating at the table so I took the officer upstairs and I showed him out. I showed him all that was there and the officer told him if he don't get out of the house he will lock him up." Then I told him he wanted

Albert Ernest Agnesi—Direct

to shoot me and wanted to shoot my father at the same time after the officer went out.

Q. Did you tell your father that in the letter?

A. Yes, sir.

Q. Was that true or not? A. That was true.

Q. Where did you go from there after this man Galizio told you this? A. I simply got on a car and went to camp. I was supposed to be up on my post at 11 o'clock.

Q. You went back to your post? A. Yes, sir. 10

Q. Where did you go from here after this man Galizio told you this? A. I got a car and went to camp. I was supposed to be up at my post at 11 o'clock.

Q. You went back to your post? A. Yes, sir.

Q. Do you remember when your father came back from Philadelphia? A. Yes.

Q. After he came back from Philadelphia, do you know whether or not there was any complaint made against this man Galizio before Recorder Young? A. Yes, I made the complaint myself. 20

Q. For what?

Mr. Dunn: I object to that, it is not material.

The Court: We have already had that.

Mr. Ward: From one of the other witnesses? 30

Mr. Dunn: You offered it and the Court ruled it out.

Mr. Ward: I think we offered the complaint itself.

The Court: Now, you propose to give tes-

Albert Ernest Agnesi—Direct

timony of the same kind from this witness. I will exclude it.

Mr. Ward: Exception.

JAMES F. MINTURN, (L.S.)

J. S. C.

- 10 Q. Were you present when the trial was had?
A. Yes, sir.
- Q. After the trial do you know why your father stayed in Paterson? A. Yes, sir.
- Q. Why? A. Because I told him to.
- Q. To stay in Paterson? A. Yes, sir.
- Q. During this time you were in camp up in Cedar Grove? A. Yes.
- Q. Whereabouts was your mother living? A. My mother was living at 13 Ellison Street.
- 20 Q. Did you ever go to see her down there? A. No, sir.
- Q. Why not? A. Because she was not the right kind of a lady to go and see, and I was afraid of this man who made these threats.
- Q. Afraid of this man? A. Yes.
- Q. Do you remember the Sunday before this shooting happened? A. Yes, sir.
- Q. Did you see your father on that day? A. Yes.
- 30 Q. Where? A. Up at my post. He came to my post while I was on guard. Our corporal and two privates were down to the island; they had to be mustered in for the payroll, and I had to stay there all alone. And while I was on guard my father laid on a cot there and cried, and I went up to him and I said, "What's the matter, Pop?" and he said, "I am worried, I don't know what to do. My aunts ain't got any more room for me,"

Albert Ernest Agnesi—Cross

and he said, "I will go and kill myself. I don't know what to do, or try to get my wife back," and I said, "You go up to her and you apologize to her and try to get back with her," and I said, "Look out for Galizio or he might kill you, in case he is there."

Q. And that was the last you saw of him until father until after— A. Then he bid me good-bye, and got up, and bid me good-bye three or four times, and shook hands and kissed me, and then I knew there was something up.

10

Q. And that was the last you saw of him until after his arrest? A. Yes.

Cross-examination by Mr. Force:

Q. You were afraid of Galizio, you said? A. Yes.

Q. You were afraid Galizio would shoot you? A. Yes, sir.

20

Q. Are you a soldier? A. Yes, sir.

Q. When did you join the military forces? A. May 8th.

Q. May 8th of this year? A. Yes.

Q. When did you go to Alabama? A. About the 6th or 7th of September.

Q. You never saw anything wrong on the part of your mother, did you? A. Yes, sir.

Q. When? A. Right there in the house.

Q. What? A. One day I came up to the house for dinner and she didn't have any dinner for me—

30

Mr. Ward: I object to this. I don't think this boy ought to—

The Court: That is not cross-examination, Mr. Force.

Albert Ernest Agnesi—Cross

Mr. Force: Counsel brought out the fact that he would not go down there because she was a bad woman.

10 Mr. Ward: I asked him if he went to see his mother since she lived at 13 Ellison Street and I asked him why not, and he said because he did not think she was a right lady and he was afraid of Galizio. I don't think that this son, an American who was born and brought up here and understands things perfectly well, should be made to testify.

Mr. Force: I withdraw it.

Q. Did you tell your father all you saw? A. Yes, sir, one Saturday night when I came home.

20 Mr. Ward: No, never mind that.

Q. You told him all you saw? A. Yes, sir.

Q. How often were you in the habit of coming home while you were at Cedar Grove? A. Twice a week.

Q. And at High Bridge? A. The same.

Q. And that was before the 11th of July? A. Yes, sir.

Q. When did you go up to High Bridge? A. I went there May 8th, the same day I enlisted.

30 Q. How long did you stay there? A. I stayed there two months and then I went——

Q. Until July? A. I stayed there until July, yes, sir; about the 1st of July.

Q. Your father was quite cruel to his wife, your mother, all the time, wasn't he?

Mr. Ward: I object to that as not cross-examination.

Angelo Bergelice—Direct

Mr. Force: All right, I won't force it.

(Question withdrawn.)

Mr. McGinnis: Your Honor, the other witnesses that I have are witnesses as to the adultery by the deceased; your Honor has overruled that and under the circumstances I will be obliged to close my case. We rest.

10

Mr. Force: I now offer in evidence the articles of separation between Salvatore Agnesi and Nickolina Agnesi, dated June 19th, 1917.

The Court: That is the separation article, is it; that may be admitted.

Mr. McGinnis: Your Honor, the witness that I call Bergelice has just come into the court room. I would like to call him.

20

The Court: All right, you may call him.

ANGELO BERGELICE, a witness produced on behalf of the defendant, testified as follows:

Direct examination by Mr. McGinnis:

Q. Mr. Bergelice, where do you live? A. Philadelphia.

30

Q. Do you know Salvatore Agnesi? A. Yes, sir.

Q. Was he living in your house with you in Philadelphia last July? A. He lived in my house four weeks.

Q. While there do you know if he received any letters from his son? A. Yes, he received three or four letters from his son.

James Brooks—Direct

Q. Did he send any back? A. Yes, my son wrote some of these letters.

Q. Did you hear him tell your son what to write? A. Yes, he would say in the letter that he wanted his wife in Philadelphia.

NO CROSS-EXAMINATION

10

REBUTTAL

JAMES BROOKS, a witness production behalf of the State, testified as follows:

Direct examination by Mr. Force:

Q. Mr. Brooks, you are a detective attached to the police department of the city of Paterson? A. Yes, sir.

Q. And were you so last July? A. Yes, sir.

Q. And had been for how long prior to that time? A. Five years.

Q. Do you know the defendant, Salvatore Agnesi? A. Yes, sir.

Q. Do you recollect the day he was arrested and brought from Hoboken? A. Yes, sir.

Q. Were you in the station house and did you have any talk with him there upon his arrival that day? A. Yes, that was after his arrival.

Q. What time of the day was it? A. Around noon time, between 12 and 1 o'clock.

Q. Where did this conversation take place? A. In the detective's room.

Q. Was anyone there besides he and you? A. Detective Moore.

Q. Was he present at that time? A. No, not at that time.

James Brooks—Direct

Q. What did he have to say?

Mr. Ward: I object to that.

Q. I will ask the direct question; did he admit to you that he intended to kill his wife and Gaetano Galizio? A. Yes, sir.

Q. What did he say? A. Why, he described how he went in through the window in response to a remark of mine—the first thing he said—— 10

(Interrupted.)

Mr. Ward: I object.

The Court: I am just wondering whether or not this isn't out of order.

Mr. Force: I asked the defendant if he did not admit that to Mr. Brooks and he said "No." 20

The Court: Repeat the question.

Q. What did he say? A. He described how he went through the window in response to a remark of mine and he said that he went through the window and he got inside and it was dark and he couldn't shoot straight; he told me how he raised the window, he said he raised it easy and that when he got inside he struck a match and he said he saw his wife groping around like this (indicating) and he began to shoot. He said he fired at her and he missed her and he said the gun was no good; then he said that he went out and he walked to Lake View and he took a car there and said he was going away and never coming back again. 30

*John Tracy—Direct**Cross-examination by Mr. Ward:*

Q. Said he saw them both in bed together? A. No, he said he saw her groping along on the floor.

Q. Didn't he say that when he made his statement? A. I wasn't there when he made his statement.

Q. Did you hear the statement at all? A. No.

10 The Court: He says he wasn't there at all.

Q. Did you hear him say he struck a match? A. He just told me he saw where his wife was and started to shoot. And that the gun was no good, the bullets wouldn't go off.

Mr. Ward: That is all.

20 JOHN TRACY, sworn at a witness on behalf of the State in rebuttal, testifies as follows:

Direct examination by Mr. Force:

Q. You are captain of detectives of Paterson, are you not? A. Yes, sir.

Q. Do you recollect the day that Salvatore Agnesi was brought to the station house after his shooting down on Ellison Street that we are inquiring about? A. Yes, sir.

30 Q. I show you a statement and ask you whether you recognize that? A. Yes, I wrote that statement.

Q. Tell us how it was taken down, by what method.

Mr. McGinnis: I object to any examination on this statement. The defendant is asked some two or three questions as to

John Tracy—Direct

whether or not he has said certain things apparently read from this statement, then counsel stopped except to ask him did he recognize his signature, a mark at the end of the page. That was all in reference to it. That is not sufficient ground work to justify putting in evidence the entire statement.

The Court: I think he was asked whether or not he made the statement and to my recollection he admitted he did. 10

Mr. Force: Yes, and this is the statement.

Mr. Ward: That is a part of their main case then.

The Court: But it is a matter of discretion and in realizing that the officers could not be found around lunch time I don't want the State to be in a position of not producing it when they are here in court, so I will allow it to go in at this time. If it should transpire that it is in any way a matter of inconvenience or prejudice to the defense and they can show me that it is, I will allow the defense to call any witnesses they desire on the subject. 20

(Defendant excepts.)

JAMES F. MINTURN, (L.S.) 30

J. S. C.

Q. Tell us how the statement was taken, shortly. A. That morning he was taken to my office by one of the officers and he seemed to talk very freely because I knew him just previous to that and I cautioned him about talking. I said,

John Tracy—Cross

“Now, listen. Do you want to tell your story?” and he said, “Yes, sure I want to tell the story.” I said, “You want to be careful about what you say now because if you want to tell the story I am going to write it down if you are satisfied.” I said, “Do you understand?” and he said, “Sure.” So he wanted to tell the story and I said, “Now, if you want to tell the story thoroughly, that is any statement that you make I want you to understand might be used against you.” He says, “I am not afraid.” He says, “You write it down.” I said, “Will you sign it?” He said, “Yes.”

Q. And is that the result? A. This is the result of it.

Q. That is the result of the questions put by you and the answers taken down in narrative form? A. Yes, sir.

Q. Did he understand English sufficiently for that? A. Yes, sir.

Q. Was there anyone who could talk Italian present at that time who signed his name as a witness there? A. Parola, yes, Parola was there at the time, they were all busy at the time looking for witnesses.

Q. Was it read over to him after it was made out? A. Yes, sir.

Q. In English or in Italian or both? A. It was read in English.

Q. What did he say about it? A. Well, he said it was true.

Q. Did he say he understood it? A. Yes, sir.

Q. Then he put his mark on? A. Yes, sir.

Q. In the presence of those witnesses? A. Yes, sir.

Cross-examination by Mr. Ward:

Q. Who wrote this? A. I did.

John Tracy—Cross

Q. On the typewriter? A. No, I wrote it with a pencil, with a lead pencil.

Q. Where is that? A. It is in my pocket.

Q. The lead pencil is? A. Yes, sir.

Q. The statement was taken down in lead pencil? A. Yes, sir. Then it was typewritten, then it was read to him and compared and he signed it.

Q. You say Parola was there? A. Yes, sir.

Q. And Parola spoke to him in Italian from time to time? A. Well, any words that he did not understand Parola interpreted. 10

Q. Is this his language? Is this what he said? A. That is what he said himself.

Q. That is the exact language he used? A. Those are just the exact words he used; yes, sir.

Q. I say, you mean that those are the exact words that Agnesi used? A. That is the exact words he used at the time; yes, sir.

Q. I say that Agnesi used, that this man here used, you mean? A. Yes, sir. 20

Q. And that was the way you took it down, just his exact words? A. Just his exact words; yes, sir. Of course any words that he could not understand and he would explain that I would have Parola interpret that.

Mr. Dunn: We offer the statement in evidence.

Mr. McGinnis: We object to it upon the ground that it is not the original evidence, not the original statement. 30

The Court: I do not understand that it has to be. It was read over to him. He understood it and signed it in the presence of the captain. That is enough. I will admit it.

Exhibits

(Defendant excepts.)

JAMES F. MINTURN, (L.S.)

J. S. C.

(Admitted and marked "State's Exhibit S-75, of this date.")

10

STATE RESTS

TESTIMONY CLOSED

The Court then cautioned the jury and ordered a recess until 7:30 o'clock this p. m.

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30

My name is Gaetano Galizio. I live at No. 15 Ellison St., Paterson, N. J. I was boarding there with a person by the name of Nicolani Agnesi. I have been there for two months. My age is 37 years. I married my wife in the old country. I have 2 children. About 3 A. M. on Wednesday morning I heard a noise at my bedroom window and there was fired at me the first shot fired at me hit me on the stomach. I opened my eyes and saw it was Salvatore Agnesie. He then fired two more shots at me, one of which struck me in the chest and the other one on the chin. I then heard Nicolenne screaming, who was in another room and I heard two more shots fired by him. I saw his face after shots were fired. I recognized it was Salvatore Agnesie. While taking this statement he is constantly muttering, I am dying. This statement is made while the man is upon his death-bed and when he is saying, I am dying, he has threatened me before the trial before recorder to shoot me.

(Signed) Gartano Galizio.

Exhibits

Sworn and subscribed before me this
11th day of July, at 9:32, at St.
Joseph's Hospital.

W. H. Young
William H. Lord
Adolph Keppler
Nicholas DeLuccia

10

This statement was made after the defendant having been warned of his rights that whatever he said might be used against him in the event of the case going to trial, and that if he did not wish to make a statement, he did not have to, and that he makes this statement of his own free will:

I am 42 years of age. I was born in Serino, Italy. I came to this country in the year 1892. I am employed at the National Silk Dyeing Com-
pany at the present time; I am parted from my
wife, because she is living with Gaetano Galizio,
and would not live with my sister at 14 Passaic
St. I have been living with my sister for three
weeks. Yesterday she told me that I would have
to find another boarding house, as she had not
room for me. I went to bed at my sister's house
last night, July 10, 1917, at 10 P. M. I remained
in bed until 1 A. M. July 11th, 1917. I could not
sleep, thinking that this man was in bed with my
wife. I arose and dressed myself and placed my
revolver in my coat pocket. I also took a knife
to force the catch off the window with, where my
wife and Gaetano lived; when I arrived at the
house No. 13 Ellison Street in the rear of the
house I attempted to look through the glass into
a bedroom. I was unable to see through the glass
because it was dark at the time; this was about

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Exhibits

- 2:30 A. M. this morning; I raised the sash and quietly crept inside, struck a match and I saw my wife and Gaetano in the same bed. I blew out the match, fired one shot, I wanted to kill them both; they were clasped in each other's arms sleeping; Gaetano was next to the wall. After the first shot my wife jumped out of bed, and ran out of the room. I fired two more shots at Gaetano, he was on his feet at this time. I wanted to shoot him
- 10 first, because he is a bad man, and would have shot me if he had a chance; I then turned and fired two shots at my wife. She was running around the rooms. There was two more shots in the gun. I attempted to fire them, but they would not explode. My gun is a seven shooter. I want to say before I crept into the window, I took off my shoes, also my hat; I went through the window in my stocking feet. My purpose in going to my home at that time was to see whether my wife
- 20 was in bed with Gaetano or not. If they were not in bed together I intended to make peace. Gaetano had been a friend of my family for some time, but for the last four months he has been intimate with my wife. I tried to break it up by asking her to move away. I also asked her to go to some other location where she could not see him or meet him. This she refused to do, causing us to quarrel frequently. These quarrels caused her to make a complaint against me before Recorder
- 30 Young. She did this to put me in jail, so we would be separated and she could live with Gaetano, but even after the case was finished I implored her to come back with me, this she refused to do. This worked on my mind so much that it caused me to do the shooting this morning. After the shooting this morning I jumped out of the window. After I had tried to get out of the kitchen door which was locked; while getting out of the window she

Exhibits

struck me with a stick. I put my shoes on in the yard, went through Ellison Street to Mill Street over the back race to Spruce St. to Grand St. to Clay and Straight St., there I waited for a White Line Car. The car did not come so I continued through Clay St. to Beckwith Ave. to Madison, and East Railway Ave. where I boarded a car for Hoboken. At Hoboken two men got on the car; one said to me in Italian, where did you come from? I said that I came from Lake View. He said You came from Paterson. I said, no, I came from Lake View because that man was where I boarded the car; he then asked me my name. I gave him my right name. He searched me, and found the revolver in my coat pocket, took me to the police station in Hoboken and I was later brought to Paterson by the Paterson detectives. 10

(Signed) Salvatore (X) Agnese 20

Witnesses:

John Tracy
Chas. H. Pirola
Howard Gall

STATE'S EXHIBIT 70

THIS INDENTURE, made this nineteenth day of June, in the year of our Lord, one thousand nine hundred and seventeen, between Salvatore Agnesi, of the City of Paterson, in the County of Passaic and State of New Jersey, of the first part and Nicoline Agnesi, his wife, of the second part, and James J. Rose, of the City of Paterson, in the County of Passaic and State of New Jersey, as trustee of the said Nicolina Agnesi, of the third part: 30

Exhibits

WHEREAS divers disputes and unhappy differences have arisen between the said party of the first part and his said wife, for which reason they have consented and agreed, and hereby do consent and agree to live separate and apart from each other during their natural life; therefore, this indenture witnesseth, that the said party of the first part in consideration of the premises, and in pursuance thereof, does hereby covenant, promise
10 and agree to and with the said trustee, and also to and with his said wife, that it shall and may be lawful for her, his said wife, at all times hereafter, to live separate and apart from him, and that he shall and will allow and permit her to reside and be in such place and places and in such family and families, and with such relations, friends and other persons, and to follow and carry on such trade or business as she may from time to time choose or think fit; and that he shall not, nor will
20 at any time, sue, or suffer her to be sued for living separate and apart from him, or compel her to live with him; nor sue, molest, disturb or trouble any other person whomsoever, for receiving, entertaining or harboring her; and that he will not, without her consent, visit her, or knowingly enter any house or place where she shall dwell, reside or be, or send, or cause to be sent, any letter or message to her; nor shall or will at any time hereafter, claim or demand any of her
30 money, jewels, plate, clothing, household goods, furniture or stock in trade, which she now has in her power, custody or possession or which she shall or may at any time hereafter have, buy or procure, or which shall be devised or given to her, or that she may otherwise acquire, and that she shall and may enjoy and absolutely dispose of the same as if she were a feme sole and unmarried; and further, that the said party of the

Charge

first part shall and will well and truly pay, or cause to be paid, for and towards the better support and maintenance of his said wife the sum of one dollar (\$1.00) per month, which said party of the second part does hereby agree to take in full satisfaction for her support and maintenance, and all alimony whatever.

IN WITNESS WHEREOF, the parties to these presents have hereunto interchangeably set their hands and seals, this nineteenth day of June, in the year of our Lord, one thousand nine hundred and seventeen. 10

Signed, Sealed and Delivered
in the presence of
Jos. A. Furrey.

	his		
Salvatore Agnesi	(X)	(L.S.)	
	mark		20
	her		
Nicolina Agnesi	(X)	(L.S.)	
	mark		
James J. Rose,		(L.S.)	
Trustee of Nicolina Agnesi.			

EVENING SESSION

The trial was continued pursuant to adjournment. 30

(Mr. Ward sums up for the Defendant.)

(Mr. Dunn sums up for the State.)

The Court then charged the Jury as follows:

Charge

THE COURT: Gentlemen of the Jury. On the eighteenth day of June of this year, this defendant and his wife entered into an agreement of separation, and, in that agreement they represented that they were unable to live together by reason of differences of views and differences of opinions, and they agreed under their hands and seals, to live apart during the balance of their natural lives, and the husband agreed that he
10 would not molest this wife or interfere with her in any business or occupation in which she might think it desirable to engage for her livelihood, or otherwise.

The effect of that agreement was that the wife thereafter rented a house on Ellison Street, to which reference has been made in the testimony, and undertook to live alone and follow her own business and occupation, in conformity with the agreement which she had entered into with her
20 husband, and, she had a right to expect on her part, that he would live up to that agreement, that he would not molest her, that he would not interfere with her in any way, and, in the language of that agreement, that he would not without her consent visit her or knowingly enter any house or place where she should dwell, reside or be.

That was on the eighteenth day of June, and, hardly a month afterwards, on the sixteenth of July, the husband, at two o'clock in the morning,
30 or thereabouts, as you will recall the testimony, left his bed and his then home, provided himself with a revolver which he carried in his pocket, and with a knife, and went to the residence of his wife, which he had agreed not to visit or enter without her consent or by her invitation. Instead of knocking at the door, or arousing the inmates in the usual formal manner, he went around to the back or the side of the house, and, using this

Charge

knife which he carried, he raised the sash of the window and entered the wife's apartments; and, when he had entered, he says, he lit a match, and went from one bedroom, through the kitchen to the rear bedroom where he says he discovered his wife and the deceased sleeping together; and that, then, he drew his pistol and discharged it three times into the body of this paramour or friend of the wife, from the effects of which wounds it is admitted he died.

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The defendant attempts to justify his act on one ground, and one ground only, for the reason that the defense which he offered, of self-defense, under these circumstances, I have ruled out of the case because, in the judgment of the Court, as a matter of law, such a defense has no application whatever to the facts in this case and you are not to consider it as an element in the case.

And so, he justifies his act upon one theory, and that is, that when he entered the house he discovered his wife and this deceased sleeping together, in a position to commit an act of adultery.

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The result of that defense is, that the inquiry here is narrowed to a very small compass. Because, under the law, if you concede that the defendant went to that house on this occasion, as he insists, for the purpose of finding the wife and her paramour in the act of adultery, he had no right to take their lives, or the life of either of them. The law in its charity, and regard for human weakness, has reduced the grade of the crime which he committed under such circumstances, from that of murder in the first degree, to manslaughter. So that, if you take his version of this case and consider it as the theory upon which you will decide it, you cannot under any circumstances acquit him, but, you must find him guilty of manslaughter at least, the law being, under such

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Charge

10 circumstances, that where a man finds his wife in the act of adultery with a paramour, and he in the heat of passion and in his excitement takes the life of one or both, he is not guilty of murder in the first degree, but, he is guilty of manslaughter. The law, however, gave him no right to take the life of either under those circumstances. It gave him the right to pursue his wife, if she was guilty of an act of that kind into the divorce courts, and it gave him the right to follow the paramour into the Grand Jury Room and into the criminal courts of the county, and there prosecute him according to the criminal law, but, it gave him no right to take that which he could never restore, the life of either his guilty wife or of her guilty accomplice.

20 Now, under the facts of this case, as presented to you by the State, you may deal with this situation from an entirely different viewpoint, if you think the evidence warrants it; and, of course, in deciding this case, you must be guided entirely by the evidence. Every theory that you entertain, every view that you take up for consideration must, in order to support itself, be based upon the evidence in the case, and, so far as this defendant is concerned, it must be based upon evidence that, in your judgment, will convict him of the crime of which you find him guilty beyond a reasonable doubt. Because, under the law, he is
30 presumed to be innocent until the State has proved him guilty beyond a reasonable doubt.

The State is relieved to a great extent of the necessity of proving the actual crime in this case because the defendant admits it. He admits the shooting, he admits the entry through the window and all the other incidents of this crime. His answer to the State's charge and to this indictment is that he is not guilty, because he found his

Charge

wife in this compromising position and then slew her guilty paramour. That, as I have stated to you, is no excuse for his crime. It palliates his offence, and reduces its enormity from that of first degree to the crime of manslaughter, accepting his own theory as the correct theory of this case and everything that he says about it to be true.

But, if the State's view of the case be correct, you have this situation; that this defendant on this morning, at two o'clock, when his wife was asleep in her home, took this pistol, took this knife, and, with the premeditation and deliberation and malice aforethought, as the law expresses it, with the design in his mind fully conceived and thought out, he went to the home of his wife at that unusual hour, and in that unusual way, without knocking or making his presence known in any way, and, then and there, did what he started out to do, took the life of his wife's paramour. If he did that, Gentlemen of the Jury, under those circumstances, if he committed this crime as the State would have you believe he did, after thinking the matter over at home, in his bed, during the hours of the night, having provided himself with a weapon for the purpose, and starting out at that early hour of the morning with the premeditation and the deliberation and the wilful design to execute his intent, and then shot this man, in his wife's apartments, in the way in which it has been described here, then he is guilty of murder in the first degree.

If you find in the case that these elements of premeditation and deliberation and wilfull design are lacking, which are the essential elements of murder in the first degree, then you may convict this defendant of murder in the second degree. If you believe that he went there and did not find

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Charge

his wife and this man together in her apartments, but found the man alone there, sleeping in his own bed, and, without any provocation shot him and killed him, without any intent of doing so by pre-meditating the act beforehand, then you may find him guilty of murder in the second degree.

10 If, on the other hand, you find that the defendant found this boarder and his wife together as he states he did, under those circumstances, and that, in the heat of passion he was so wrought up and exercised that he could not control himself, you may find him guilty of manslaughter.

As I have said, Gentlemen of the Jury, the facts in the case are entirely with you. The Court has expressed no opinion on the facts and desires to express none, because you are the judges and the sole judges of the facts, the Court's function being entirely to explain to you the law as the Court understands the law to be written.

20 Throughout the entire case, if there be a doubt in your mind as to the quality and degree of this crime on the evidence, a reasonable doubt, give the benefit of that doubt to the defendant, for the reason that under the law, he is entitled to it and must have it. Because, the defendant, except to the extent that he has admitted his guilt, stands before you innocent of any higher crime than the one which he himself has described, of taking the life of the man that he found in this compromising position with his wife, which as I stated would
30 be manslaughter.

Now, Gentlemen of the Jury, under the law as it is now laid down by our legislature, you have an additional duty to perform. If you find this defendant guilty of murder in the first degree, it is your right and your duty, if you think proper, as the law now stands, to impose upon him the sentence of the law that you think, under the cir-

Charge

cumstances of the case and the testimony, you are warranted in imposing. That penalty you must impose if you find him guilty of murder in the first degree, and only in that case, because, if you find him guilty of any other degree of crime, the law obliges the Court to deal with the penalty; but, if you find him guilty of murder in the first degree, it is your duty, in your discretion, to impose upon him, the penalty either of imprisonment for life, or the death penalty, as in your judgment the circumstances and the evidence in the case may warrant. 10

I have a number of Requests to Charge here from the defendant's counsel, a number of which I will charge you:

1.—The Jury in considering the evidence must start with the legal presumption of the defendant's innocence, which presumption must continue throughout all their deliberations, unless the evidence establishes the defendant's guilt beyond all reasonable doubt. 20

I charge you that.

2.—The law presumes the defendant to be innocent until that presumption of innocence is overthrown beyond all reasonable doubt, by evidence in the case.

I so charge you.

3.—The presumption of innocence attaches to the defendant from the very beginning, and such presumption of innocence must be carried by the jury into their final deliberations. 30

I so charge you.

4.—A reasonable doubt in law, is that state of mind, which after fairly considering all the evidence, leaves the mind of a juror in such a condition that he cannot say that he feels an abiding conviction of the defendant's guilt as charged.

I so charge you.

Charge

5.—The defendant is not required to satisfy the jury of his innocence, but the burden is always upon the State, and the State must prove beyond all reasonable doubt, that the defendant is guilty of the crime charged.

I so charge you.

10 6.—The burden of proof never shifts from the State in a criminal trial, but throughout the entire trial, the burden of proof is always upon the State to prove the defendant's guilt of the crime charged, beyond a reasonable doubt.

I so charge you.

(7th request omitted and withdrawn.)

(8.—Declined and defendant excepts.)

JAMES F. MINTURN, (L.S.)

J. S. C.

20 9.—If there is in the mind of any juror a reasonable doubt of the defendant's guilt, fairly arising from the evidence in the case, the juror has no right to consent to a verdict of guilty in deference to or from respect to the other jurors' opinion or belief. Such juror must stand by and abide by his own belief formed in his own mind from the whole of the evidence in the case in which he believes, including the testimony of the defendant.

I so charge you.

30 10.—Each juror must reach a conclusion. Eleven jurors are not competent to reach a verdict in the case. All must reach that conclusion. No juror is relieved from responsibility by letting any number of the body agree upon a verdict, and by then consenting to it, because it is the judgment of others. Each juror must reach his own judgment.

I so charge you.

Charge

11.—If there is in the minds of the jury one or any number of theories consistent with the defendant's guilt, fairly springing from the evidence in the case, which the jury believes, and but one theory consistent with the defendant's innocence, fairly arising from the evidence in the case, including the defendant's testimony, which the jury also believes, the jury must disregard and put aside all those theories of his guilt, and adopt that one theory of his innocence, and render a verdict of not guilty. For, in such condition of the case there would be a reasonable doubt of the defendant's guilt, and the defendant should be acquitted. 10

I so charge you.

12.—A presumption of good character always exists as to the defendant, and may of itself, be sufficient to raise a reasonable doubt as to the defendant's guilt.

I so charge you.

(The 13th Request is declined and defendant excepts.) 20

(The 14th Request is declined and defendant excepts.)

(The 15th Request is declined and defendant excepts.)

(The 16th Request is declined and defendant excepts.)

(The 17th Request is declined and defendant excepts.)

(The 18th Request is declined and defendant excepts.) 0

(The 19th Request is declined and defendant excepts.)

(The 20th Request is withdrawn.)

(The 21st request is declined and defendant excepts.)

22.—If the defendant detected his wife in the act of adultery with deceased, and thereupon

Charge

killed the deceased, such act of adultery under the circumstances constituted sufficient provocation to reduce the homicide to manslaughter.

I so charge you.

23.—If the defendant killed the deceased with malice, but under the heat of passion aroused by detecting his wife in adultery with deceased, aside from any question of deceased attacking the defendant, such killing would mean manslaughter only.

I so charge you.

24.—In connection with the last two mentioned requests, it is not necessary that the defendant should actually see deceased and wife in the act of adultery, but it is sufficient if he found them together under circumstances reasonably leading him to believe that they were or had been so engaged in adulterous conduct.

I so charge you.

20 (The 25th Request is declined and defendant excepts.)

(The 26th Request is declined and defendant excepts.)

(The 27th Request is declined and defendant excepts.)

30 Counsel call my attention to the fact that there is in their mind some question as to whether I made it sufficiently plain to you, Gentlemen of the Jury, that if you find the defendant guilty of murder in the first degree you may fix the penalty for that crime and that penalty may be either death or life imprisonment. If you do not fix the penalty, but simply find the defendant guilty of murder in the first degree, then the question of the penalty to be fixed for the crime must be left to the Court. In other words, if you fail to fix the penalty, the Court will be obliged to fix the penalty of death. So that you have it in your power

Defendant's Requests Refused

if you find the defendant guilty of murder in the first degree to fix the penalty which he must suffer for that crime, which in your discretion may be either death or life imprisonment.

(The Jury then retire.)

Defendant excepts to the refusal of the Court to charge the Requests submitted by the defendant, in the instances in which the Court declined to charge. 10

Also a general exception to the charge is asked and allowed.

JAMES F. MINTURN, (L.S.)

J. S. C.

DEFENDANT'S REQUESTS TO CHARGE WHICH WERE
REFUSED BY THE COURT AND TO WHICH
REFUSAL EXCEPTION WAS TAKEN 20

8.—If there is in the mind of the jury a reasonable doubt as to the truth or untruth of any testimony on the part of the State, such doubt must be resolved in favor of the defendant by the rejection of such testimony. If there is a reasonable doubt as to the truth or untruth of any testimony on the part of the defendant, such doubt must be resolved in favor of the defendant by treating such testimony in his favor, as though unquestionably true and correct. 0

Declined, and exception to defendant.

JAMES F. MINTURN, (L.S.)

J. S. C.

Defendant's Requests Refused

13.—If the jury believes from the evidence that the defendant was of a violent or turbulent character, they are to take such evidence into consideration in determining whether or not the defendant acted in self-defense.

Declined, and defendant excepts.

JAMES F. MINTURN, (L.S.)

J. S. C.

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14.—If it appears that the defendant at the time he inflicted the wound upon the deceased, was acting under a reasonable belief that he was in imminent danger of great bodily harm or death from the attack at the hands of the deceased, and that the defendant believed that it was necessary for him to strike a blow or to perform such other act as to inflict the wound upon the deceased in order to avoid great bodily harm or death, then the wound which was inflicted upon the deceased by the defendant was justified and the defendant should be acquitted.

20

The Court: This legal rule has no application to this case. The request is refused.

Defendant excepts.

JAMES F. MINTURN, (L.S.)

J. S. C.

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15.—The belief that the defendant had that he was in danger of bodily harm or death, at the time of the assault upon him, should be viewed by the jury from the standpoint of the defendant at the time the wound was inflicted upon the deceased.

The Court: This rule is not applicable to the facts in this case.

Declined. Defendant excepts.

JAMES F. MINTURN, (L.S.)

J. S. C.

Defendant's Requests Refused

16.—To justify such a blow and wound as was inflicted upon the deceased by the defendant, the danger to the defendant did not have to be actual, so long as the defendant acted upon a reasonable appearance and belief of danger.

The Court: This rule is not applicable to the facts of this case.

Declined. Defendants excepts.

JAMES F. MINTURN, (L.S.) 10

J. S. C.

17.—If by menace and threats of the deceased to the defendant, the defendant believed himself to be in danger of great bodily harm or death at the hands of the deceased, the defendant was then justified in inflicting the wound upon the deceased.

The Court: This rule is not applicable to the facts in this case.

Declined. Defendant excepts.

20

JAMES F. MINTURN, (L.S.)

J. S. C.

18.—The real intention of the deceased is immaterial, if from his actions the defendant had reasonable grounds to apprehend danger of great bodily harm or death at the hands of the deceased.

The Court: This rule is not applicable to the facts of this case.

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Declined. Defendant excepts.

JAMES F. MINTURN, (L.S.)

J. S. C.

19.—Where the homicide occurs under such circumstances that it is doubtful whether the act was

Defendant's Requests Refused

committed maliciously or from a well-grounded apprehension or fear of danger or bodily harm or death, testimony showing that the attitude of the deceased before the affray was violent and threatening, may be considered by the jury in order to determine whether the defendant had reasonable cause to apprehend death or great bodily harm.

The Court: This rule is not applicable to the facts of this case.

10 Declined. Defendant excepts.

JAMES F. MINTURN, (L.S.)

J. S. C.

21.—If the deceased was killed while he was attempting to commit murder, or do great bodily harm to defendant, then the defendant is guiltless and must be acquitted.

20 The Court: This rule is not applicable to the facts in this case.

Declined. Defendant excepts.

JAMES F. MINTURN, (L.S.)

J. S. C.

25.—There is no evidence in the case showing that there was any wilfull, deliberate and premeditated intent on the part of the defendant to kill the deceased, therefore, the defendant can not be convicted of murder in the first degree.

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Declined. Defendant excepts.

JAMES F. MINTURN, (L.S.)

J. S. C.

26.—The belief in God and the sense of accountability to Him for false swearing are indis-

Defendant's Requests Refused

pensable to the competency of a witness, and no dying declaration can be received of any person who lacks that belief in God and sense of accountability for false swearing. If, therefore, the Jury believe that this deceased did not believe in God and accountability to Him for false swearing, they cannot consider the alleged dying declaration produced here.

Declined. Defendant excepts.

10

JAMES F. MINTURN, (L.S.)

J. S. C.

27.—The jury may consider the defense of self-defense, and ascertain from the evidence whether or not the defendant committed the act of shooting the deceased in order to protect himself from great bodily harm or loss of his own life.

The Court: This rule, while strictly correct as an abstract principle of law, has no application to the facts in this case.

20

Declined. Defendant excepts.

JAMES F. MINTURN, (L.S.)

J. S. C.

At 11 o'clock P. M., the Jury returned their verdict, Guilty of Murder in the Second Degree, and the Court thereupon remanded the Defendant in the custody of the Sheriff until Saturday, November third, at 10:00 o'clock A. M., at which time the sentence of the law will be imposed.

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*Assignments of Error*NEW JERSEY COURT OF ERRORS AND
APPEALS.

	THE STATE OF NEW JERSEY, Defendant-in-Error,	} Assignments of Error.
	vs.	
10	SALVATORE AGNESE, Plaintiff-in-Error.	

ASSIGNMENTS OF ERROR.

20 Afterwards, to wit, on the return of the writ of error in the above cause, before the New Jersey Court of Errors and Appeals, comes the said Salvatore Agnese by Ward & McGinnis, his attorneys, and says that in the record and proceedings aforesaid, and also in the matters recited in the bill of exceptions and in the verdict and judgment aforesaid there is manifest error, to wit:

30 1.—Because the court at the trial of the indictment, when James Carr, a witness for the State, was being cross-examined by counsel for the defendant, refused to permit counsel for the defendant to ask the following question: Q. “You had known her [referring to the wife of the defendant] on an occasion when her son had asked you to have this man arrested, had you not, for threatening his life?”, which question the court overruled on the ground that the same was leading and immaterial; said ruling was erroneous and to the manifest injury of the defendant.

2.—Because the court at the trial of the indictment, when James Carr, a witness for the State,

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was being cross-examined, refused to permit the counsel for the defendant to ask the following question: Q. "On your direct examination you were asked if you had known this woman before and you stated yes; now, what was the occasion of your knowing her before?" A. "Yes, I have known her." Objection having been interposed, the court overruled the question and answer; which ruling was erroneous and to the manifest injury of the defendant.

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3.—Because the court at the trial of the indictment, when James Carr, a witness for the State, was being cross-examined, refused to permit the counsel for the defendant to ask the following question: Q. "Was the time that you referred to as knowing her before the time when this young man came to you and complained of this Galizio, the dead man, and claiming that he was living with his mother improperly?" Upon objection of the State, the court would not permit this question to be answered; said ruling was erroneous and to the manifest injury of the defendant.

20

4.—Because the court at the trial of the indictment, when James Carr, a witness for the State, was being cross-examined, refused to permit the counsel for the defendant to ask the following question: Q. "Under what circumstances had you known her?" [referring to the wife of the defendant], which question the court overruled; said ruling was erroneous and to the manifest injury of the defendant.

30

5.—Because the court permitted to be introduced in evidence on behalf of the State, against the objections of counsel for the defendant, a paper writing, signed or alleged to be signed by the deceased, Gaetano Galizio, which paper was

Assignments of Error

marked and received in evidence as Exhibit A-2 on behalf of the State, as a dying declaration or statement; said statement being inadmissible on the ground that the state of mind of the deceased as to his expectation of death was not such as to justify the admission of such paper in evidence; said ruling was erroneous and to the manifest injury of the defendant.

10 6.—Because the court permitted to be introduced in evidence on behalf of the State, against the objections of counsel for the defendant, a paper writing, signed or alleged to be signed by the deceased, Gaetano Galizio, which paper was marked as Exhibit A-2 on behalf of the State and was received in evidence as a dying declaration or statement; said statement being inadmissible on the ground that said statement was admittedly
20 give nthrough an interpreter and said interpreter was not sworn to prove the correctness of the written statement in question; said ruling was erroneous and to the manifest injury of the defendant.

30 7.—Because the court permitted to be introduced in evidence on behalf of the State, against the objections of counsel for the defendant, a paper writing, signed or alleged to be signed by the deceased, Gaetano Galizio, which paper was marked as Exhibit A-2 on behalf of the State and was received in evidence as a dying declaration or statement; said statement being inadmissible on the ground that said statement contained in addition to the alleged language of the deceased, the opinion of William H. Young, the person taking the statement, as to the condition of mind and body of the said deceased at the time of the making of said statement; said ruling was erroneous and to the manifest injury of the defendant.

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8.—Because the court permitted to be introduced in evidence on behalf of the State, against the objections of counsel for the defendant, a paper writing, signed or alleged to be signed by the deceased, Gaetano Galizio, which paper was marked as Exhibit A-2 on behalf of the State and was received in evidence as a dying declaration or statement; said statement should not have been admitted in evidence but could only have been used by the witness, William H. Young, by whom it was produced, for the purpose of refreshing his memory; said ruling was erroneous and to the manifest injury of the defendant. 10

9.—Because the court permitted to be introduced in evidence on behalf of the State, against the objections of counsel for the defendant, a paper writing, signed or alleged to be signed by the deceased, Gaetano Galizio, which paper was marked as Exhibit A-2 on behalf of the State and was received in evidence as a dying declaration or statement; said statement was inadmissible because it did not appear that the deceased had any belief in God or in a future state of punishment and reward, or any other religious belief sufficient to admit such dying declaration; said ruling was erroneous and to the manifest injury of the defendant. 20

10.—Because the court overruled the defense of self-defense of the defendant as appears from the following: the defendant in the course of his testimony was relating a conversation that he had with the deceased. The prosecutor for the State objected to the conversation as being irrelevant and immaterial. After a discussion between the prosecutor and counsel for the defendant, the trial judge ruled as follows: "I may as well treat with this matter now as later, because I will have 30

Assignments of Error

10 to deal with it in charging the jury if I do not deal with it now. I will rule out and exclude all testimony offered by the defendant showing threats by the deceased against the defendant and also testimony going to show the violent disposition of the deceased as the aggressor, and I base that conclusion entirely upon the theory that the act of so-called self-defense as I understand it from the offer of counsel was committed while the defendant was attempting to enter through the window of the premises of another where this homicide was committed at three o'clock in the morning, or while he was inside of the premises and on the floor at that time. Under those circumstances it is impossible for the Court to conceive that the doctrine of self-defense applies to such a situation in which defendant clearly was the aggressor. That makes clear the position of the Court, and to that ruling the defendant may

20 take an exception." "Mr. Ward: 'Yes, sir.' "

"The Court: 'Then you may proceed with the rest of the case.' "; said ruling was erroneous and to the manifest injury of the defendant.

11.—Because following the statement of the court and Mr. Ward in the last preceding assignment was: "Mr. Ward: Your Honor will not then permit us to call these witnesses? The Court: No, not on that question. Mr. Ward:

30 Then for the purpose of getting it on the record we might have to call the witnesses. The Court: I don't think it is necessary unless you want to unnecessarily take up the time of the Court and waste your own time. Mr. Ward: No, sir, we do not wish to do that at all. We simply wish to preserve the rights of the defendant. The Court: I am placing the conclusion of the Court as plainly and frankly on the record as I can do it; if there

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is anything I have omitted in that statement that will make your position more clear to the upper Court, I will be glad to amend it. I want to give you the benefit of my views at this time so as to save your time and save you trouble and to save the time of the Court and jury, and at the same time give you the benefit of an exception upon which you can carry the whole question to the upper Court on appeal"; said ruling was erroneous and to the manifest injury of the defendant.

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12.—Because the court in the course of the discussion under which the exceptions were taken as in the last two preceding assignments set forth further ruled that the defendant would have no right to break into the apartment occupied by his wife and the deceased if he had reasonable grounds to believe that they were committing adultery; to which ruling exception was allowed and which said ruling was erroneous and to the manifest injury of the defendant.

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13.—Because the court at the trial of the indictment refused to allow counsel for the defendant to ask the defendant, or to be answered by him, in his direct examination the following question [referring to deceased]: Q. "Do you know whether or not Galizio [referring to deceased] had struck his wife with an axe in Italy?"; said ruling was erroneous and to the manifest injury of the defendant.

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14.—Because the court at the trial of the indictment refused to allow counsel for the defendant to ask the defendant, or to be answered by him, in his direct examination the following question [referring to deceased]: Q. "Do you know whether or not Galizio ever shot his brother?"; said ruling was erroneous and to the manifest injury of the defendant.

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15.—Because the court at the trial of the indictment refused to allow counsel for the defendant to ask the defendant, or to be answered by him, in his direct examination the following question: “Do you know whether or not Galizio was ever convicted of shooting a man by the name of Santoro?”; said ruling was erroneous and to the manifest injury of the defendant.

10 16.—Because the court at the trial of the indictment refused to allow the counsel for the defendant to ask the defendant, or to be answered by him, in his direct examination the following question: Q. “Do you know whether or not Galizio ever attacked Romaro, a man from Philadelphia, whether he attacked him about 15 years ago and hurt him very severely?”; said ruling was erroneous and to the manifest injury of the defendant.

20 17.—Because the court at the trial of the indictment against the objections of the counsel for the defendant permitted the prosecutor for the State to ask of the defendant on cross-examination the following question: Q. “You know you had not any right to go there, and you say you know you did not have any right to speak to her on the street under the agreement between you?” Counsel for the defendant objected to said question; the court overruled said objection, which ruling was erroneous and to the manifest injury of the
30 defendant.

18.—Because the court at the trial of the indictment upon the direct examination of Patrick Cunningham, an attache of the office of the County Clerk of Passaic County, being duly sworn as a witness on behalf of the defendant, and charged with the records of that office, refused to permit the said Patrick Cunningham to testify as to the conviction of Gaetano Galizio, the

Assignments of Error

deceased, or to testify as to the record containing proof of the conviction Gaetano Galizio of a crime; the said Gaetano Galizio being the person who was killed by the defendant; to which ruling counsel for the defendant objected and which objection was overruled; said ruling was erroneous and to the manifest injury of the defendant.

19.—Because, at the trial of the indictment upon the direct examination of John F. Grossi, Clerk of the Recorder's Court of the City of Paterson, and in charge of the records of that court, being duly sworn as a witness on behalf of the defendant and who having testified that he had in his possession records showing the conviction of Gaetano Galizio for assault and battery, the court refused to permit counsel for the defendant to prove such records and such conviction; said ruling was erroneous and to the manifest injury of the defendant. 10 20

20.—Because the court, at the trial of the indictment upon the direct examination of John F. Grossi, Clerk of the Recorder's Court of the City of Paterson, being duly sworn as a witness on behalf of the defendant, refused to permit counsel for the defendant to ask said John F. Grossi as to a certain conversation which took place between the Recorder of the City of Paterson and Gaetano Galizio, the deceased, with reference to the actions of the said Gaetano Galizio towards the wife of the defendant; which said Gaetano Galizio was the person killed by the defendant; said ruling of the court was erroneous and to the manifest injury of the defendant. 30

21.—Because, at the trial of the indictment upon the direct examination of James J. Rose, an attorney at law of New Jersey, being duly sworn

Assignments of Error

as a witness on behalf of the defendant and who had testified that he was present at the trial in the Recorder's Court of the City of Paterson of Gaetano Galizio, thereupon counsel for the defendant asked the witness the following question: Q. "Do you recall at that time what the Recorder said to Gaetano Galizio," the court overruled the question; said ruling was erroneous and to the manifest injury of the defendant.

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22.—Because, at the trial of the indictment upon the direct examination of James J. Rose, an attorney at law of New Jersey, being duly sworn as a witness on behalf of the defendant and who had testified that he was present at the trial in the Recorder's Court of the City of Paterson of Gaetano Galizio, thereupon counsel for the defendant asked the witness the following question: Q. "Do you recall at that time whether or not this man Agnesi complained because of Gaetano Galizio was living with his wife?", the court overruled the question; said ruling was erroneous and to the manifest injury of the defendant.

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23.—Because, at the trial of the indictment upon the direct examination of Joseph A. Furrey, an attorney at law of New Jersey, being duly sworn as a witness on behalf of the defendant and who had testified that he was present at the trial in the Recorder's Court of the City of Paterson of Gaetano Galizio, thereupon counsel for the defendant asked the witness the following question: Q. "And do you know what the Recorder told Galizio?", the court overruled the question; said ruling was erroneous and to the manifest injury of the defendant.

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24.—Because the court, at the trial of the indictment refused to permit counsel for the defendant to ask one Caesare Palito, a witness sworn on be-

Assignments of Error

half of the defendant and who testified as to a conversation between him and Gaetano Galizio wherein Gaetano Galizio told this witness that he had been in adulterous intercourse with the wife of the defendant, or to permit the witness to answer the question, which question was as follows: Q. "Will you tell the court and jury what was said on that occasion?"; said ruling was erroneous and to the manifest injury of the defendant.

25.—Because the court when Rosina De Lorenzo, a witness on behalf of the defendant, was being cross-examined and had been asked the following question: Q. "Or did he used to tell you?" A. "She said that Agnesi had driven his wife out and her husband had beaten her," permitted said answer to stand although the same was hearsay and is not responsive to the question; said ruling was erroneous and to the manifest injury of the defendant.

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26.—Because the court at the trial of the indictment when Tony Levardo, a witness on behalf of the defendant, on direct examination was asked the following question by counsel for the defendant: Q. "Do you remember having a conversation with Galizio and him saying what he would do with Agnesi?" overruled the question; said ruling was erroneous and to the manifest injury of the defendant.

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27.—Because the court at the trial of the indictment when Gilberta Vantura, a witness on behalf of the defendant, on direct examination was asked the following question by counsel for the defendant, with reference to deceased: Q. "Do you know what his reputation was for being a bad and quarrelsome man?", overruled and excluded the question; said ruling was erroneous and to the manifest injury of the defendant.

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Assignments of Error

10 28.—Because the court refused to permit Carmela Ventre, a witness on behalf of the defendant, on direct examination in response to a question by counsel for the defendant to testify as to a conversation had by witness with Mrs. Agnesi, wife of the defendant, said conversation being in the presence of the deceased, Gaetano Galizio; which question counsel for the defendant at the time informed the court was for the purpose of showing threats by the deceased and which question was as follows: Q. "Will you tell the court and jury what was said by Mrs. Agnesi at that time?"; said ruling was erroneous and to the manifest injury of the defendant.

20 29.—Because the court at the trial of the indictment refused to permit Albert Ernest Agnesi, a witness on behalf of the defendant, to testify that he had made a complaint against the deceased Gaetano Galizio before Recorder Young of the City of Paterson; the witness having testified to the fact that he had made the complaint, counsel for the defendant asked him the following question: Q. "For what?"; said question was overruled; said ruling was erroneous and to the manifest injury of the defendant.

30 30.—Because the court at the trial of the indictment allowed John Tracy, a witness on behalf of the State, on rebuttal to testify as to a statement made by defendant to him with regard to the killing of Gaetano Galizio; the defendant not having been asked with reference to said statement on his cross-examination so as to lay a proper foundation therefor, which statement as an admission should have been used on the main case only. The court overruled the objection made by counsel for the defendant to the admission of said testimony. The question was as follows: Q. "Tell us how it

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was taken down, by what method?"; said ruling was erroneous and to the manifest injury of the defendant.

31.—Because the court at the trial of the indictment allowed, in the cross-examination of John Tracy, a witness for the State on rebuttal, to be put in evidence a written statement signed by the defendant with reference to the killing of said Gaetano Galizio; said admission into evidence was objected to by counsel for the defendant on the ground that it appeared from the testimony of said witness that the statement was produced through one Charles Pirola, an Italian interpreter, and said Charles Pirola was not produced as a witness to testify as to the correctness of his interpretation; the objection of the counsel for the defendant was overruled; said ruling was erroneous and to the manifest injury of the defendant.

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32.—Because the court charged the jury as follows: "The defendant attempts to justify his act on one ground, and one ground only, for the reason that the defense which he offered, of self-defense, under these circumstances, I have ruled out of the case because, in the judgment of the Court, as a matter of law, such a defense has no application whatever to the facts in this case and you are not to consider it as an element in the case," which charge was contrary to law and to the evidence in the case and was erroneous and to the manifest injury to the defendant.

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33.—Because the court charged the jury as follows: "So that, if you take his version of this case and consider it as the theory upon which you will decide it, you cannot under any circumstances acquit him, but you must find him guilty of man-

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slaughter at least, the law being, under such circumstances, that where a man finds his wife in the act of adultery with a paramour, and he in the heat of passion and in his excitement takes the life of one or both, he is not guilty of murder in the first degree, but he is guilty of manslaughter," which charge was contrary to law and to the evidence in the case and was erroneous and to the manifest injury of the defendant.

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34.—Because the court charged the jury as follows: "The State is relieved to a great extent of the necessity of proving the actual crime in this case because the defendant admits it. He admits the shooting, he admits the entry through the window and all the other incidents of this crime. His answer to the State's charge and to this indictment is that he is not guilty, because he found his wife in this compromising position and then slew her guilty paramour. That, as I have stated to you, is no excuse for his crime. It palliates his offense, and reduces its enormity from that of first degree to the crime of manslaughter, accepting his own theory as the correct theory of this case and everything that he says about it to be true," which charge was contrary to law and the evidence in the case and was erroneous and to the manifest injury of the defendant.

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35.—Because the court after laying down the elements of murder in the first degree and murder in the second degree with reference to the State's side of the case, charged the jury as follows: "If, on the other hand, you find that the defendant found this boarder and his wife together as he states he did, under those circumstances, and that, in the heat of passion he was so wrought up and exercised that he could not control himself, you may find him guilty of manslaughter," which

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charge was contrary to law and the evidence in the case and was erroneous and to the manifest injury of the defendant.

36.—Because the court charged the jury as follows: “Throughout the entire case, if there be a doubt in your mind as to the quality and degree of this crime on the evidence, a reasonable doubt, give the benefit of that doubt to the defendant, for the reason that under the law, he is entitled to it and must have it. Because the defendant, except to the extent that he has admitted his guilt, stands before you innocent of any higher crime than the one which he himself has described, of taking the life of the man that he found in this compromising position with his wife, which as I stated would be manslaughter,” which charge was contrary to law and the evidence in the case and was erroneous and to the manifest injury of the defendant.

37.—Because the court refused to charge the jury as follows when thereunto requested by counsel for the defendant: “If there is in the mind of the jury a reasonable doubt as to the truth or untruth of any testimony on the part of the State, such doubt must be resolved in favor of the defendant by the rejection of such testimony. If there is a reasonable doubt as to the truth or untruth of any testimony on the part of the defendant, such doubt must be resolved in favor of the defendant by treating such testimony in his favor, as though unquestionably true and correct,” said ruling was erroneous and to the manifest injury of the defendant.

38.—Because the court at the trial of the indictment refused to charge the jury when thereunto requested by counsel for the defendant as follows:

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“If the jury believes from the evidence that the defendant was of a violent or turbulent character, they are to take such evidence into consideration in determining whether or not the defendant acted in self-defense,” said ruling was erroneous and to the manifest injury of the defendant.

10 39.—Because the court at the trial of the indictment refused to charge the jury when thereunto requested by counsel for the defendant as follows: “If it appears that the defendant at the time he inflicted the wound upon the deceased, was acting under a reasonable belief that he was in imminent danger of great bodily harm or death from the attack of the hands of the deceased, and that the defendant believed that it was necessary for him to strike a blow or to perform such other act as to inflict the wound upon the deceased in order to avoid great bodily harm or death, then
20 the wound which was inflicted upon the deceased by the defendant, was justified, and the defendant should be acquitted,” said ruling was erroneous and to the manifest injury of the defendant.

30 40.—Because at the trial of the indictment the court refused to charge the jury as follows: “The belief that the defendant had that he was in danger of bodily harm or death, at the time of the assault upon him, should be viewed by the jury from the standpoint of the defendant at the time the wound was inflicted upon the deceased,” said ruling was erroneous and to the manifest injury of the defendant.

41.—Because at the trial of the indictment the court refused to charge the jury when thereunto requested by the counsel of the defendant as follows: “To justify such a blow and wound as was inflicted upon the deceased by the defendant, the

Assignments of Error

danger to the defendant did not have to be actual, so long as the defendant acted upon a reasonable appearance and belief of danger," said ruling was erroneous and the manifest injury of the defendant.

42.—Because the court at the trial of the indictment refused to charge the jury when thereunto requested by the counsel of the defendant as follows: "If by menaces and threats of the deceased to the defendant, the defendant believed himself to be in danger of great bodily harm or death at the hands of the deceased, the defendant was then justified in flinging the wound upon the deceased," said ruling was erroneous and to the manifest injury of the defendant. 10

43.—Because the court at the trial of the indictment refused to charge the jury when thereunto requested by the counsel of the defendant as follows: "The real intention of the deceased is immaterial, if from his actions the defendant had reasonable ground to apprehend danger of great bodily harm or death at the hands of the deceased," said ruling is erroneous and to the manifest injury of the defendant. 20

44.—Because at the trial of the indictment the court refused to charge the jury when thereunto requested by counsel for the defendant as follows: "Where the homicide occurs under such circumstances that it is doubtful whether the act was committed maliciously or from a well-grounded apprehension or fear or danger of bodily harm or death, testimony showing that the attitude of the deceased before the affray, was violent and threatening, may be considered by the jury in order to determine whether the defendant had reasonable cause to apprehend death or great 30

Assignments of Error

bodily injury"; said ruling was erroneous and to the manifest injury of the defendant.

10 45.—Because at the trial of the indictment the court refused to charge the jury when thereunto requested by counsel for the defendant as follows: "If the deceased was killed while he was attempting murder, or do great bodily harm to defendant, then the defendant is guiltless and must be acquitted"; said ruling was erroneous and to the manifest injury of the defendant.

20 46.—Because at the trial of the indictment the court refused to charge the jury when thereunto requested by counsel for the defendant as follows: "There is no evidence in the case showing that there was any wilful, deliberate and premeditated intent on the part of the defendant to kill the deceased, therefore, the defendant can not be convicted of murder in the first degree"; said ruling was erroneous and to the manifest injury of the defendant.

30 47.—Because at the trial of the indictment the court refused to charge the jury when thereunto requested by counsel for the defendant as follows: "The belief in God and the sense of accountability to Him for false swearing are indispensable to the competency of a witness, and no dying declaration can be received of any person who lacks that belief in God and sense of accountability for false swearing. If, therefore, the jury believe that this deceased did not believe in God and accountability to Him for false swearing, they cannot consider the alleged dying declaration produced here"; said ruling was erroneous and to the manifest injury of the defendant.

48.—Because at the trial of the indictment the court, when requested by counsel for the defend-

Assignments of Error

ant to charge the jury as follows: "The jury may consider the defense of self-defense, and ascertain from the evidence whether or not the defendant committed the act of shooting the deceased, in order to protect himself from great bodily harm or loss of his own life," refused to charge the jury thus in the following language: The Court: 10
 "This rule, while strictly correct as an abstract principle of law, has no application to the facts in this case"; said ruling was erroneous and to the manifest injury of the defendant.

49.—Because the court at the trial of the indictment in its statement to the jury failed to define manslaughter as an element in the crime excepting in connection with the defendant catching the defendant and his wife in the act of adultery. The court put aside all other questions in the case 20
 which might have reduced the crime to manslaughter; said ruling was erroneous and to the manifest injury of the defendant.

50.—Because the court charged the jury as follows: "So that if you take his version of this case and consider it as the theory upon which you will decide it, you cannot under any circumstances acquit him, but you must find him guilty of manslaughter at least."

51.—Because the court in the course of his charge to the jury in stating the law of reasonable doubt, said: "Because the defendant, except to the extent that he has admitted his guilt, stands before you innocent of any higher crime than the one which he himself has described." 30

52.—Because the jury found the defendant guilty of murder in the second degree, whereas by the evidence and law applicable thereto he should have been acquitted.

Assignments of Error

53.—Because the jury found the defendant guilty of murder in the second degree, whereas by the evidence and law applicable thereto he should have been convicted of manslaughter only.

10 54.—Because the court sentenced the defendant to be confined in the State's prison for a term of not more than thirty years and less than twenty years.

55.—Because the Supreme Court in considering the appeal affirmed the judgment of the Passaic Court of Oyer and Terminer; that said judgment should have been reversed.

20 56.—Because for each of the errors hereinabove specifically assigned, all of which were duly presented to the Supreme Court for its consideration, the Supreme Court should have reversed the judgment of the Court of Oyer and Terminer.

For the errors aforesaid, and in the giving of judgment and passing of sentence aforesaid, the said Salvatore Agnesi prays that judgment and sentence be reversed and annulled and for nothing holden, and that he may be restored to all things which he lost by occasion thereof.

WARD & MCGINNIS,

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*Attorneys for and of Counsel
with Plaintiff in Error.*

*Joinder in Error*NEW JERSEY COURT OF ERRORS AND
APPEALS.

THE STATE OF NEW JERSEY,
Defendant in Error,

vs.

SALVATORE AGNESI,
Plaintiff in Error.

In Error.

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Joinder in
Error.

And thereupon the State of New Jersey, defendant in error, by Michael Dunn, its attorney, comes into court and says, that there is no error either in the record and proceedings aforesaid or in the giving of judgment aforesaid, and it prays here, that the court here may proceed to examine, as well the record and proceedings aforesaid, as the matters aforesaid assigned for error, and the judgment aforesaid, in the manner aforesaid, given, may in all things, be affirmed.

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MICHAEL DUNN,

Attorney for Defendant in Error.

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NEW JERSEY SUPREME COURT.

FEBRUARY TERM, 1918.

10	STATE <i>vs.</i> SALVATORE AGNESI	}	Opinion. SWAYZE, J.
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OPINION

Submitted February Term, 1918. Decided
June Term, 1918.

Before JUSTICES SWAYZE, TRENCHARD and
MINTURN.

20 MICHAEL DUNN, for the State.

WARD & MCGINNIS, for Defendant.

30 The prisoner was living in a state of separation from his wife under articles which provided that he would not sue, molest, disturb or trouble any other person whomsoever for receiving, entertaining or harboring her; that he would not without her consent, visit her or knowingly enter any house or place where she should dwell, reside or be, or send or cause to be sent any letter or message to her. The wife and the decedent, as the prisoner knew, were occupying the same apartments which had been rented by the wife. The prisoner says he was afraid of the decedent, who was known to him as a man of violence and had made threats to kill the prisoner. On a Saturday the prisoner bought a revolver because as he says of the decedent's threats. The other essential facts are thus stated by the prisoner:

“Then on Monday night I again saw my wife.

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I used to see her almost every night, and then I thought that my wife wanted me, and I also wanted my wife back, because we were 22 years married and we have property together. I did not know myself what to do. Then on Tuesday I went to work again, always sick, I couldn't work. I couldn't rest and I could not eat because I was always thinking about my wife and my son, and that me and my son did not have no home. On Tuesday I went to work again. On Tuesday night I came home at six o'clock. I couldn't eat when I got in the house, and then I went to a moving picture show, and I came home at nine o'clock, and I sat on the stoop there smoking, and I had a watch and I looked at it, and it was six o'clock, and then after that I looked at the watch again, and I looked again. I laid down in the bed and could not get to sleep because I was always thinking of my wife and son. Then I got up again from the bed and I started to smoke a pipe on the porch. Then I looked at the watch and it was 11 o'clock. Then I went back to bed and I couldn't sleep. I looked at the watch again and it was 12 o'clock. Then I laid down and couldn't get to sleep because I was always thinking about my wife and my son and I could not get to sleep. Then right away I thought what my son had told me, to go to his mother, and to talk to her and say to her that she should come back to me. I was afraid to go there that night because it was 12 o'clock and because I was afraid of Galizio because he was always there in that house. Then I looked at the watch again and it was one o'clock in the morning. Then it came into my head again to go there, and I was afraid to go there; right away then it was one o'clock. I don't know. It must have been my Lord Jesus Christ of the Mother of the Lord that says to me, 'Go there, go there,' but I was afraid.

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It was raining very hard and again it was in my head, 'Go, go.' All at once, I don't know if it was the Devil or the Mother of God that said to me, 'Go, go,' and I took my coat and put it on and put on my shoes without lacing them, and I went. I had the revolver right here. I always carried a
10 revolver because I was afraid of him, because he was going to kill me any place. As I got in the yard, because they lived in the rear, I took my shoes off. I then went into the yard in my stocking feet. Then I saw where the window was where they were living. Then I listened by the window to see if they were sleeping or not. And I took this putty knife and I went to the first window and tried to open it and that was locked. Then I went to the second window and went this
20 way with the putty knife. That window opened. The window opened, not much but a little bit, a little bit at a time. Then I laid down this knife on the ground and I raised the window nice and easy a little bit at a time, and I had always had my ear to the window to listen because if they were awake why then they would have to cut my head off, see, because I cannot go in through the door because the door was locked and I went through the window, I went nice and easy. Then I put my foot into the house first, and then a hand, and I went
30 in. It was dark. There was no light there. I saw a bed there. There was nobody in that bed, in the first room. Then nice and easy I found my way out into the kitchen because the kitchen is near to this room because I never was in that house. I never had been in there before, and I went nice and quietly looking for me way. Then I entered another room. I looked into the dark and I saw a bed. I did not see anything. I looked and I did not see nothing because it was dark in that room. Because I smoke and I carry matches

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in my pocket, I took out a match and lit a match. I lit a match and threw the light like this, and I held it up and then I see Gaetano Galizio and my wife in bed. Gaetano Galizio in bed. He got up right away and he made a motion down this way to take a axe. As he raised the axe of course I don't think, I don't think, I don't know what it is. I shoot, I don't know how many times, one, two, three, four, five times." 10

The trial judge charged that the defense of self-defense had no application to the facts of the case, and that the jury were not to consider it.

The opinion of the Court was delivered by Swayze, *J.*

The principle on which the right of self-defense rests and the limitations of that right have been settled by the decision of the Court of Errors and Appeals in *Brown v. State*, 62 N. J. Law, 666, 702. The Court there said: "The foundation of the right to take life by the way of self-defense is necessity. There must exist a necessity for resorting to violence for self-protection and necessity for using the means that were used to secure the defense of the person. An accused is justified in using force to defend his person only when force is necessary to accomplish that end. If the injury apprehended could be otherwise avoided, the prisoner was bound to avoid the danger without resorting to violence, and even if the circumstances be such as to require the use of force to repel the assault he will be inexcusable if he carried his defense beyond the bounds of necessity. The danger must be immediate, and must be actual or else apprehended on reasonable grounds of which the jury is to judge." Underlying this rule is the assumption that the necessity must not be of the defendant's own creation. It would be contrary to the fundamental principles of the law if a man 20 30

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could justify what would otherwise subject him to legal liability, by his own act. The prisoner was under no necessity of breaking in the apartment occupied by Galizio, and that in the dead of night, after assuring himself that Galizio was asleep. Even if we assume in his favor that the apartment
10 was rented by his wife, and that he had the right to break into that apartment at the hour he did notwithstanding his agreement not to enter any house or place where she should dwell, reside or be, and if we assume further that he supposed Galizio was there and might be caught in the act of adultery, he was under no necessity of breaking in as he did. He confessedly knew Galizio's violent character and the threats made by Galizio against his life, and the illicit relations with his wife. He must have known that his own appearance at that hour armed with a revolver would
20 provoke a combat. His entry at such a time, in such a manner, so armed, was in any aspect of the case an act of aggression. It would of course be too much to say that an aggressor can never justify himself by acting in self-defense, but *prima facie* it is his adversary who has that right. That is particularly so in a case like the present where the situation was such that the decedent probably had the right to kill the prisoner. For
30 it is well settled that a person under a reasonable apprehension of death or great bodily harm may kill his adversary in self-defense. This rule to which the prisoner himself appeals would have justified the decedent. A jury could hardly find otherwise than that the appearance of an armed man with whom he had had differences, in the bedroom of the deceased at that hour of the night and the rousing of the deceased from sleep, was a situation to cause a reasonable apprehension of death or great bodily harm and to justify him in

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slaying the prisoner. There were other circumstances which would have justified the deceased in arresting the prisoner. Section 2 of the Act concerning disorderly persons enacts that any person who shall be apprehended having upon him or her any pick-lock, key, crow, jack, bit or other implement with an intent to break and enter any building shall be deemed and adjudged to be a disorderly person. The prisoner by his own evidence had a putty knife, adapted for prying up a window sash, and commonly used by glaziers for removing the putty that secures panes of glass in place. He had provided himself with it for the purpose of breaking in the apartments where the deceased was shot, and had actually used it for the purpose. He was clearly a disorderly person within the meaning of the act. Section 36 makes it the duty of police officers, and lawful for any other person to apprehend without warrant or process, any disorderly person, and take him before a magistrate. In *Brown vs. State*, 62 N. J. Law, 666, at page 697, Justice Depue called attention to the importance of this statute, which the trial judge had excluded from the consideration of the jury, in order to say that it was not to be excluded. The Court in that case was dealing with the justification of an officer, but, under Section 36 the right of any person is the same as the right of an officer; the difference between the two being that the officer is under a duty to make the arrest. The distinction between the right of an officer and the right of one not an officer, to arrest in case of felony and misdemeanor, considered in the same case, has no application to the case of a disorderly person.

The situation, then, is this: The decedent had the right to slay in self-defense if in reasonable apprehension for his own life, as he must have

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been, and he had the right to arrest the prisoner as a disorderly person. Whatever he did by way of assaulting the prisoner would have been legal unless he used excessive force. The prisoner could not justify resistance to lawful force. In the Brown case the Court said: "If the arrest
10 was a lawful one the officer had the right to use the force necessary to render the arrest effective, and if the prisoner, by his resistance to the arrest, brought violence upon himself, which put his body in danger, that cannot be made justification for killing the officer. The basis of the rule is the lawfulness of the arrest, not the character of the person making it, and the same rule applies to a person other than an officer, when he has the lawful right to arrest. The only question, then, is
20 whether there was any evidence that the decedent used excessive force. It would be superfluous to add anything on this subject since the prisoner was armed with a deadly weapon effective at some distance, the decedent unarmed except, (if the prisoner is to be believed as he must be for the present purpose), with an axe hastily seized as he woke from sleep. The prisoner neither said nor did anything to allay the apprehension which the decedent could not have avoided feeling, nor did he retreat as he might readily have done; he does
30 not even say that the way by which he had entered was not open for retreat, and he had the advantage of a weapon which made it possible for him to "cover" his adversary. We think the trial judge was right in taking the question of self-defense from the jury. We have dealt with the question as presented by the charge rather than as presented by the rulings on evidence for the reason that the remarks made by the judge on the original offer of evidence became harmless when the prisoner, the only possible witness, was

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subsequently permitted to tell his story in full without interruption.

The judge allowed in evidence a dying declaration under circumstances that require some comment. The declaration was made by an Italian who spoke English imperfectly, and was taken down in narrative form by the police magistrate. The magistrate says: "When I asked him questions he would say in English,—some part of it I possibly did not understand and I would have the same question repeated by DeLuccia who would explain to me in Italian what he said." DeLuccia was an interpreter who was not produced as a witness at the trial. The statement as written out by the magistrate was signed by the deceased. A statement so taken is subject to criticism as to its accuracy, but we see no reason why it is not admissible. It is like any other signed statement when it is once established as a dying declaration. The fact that it also contained the magistrate's own statement tending to show that the declarant realized that death was impending does not vitiate the statement of the decedent himself. While these remarks of the magistrate were no evidence of the fact, that was established by proper evidence and the finding of the trial judge on the point is conclusive. *State v. Monich*, 74 N. J. Law, 522. Nor did the prisoner in fact suffer any manifest wrong or injury by the admission of the declaration. In material matters it agreed with the testimony of the prisoner, except in the statement that the prisoner's wife was in another room. This might have been harmful if the defendant was entitled to have the jury consider whether his offense was not reduced to manslaughter. But the rule is not that the offense is always reduced to manslaughter when a husband kills the paramour of his wife, in the act of adul-

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10 tery, but only when the circumstances are such that the husband may be supposed to have acted in a sudden transport of passion, or heat of blood upon a reasonable provocation, and without malice. The provocation must be of such a character and so close upon the act of killing that, for the moment could be considered as not master of his own understanding. If such an interval of time elapsed between the provocation and the act of killing as is reasonably sufficient for reason to resume its sway, the act is not mitigated to manslaughter. 1 Russell on Crimes, 786, *Brown v. State*, *supra*, at pages 710-711, and 713. The rule is not applicable to a case like the present where the husband kills the adulterer deliberately and upon revenge after the fact and sufficient cooling time. 1 Russell, 724. In this case the defendant

20 knew of the adulterous relations as he says, between his wife and the decedent and armed with a deadly weapon, was seeking him out in the hope and expectation of catching him in the act. Rules applicable to conduct due to a transport of passion cannot apply to so deliberate an act.

The objection that there was no proof that the deceased believed in a Supreme Being or in a future state of punishment and reward is unsubstantial. The law is settled for us by what this

30 Court said in *Donnelly v. State*, 26 N. J. Law, 601, 620.

The evidence of threats, so far as it was excluded, was properly excluded; the prisoner sought the decedent notwithstanding his knowledge of the threats. In fact he was allowed to testify to the threats himself.

The trial judge charged the jury that if they took the prisoner's version of the case, they must find him guilty of manslaughter at least. This was favorable to the prisoner if self-defense was

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excluded. The prisoner's own claim was either that he acted in self-defense, or in a transport of passion caused by finding the deceased in bed with the prisoner's wife. The first claim being inadmissible, the second only is to be considered, and that on the prisoner's own claim, merely reduced the crime from murder to manslaughter. The judge might well have told the jury that under the circumstances of this case the grade of crime was not reduced to manslaughter. 10

Let the judgment be affirmed.

Filed June 17, 1918.

ENOCH L. JOHNSON, *Clerk*.

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New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY, <i>Defendant-in-Error,</i> <i>vs.</i> SALVATORE AGNESI, <i>Plaintiff-in-Error.</i>	}	On Appeal From New Jersey Supreme Court.
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BRIEF IN BEHALF OF PLAINTIFF-IN-ERROR

STATEMENT OF FACTS

Defendant was convicted of murder in the second degree. To set aside this conviction he took a writ of error out in the New Jersey Supreme Court and the conviction was affirmed. (See Opinion, page 212, etc., of the State of Case.)

Fifty-six different causes of error are specified for a reversal of the judgment of the Supreme Court and the Passaic Court of Oyer and Terminer. Many of these assignments, however, are to the same point and in substance are: (1) that the trial judge directed the jury to convict the defendant, overruling his defense; (2) the Court overruled the defense of self-defense; (3) an alleged dying statement was admitted, reduced to writing, which statement was produced through an interpreter, the interpreter, however, not being produced as a witness, or the original language spoken by the deceased; (4) that the Court refused to allow evidence to be admitted of the quarrelsome or turbulent character of the deceased; (5) that the Court refused to receive evi-

dence of the threats the deceased had made against the defendant; (6) the Court refused to allow proof of previous convictions for crime, of the deceased; (7) that the Court excluded evidence from which the inference could be drawn that the deceased was living in adultery with the wife of the defendant, notwithstanding that this adulterous intercourse was indirectly and perhaps directly the cause of the killing. In addition to the ruling of the Court on the evidence covering the above points there were many requests to charge which the Court refused to charge.

The defendant was charged with having killed Gaetano Galizio. At the time of the killing, the defendant and his wife were living in a state of separation, but against the wishes of the defendant. Living with her in her apartment was the deceased Galizio. The defendant entered the apartment where his wife was living at about two or three o'clock in the morning and shot Galizio. This was the State's case. Almost the entire defense against this charge was completely overruled. This defense as outlined by counsel for defendant in his opening, which appears in full, and also as attempted to be developed by numerous questions on cross-examination, by statements to the Court by counsel and by production of witnesses for the defendant, whose testimony was overruled, was substantially as follows:

With regard to all of these various rulings of every kind the Court took the stand that inasmuch as the defendant had entered the apartment where his wife was in an unusual way and in an unusual manner (through a window), that he was entitled to no defense. That he would not have been justified in resisting an assault made by deceased upon him in an attempt to kill defendant. That Galizio's previous record and his reputation for quarrelsomeness, his threats against the defendant would have no bearing whatever upon the case. As the result of the Court's various rulings the case went to the jury on the simple question of

what degree of murder the defendant was guilty of and that he might be guilty of manslaughter if the jury believed that he caught the deceased and his wife in adultery, and every other possible defense was overruled.

The defendant and his wife had been living in a state of separation due to the fact that she had been acting in an adulterous manner with the deceased Galizio. The defendant had frequently asked Galizio to leave his wife alone, but without avail. (The defendant's fears appear quite fully set out in the opening made to the jury which appears in the State of Case at page 20.) The defendant, then, was living with his wife. Finally Mrs. Agnesi insisted upon a separation and both parties went to a lawyer's office, and each were represented by counsel, both of whom were produced as witnesses by defendant. The articles of separation were drawn up against the protest of the defendant as these lawyers testified, and he signed them very reluctantly. His wife thereafter occupied the apartments with no member of her family and with the deceased, Galizio, as the sole boarder, and as we claim, living in continuous adultery with her.

This continued for some time and shortly before the killing of Galizio, the deceased, the defendant in an effort to get his wife away from the influence of Galizio asked her to go to Philadelphia with him to live, but she refused to do so. He then continued at the request of his son to live in Paterson, boarding with his sister.

Frequently there were brought to him by old friends, threats that Galizio had made with regard to his intentions of killing the defendant, because of defendant's efforts to have his wife leave Galizio. There can be no question that the defendant loved his wife intensely and the actions of his wife with Galizio and their separation weighed heavily upon his mind.

The Saturday previous to the shooting, which took place on a Monday, there were brought to his

attention further threats by Galizio. As a result of which the defendant purchased a revolver and carried it with him for protection.

On Sunday he went to the military camp where his son, an enlisted man, was doing duty and there, as his son testified, father and son both broke down and suggestion was made by the son that the defendant seek out the mother again.

His story, as told by counsel for the defense in the opening (page 86), described his state of mind at the time of the killing. He had been worrying all day; attempted to sit through a moving picture show performance; was unable to do it. He went to his own home, was unable to sleep and got up finally at about one o'clock in the morning and went to his wife's apartments. He testified, positively, that he had no intention of killing Galizio when he went to his wife's house (page 117, lines 15 to 25) but that he went there for the purpose of making one more effort to get his wife to give up living with Galizio and resume her homelife with him, the defendant.

He got into the house through a window; lighted a match and as he held it up in his hand he saw Galizio and his wife in bed together and saw Galizio raise up and grasp an axe and, as Galizio swung the axe, the defendant shot. (Pages 118 and 119 of State of Case.)

The defendant further attempted to testify at this point that he had known of the deceased, Galizio (who was a married man) having cut his wife's hand with an axe in Italy. That Galizio had shot his brother; that Galizio had been convicted of shooting a man by the name of Santoro and on another occasion attacked and severely injured a man, Romaro, in Philadelphia. All these efforts were, however, thwarted by objections of counsel for the state, which objections were sustained by the trial judge (pages 120 and 121 of State of Case). Following the story as told by the defendant, numerous witnesses were put on the stand for the purpose of proving threats by

the deceased, regarding defendant, acts of adultery with Mrs. Agnesi; his reputation for quarrelsomeness; all of which were overruled as not being a defense; because of these rulings, numerous witnesses who were present in court were not called by the defendant, and those called were not allowed to testify. At the close of the case the jury were instructed to find the defendant guilty, *although no witness was produced who saw the crime committed.*

POINT I.

The Court Had No Power to Direct a Verdict of Conviction of Murder or Manslaughter.

There can be no question that the court did this, in overruling the only defense offered in which an acquittal might have been justified; namely, that he slew the deceased in self-defense, and in directing the jury to convict. The court ruled so frequently and completely on this point that there can be absolutely no question in the matter:

“Mr. Ward: Does Your Honor mean that you will eliminate entirely from the case the question of self-defense?”

The Court: Yes, I don't think there is any self-defense in the case, upon your statement of the facts of the situation.” (P. 102 of State of Case.)

And after argument between counsel and the court, the court made this further statement:

“The Court: The question of self-defense does not enter into the case at all under the facts that you have presented as a defense.” (P. 103 of State of Case.)

Further rulings will be quoted under Point II.

Also in the charge wherein the court stated the following:

“You cannot under any circumstances acquit him, but you must find him guilty of manslaughter at least.”

And even with regard to a conviction for manslaughter, the court limited this only on the single ground that the jury would have to find that the defendant had actually caught his wife in adultery with the deceased; thereby excluding the possibility of manslaughter arising out of the quarrel between the deceased and the defendant from certain angles of which the jury might have been justified in finding the defendant guilty of manslaughter. These rulings of the court were practically a direction for conviction of murder or manslaughter. The court in its charge said:

“So that if you take his version of this case and consider it as the theory upon which you will decide it, you cannot under any circumstances acquit him, but you must find him guilty of manslaughter at least.”

This is against the well settled policy of the law. (See 12 Cyc., page 595, and cases cited to note 15.) Among the cases cited are, *United State v. Taylor*, 11 Fed., 470, syllabus of which is as follows:

“In a criminal case the court cannot direct a verdict of guilty even where the facts are admitted beyond dispute, and the question of guilt or innocence depends wholly upon a question of law which the court must determine.”

“The right to a speedy and public trial by an impartial jury is guaranteed to every one accused of crime by amendment to Article 6

of the Constitution of the United States. It is a right which cannot be waived, and a trial by the court without a jury, even with the consent of the accused is erroneous."

"While the court is the judge of the law and may instruct the jury upon the law, and while it is the duty of the jury to render a general verdict, and thereby to decide on the law as well as the facts."

Chief Justice McCrary said:

"The single question to be determined is whether in such a case as this, a court may direct a verdict of guilty. It is insisted on the part of the government that, the facts being admitted or settled beyond dispute, the question of guilt or innocence depends wholly upon a question of law, which the court must determine, and that, therefore, the court may direct a verdict either way, in accordance with its opinion of the law. This is the view which was taken by the court below. In so holding, the learned district judge was, no doubt, largely influenced by the ruling of Mr. Justice Hunt in the case of *J. S. v. Anthony*, 11 Blatch., 200. I find, however, upon an examination of the subject, that, with this single exception, the authorities are, with entire unanimity, against the right of a court in a criminal case to direct a verdict of guilty."

"The constitution guarantees to every accused person 'the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed.' Sixth amendment. This is a right which cannot be waived, and it has been frequently held that the trial of a criminal case before the court by the prisoner's consent is erroneous. (*State v. Mann*, 27 Conn., 281.)

"It is very difficult to see upon what prin-

ciple it can be maintained that an accused person has had a trial by an impartial jury, within the meaning of the constitution, in a case where the court has directed the jury, without deliberation, to find him guilty. It would seem that such a trial is, in substance and effect, a trial by the court quite as much as in a case where a jury is waived by consent of the accused.

“The constitution does not deal with the form, but with the substance, the essence, of the trial, and therefore requires a submission of the case to the jury for their consideration and decision upon it. There can, within the meaning of the constitution, be no trial of a cause by a jury unless the jury deliberates upon and determines it.

“It is doubtless true that, in a certain sense and to a limited extent, this doctrine makes the jury the judges in criminal cases, of both law and fact; but this is the necessary result of a jury system, so long as the absolute right of the jury to find a general verdict exists, for a general verdict necessarily covers both the law and the fact, and embodies a decision based upon growing out of both.

“It has accordingly long been well settled that, while the court is the judge of the law and may instruct the jury upon the law, and while it is the duty of the jury to receive the law from the court, it is still within the power of the jury to render a general verdict, and thereby to decide on the law as well as the facts. It has never, to my knowledge, been claimed that if the jury disregard the law as laid down by the court, and render a general verdict of not guilty, the court can set it aside; and if this cannot be done by an order after verdict, how can the court do substantially the same thing by an instruction before verdict? The action of the court is in effect, the same in either case; it is in effect a de-

cision by the court upon the law and facts, that the accused is guilty. The court must determine both the fact and the law, whether it directs a verdict of guilty or sets aside a verdict of not guilty. It may be going too far to say broadly that the jury have a right to disregard the instructions of the court upon questions of law, although many courts have gone to this extent; but it is quite clear that the right to render a general verdict includes the power to decide both law and fact, and therefore necessarily the power to decide independently of the court."

In view of this, courts have usually gone no further than to say to the jury that while they may, by general verdict, determine both the law and facts, it is their duty to believe the law as laid down by the Court. In the case of *U. S. vs. Wilson*, 1 Bladw., 108, the court, by Mr. Justice Baldwin, in charging the jury, commented upon the subject as follows:

"In repeating to you what was said on a former occasion to another jury, that you have the power to decide on the law as well as the facts of this case, and are not bound to find according to our opinion of the law, we feel ourselves constrained to make some explanations then not deemed necessary but now called for from the course of the defense.

"You may find a verdict of guilty or not guilty, as you think proper, or may find the facts specially and leave the guilt or innocence of the prisoner to the judgment of the court. If your verdict acquits the prisoner, we cannot grant a new trial, however much we may differ with you as to the law which governs the case, and in this respect a jury are the judges of the law, if they choose to become so. Their judgment is final, not because they settle the law, but because they

either think it not applicable, or do not choose to apply it to the case.

“But if a jury find a prisoner guilty against the opinion of the court on the law of the case, a new trial will be granted. No court will pronounce a judgment on a prisoner against what they believe to be the law. On an acquittal there is no judgment; the court does not act, and cannot judge, there remaining nothing to act upon.

“This, then, you will understand to be what is meant by your power to determine upon the law; but you will still bear in mind that it is a very old, sound, and valuable maxim in law that the court answers to questions of law, and the jury to facts. Every day’s experience evinces the wisdom of this rule.”

That this charge presents the true doctrine upon the subject will be apparent from an examination of the following authorities, all of which sustain it, and some of which go even beyond it, and declare that the jury are the exclusive judges of both law and fact in a criminal case. Several of them are exactly in point, holding that a direction to the jury to convict is erroneous, notwithstanding overwhelming evidence of guilt. *U. S. v. Battiste*, 2 Sumn., 243; *Com. v. Porter*, 10 Metc., 262; *Com. v. Van Tuyl*, 1 Metc. (Ky.), 1; *U. S. vs. Stockwell*, 4 Cranch, C. C., 671; *Stetinius v. U. S.*, 5 Cranch, C. C., 573; *Montee vs. Com.*, 3 J. J. Marsh, 132; *Sims v. State*, 43 Atla., 33; *U. S. vs. Hodges*, 2 Wheeler, Crim. Cas., 477; *U. S. vs. Wilson*, Baldw., 78; *U. S. v. Fenwick*, 5 Cranch, C. C., 562; *U. S. v. Greathouse*, 2 Abb. (U. S.), 364; 4 Bl. Comm., 361; *Tucker v. State*, 57 Ga., 503; *Huffman v. State*, 29 Ala., 40; *Perkins v. State*, 50 Ala., 154.

The rule is thus stated in *Com. v. Tugl*:

“The jury must derive a knowledge of the facts from the witnesses, and of the law from the court. They have, however, to pass upon both, and by making an application of the law to the facts of the case, decides whether the offense charged in the indictment has been committed. In this sense only are they the judges of the law of the case.”

Howell *vs.* People, 5 Hun (N. Y.), 620, the syllabus reads:

“In criminal cases, where the accused has plead not guilty, the court has no power to direct the jury to bring in a verdict of guilty.”

In this case Learned, P. J., in his opinion said:

“We think it was error for the court to direct a verdict of guilty. The defendants were entitled to a jury trial. And it is for the public interest that this right should be preserved. (The People *v.* Cancemi, 18 N. Y., 128.) The right to trial by a jury means that the persons indicted are entitled to have the question of their guilt passed upon by the jury. It does not mean that the court is to decide that question, and the jury are only to utter the verdict of the court. It is true that the court may direct, and in a proper case ought to direct, a verdict of acquittal. (The People *v.* Bennett, 49 N. Y., 137; Duffy *v.* The People, 26 *id.*, 588.) Of this the prisoner cannot complain. And the State has no right to put him to the peril of a trial, when its own court says that there is no sufficient evidence of his guilt. But to direct his acquittal is one thing, to direct his conviction, is another; as any prisoner on trial would know. Thus it is said that the court may direct a verdict of acquittal, because, if the

defendant were convicted by the jury, the court would have the power to grant a new trial, if the verdict were against evidence. (United States *v.* Fullerton, 7 Blatch., C. C., 177.) But if the jury should acquit, could the court grant the people a new trial, and put the prisoner in jeopardy again? The very power, then, of granting a new trial, which, by implication, is said to authorize a direction to acquit, does not exist in the case of an acquittal by a jury. No implication, then, authorizes a direction to convict.

“So it is said that the court is the judge of the law, and the jury of the fact; that is, it is the duty of the jury ‘to be governed by the instructions of the court as to all legal questions involved in such (general) verdicts. They have the power to do otherwise, but the exercise of such power cannot be regarded as rightful, although the law has provided no means, in criminal cases, of reviewing their decisions, whether of law or fact.’ (Duffy *v.* People, *ut supra.*)

“In the present case, the court might have said to the jury: If you find that the prisoners did so and so, it will be your duty to convict them. But even then, if the jury had disregarded such instructions, and had acquitted, that would have been a matter for their consciences. It is better that, in some rare case, a jury should violate their duty and acquit a prisoner, unquestionably guilty, than that the power to compel a conviction should be in the hands of the courts. Thus, even before the passage of the libel bill, and when the courts were asserting, in the strongest manner, their right to decide questions of law in criminal prosecutions for libel, Lord Mansfield said, in the Dean of St. Asaph’s Case: ‘It is the duty of the judge, in all cases of general justice, to tell the jury how to do right, though they have it in their power to

do wrong, which is a matter entirely between God and their own consciences.' (21 State Trials, 1040.) Such language could not have been used, if that great judge had supposed that the court could not only tell the jury how to do right but could compel them to render such verdict as the court chose."

See also cases cited in 13 Am. R., 649; 6 Cranch, 562.

The principle of this seems to be recognized in this state in the case of *The State v. Pulley*, 82 N. J. L., 579, 583 (Errors and Appeal), where the court pointed out that the language used by the judge was merely stating an impression of the mind and that it was

"not an attempt to control them in the exercise of their function. It is a declaration of what, in the opinion of the judge, their verdict ought to declare, under the evidence, in case of a conviction; not what it must declare as a matter of law."

The Supreme Court did not touch upon this point in its opinion, so that so far as the court is concerned there is absolutely no pronouncement whatever upon the subject.

POINT II.

The Court Overruled the Defense of the Self-Defense.

Under Point One, we have shown to some extent, where the court overruled the defense of self-defense. In addition to the quotations from the State of Case in Point One, there also appears the following, after counsel for defendant had opened:

“The question of self-defense does not enter into the case at all under the facts that you have presented as his defense.”

It will be observed that the court based this ruling on the facts as the counsel for the defendant presented as his proposed defense. That is to say, *that if the defendant upon entering his wife's apartment and finding her committing adultery was attacked by the paramour of his wife with an axe, he was not justified in defending himself.*

The court did not indicate what he could have done. Presumably the deceased could have hacked the defendant to pieces, and be guiltless of any crime before the law. Applicable is *State vs. Stiltz*, 97 Mo., 20, where the court held:

“The evidence showed that the defendant and deceased had had a quarrel, and that deceased was advancing on defendant in a threatening manner with a stone in his hand when defendant shot him. Held, that an instruction that if defendant brought on the difficulty terminating in the homicide by his own wilful and unlawful act, or of his own free will and inclination, he could not set up the plea of self-defense, no matter how imminent is his peril, is erroneous.”

The assignments of errors which specifically bring this before the court are numbers 50, wherein the court charged the jury as follows:

“So that if you take his version of this case and consider it as the theory upon which you will decide it, you cannot under any circumstances acquit him, but you must find him guilty of manslaughter at least.”

[Note: Even the statement concerning manslaughter was afterwards qualified and limited.]

Also numbers 10, 11, 12, 32, 33, 34, 36, 38, 39, 40, 41, 42, 43, 44, 45, 48, 49, 50 and 51.

The only attempt on the part of the court to justify its position in overruling the defense was that inasmuch as his wife was living apart from him under articles of separation, that, therefore, under no circumstances had he a right to visit her without an express invitation from her. It must be borne in mind that the evidence of the defendant and also the statement of counsel in opening, on which opening some of the rulings were made, was that the defendant was going to his wife for the purpose of persuading her to give up her adulterous conduct and to resume relations with him, the defendant. The Court's language on the subject is as follows:

"I certainly will tell the jury that he had no right in this house. I might as well say it now as say it later to the jury."

And again:

"The Court: This man was living separate and apart from his wife, that is admitted; his wife had rented this home and the home was hers. What gave him the right to go there through the window to that home which was hers, at that hour of the morning?" (Page 95, lines 1 to 5, of State of Case.)

"Mr. Ward: A husband cannot be a trespasser upon the property of his wife even though not living together."

"The Court: Then a husband may violate the law by breaking and entering the wife's separate domicile?"

"Mr. Ward: Yes." (Page 95, lines 5 to

15, of State of Case.)

And again on page 99 of State of Case:

“Mr. McGinnis: He has a right to go wherever his wife is, if he wants to.

“The Court: Under those circumstances I don't think he had, at that hour in the morning.”

Then followed a number of rulings of the court to which exception were taken.

“Mr. Ward: Does your Honor mean that you will eliminate entirely from the case the question of self-defense?”

“The Court: Yes. *I don't think there is any self-defense in the case, upon your statement of the facts of the situation.*” (Page 102 of State of Case.)

The court from these rulings seemed to take the position that the husband had no right on his wife's premises. That, in fact, he was a trespasser. He had no right to defend himself under any circumstances from a murderous attack. Upon this point our contention is (I) that he could not be a trespasser upon his wife's property; (II) irrespective of being a trespasser he could under the circumstances defend *his life from a murderous attack.*

(I)—A HUSBAND CANNOT BE A TRESPASSER UPON HIS WIFE'S PREMISES.

“Owing to the common-law doctrine of identity of husband and wife, neither can, in the absence of statute, maintain an action in tort against the other. This rule applies to injuries both to person and to property.”

“Common-law crimes against the property of another such as larceny and arson, cannot be committed by husband or wife against the other, owing to the doctrine that husband and wife are one.”

(21 Cyc., Page 1303.)

In a note to the above is the following:

“It was not intended to declare that her property should be so separate that her husband could be liable in trespass or trover * * * or using it without her consent.”

Walker v. Reamy, 36 Pa. St., 410, 414.

A further note reads as follows:

“A wife stealing in a building owned by her husband is not liable to the punishment prescribed in Mass. St. (1851) Com. v. Hartnett, 3 Gray (Mass.), 450.”

To the same effect is Lemon v. Simmons, 57 L. J. Q. B., 260, 36 Wkly. Rep., and Lamphier v. State, 70 Ind., 317, both dealing with a husband and wife living apart, and the wife taking money belonging to her husband. Therefore, where one has the right to be, there has the other also.

A most illuminating case on the subject is the State of North Carolina vs. Jones, 61 L. R. A., page 777. In that case the husband was living apart from his wife due to his adulterous conduct. He entered her house against her consent. The syl. in that case is:

“A man cannot be prosecuted for criminal trespass for entering upon his wife’s land, with intent to make his residence there, although she has left him and removed from the premises upon good grounds for believing that he has been guilty of adultery and has

forbidden him again to enter upon them, and the Constitution provides that her property shall be and remain her sole and separate estate."

In the opinion of the Court is the following:

"The wife of the defendant, who was the owner of the premises on which they resided up to November, 1892, left on that day, and has remained off ever since, having good grounds for believing that the defendant had been for some time living in adultery with a woman in the neighborhood. She had, before she left her home and he refused to do so. The defendant urged upon the defendant to leave her premises, that she might live there alone, and he refused to do so. The defendant had been living on the land all the while, although, shortly after having left herself, she ordered the defendant to leave, and not to enter again. Upon his frequent ingress and egress and refusal to leave, a warrant was issued for entering upon the land after being forbidden. He was found guilty in a court of justice of the peace, and fined. From that judgment he appealed to the superior court. The above facts were found by a special verdict in the superior court, and upon them the court adjudged that the defendant was not guilty.

"We can see no error in the judgment. Notwithstanding the fact that the wife may have good grounds to suspect the defendant husband of immoral conduct, they are still, in the eye of the law, husband and wife, and there has been no separation by a decree of a divorce, a *mensa et thoro*. This case presents the novel feature of a wife seeking a judicial separation from her husband by the criminal action of trespass. In *Manning v. Manning*, 79 N. C., 293, 28 Am. Rep., 324, the husband

and wife occupied the same house and farm, the property of the wife, and the action by the wife against her husband was an action of ejectment. He had taken possession of the property, was using it as his own, and had been appropriating the rents and profits to his own use, without applying part of the same to the wife's comfort and support. This court held that the wife was entitled to an order for the possession of the property, but that the husband could not be ejected from the premises, for that was "a proposition fraught, as I conceive, with the most dangerous consequences to society, to wit, that a wife may, under the forms and with the sanction of law, at her own will, and without cause, eject her husband from her dwelling and society because the house is her separate property. I can never agree that either husband or wife can, without committing those offenses which the law designates as causes of divorce or separation, invoke the aid of the courts to render a judgment, the unavoidable consequences of which would be a separation of man and wife. Nothing less than an express and positive statute to that effect can control or destroy that highest of all the obligations imposed in the marriage relation,—that man and wife shall live together. Any decision of the courts, the direct or incidental result of which is to destroy the sanctity of marriage in that particular, can but weaken and undermine the surest foundation upon which the structure of society, and, through it, or political institutions, rest and command our confidence." The court further said: "By the matrimonial contract the husband and wife are to live together, and the law, divine as well as human, has, whether wisely or unwisely, made him the ruler of the household; and the well understood, and well defined legal duties, relations and obligations of

the marriage compact cannot be abridged or changed at the will of either, or otherwise or for other causes than are prescribed in the statute, in relation to divorce and alimony." In that case the parties were occupying together the premises; but does the fact in the present case that the wife has abandoned her husband and their home, and made her residence elsewhere, alter the principle involved in the case from which we have just quoted? Are not the purposes and effect of the present action, if successful, the separation of the husband and wife, and the destruction of the home relations? *Can it be that a wife may, whenever she sees fit, leave her home, and take up her residence in another place, refuse the society to her husband, and indict him as a trespasser if he puts his foot upon the wife's abandoned property, the place he has made his home? Have we reached that stage of social progress when the sacred relation of husband and wife and the hallowed influences of the home are converted into mere traditions, without power to influence, and dreams instead of relations? It would seem so to us if we were to hold that the indictment in this case was lawful and proper."*

(61 L. R. A., page 778.)

The trial court seemed to think that some different rule applied, however, where the husband and wife were living in a state of separation. To this we answer:

(a) He was going there, as he states, and the jury had a right to believe, for the purposes of inducing his wife to resume marital relations with him. This was lawful and proper.

(b) He was going there, as he states, and the jury had a right to believe, for the purpose of in-

ducing his wife to refrain from committing the crime of adultery. This was lawful and proper.

Urging his wife to cease to live apart under these written articles of agreement and resume relations with him was an entirely commendable act on his part. Articles of separation are not looked upon with favor by the court. The case of *Aspinwall vs. Aspinwall*, 49 N. J. E., 304, is in point with our contention.

“The doctrine that a court of equity will not aid to carry into effect an agreed separation between married persons has always been regarded as the law of this State. The doctrine was considered as settled law more than a half century ago, for, prior to the year 1831, Governor Williamson, sitting as chancellor, dealing with this subject, in the case of *Meloney v. Meloney*, thus strongly expresses his conviction: ‘I am clearly of the opinion that the agreement between the parties to live in a state of separation cannot be recognized in this court as valid, and that such agreement is a direct contravention of the marriage contract. It is contrary to sound policy as well as morality that the parties who have entered into the marriage state should be permitted to separate, and agree that they will live in a state of separation, and free from the obligations imposed on them by the marriage. The marriage contract cannot be annulled and cancelled, nor the parties absolved from their obligations under it by their private agreement.’ Sax., 391.

“In the case of *Emery v. Neighbour*, 2 Halst., 151, we find a similar expression of this equitable rule, which is reiterated in *Calame v. Calame*, 10 C. E. Gr., 552.”

It follows, therefore, that the defendant had a perfectly justifiable right to enter his wife's apartments. *It might be that he used an unusual hour and method, but those were questions for the consideration of the jury.* Also the question as to what the decedent might have thought at the entry of the defendant under the circumstances and time was for the jury. But the legal right, nevertheless, permitted him to enter. If he entered lawfully even though he knew that a struggle or conflict of arms might result and even though he might think it would be necessary for him to strike the first blow, nevertheless, his right to enter would remain and with it his right to defend himself.

The following is a statement of the law on this subject:

“The exercise of a legal right in a lawful manner is not such an act of provocation as will deprive the person exercising the same of his right of self-defense, although having reason to believe that it will result in a struggle or conflict, he arms or otherwise prepares himself accordingly; or although by exercising such rights he puts himself in the way of being attacked, or even though he strikes the first blow, if this is necessary to secure his personal safety.”

(21 Cyc., page 810.)

See also notes 52-58 to the foregoing, under

which is cited numerous cases.

To restate the rule, therefore, if it should have been applied by the court, the defendant could not be a trespasser upon his wife's premises and therefore he had a right to enter, and having a right to enter, he had a right to defend himself from attack from whatever quarter it might come and without the necessity of retreat. And finally,

let it not be forgotten that the evidence of the defendant and the opening of his counsel was that his presence in those apartments was because of a commendable intention on his part to persuade his wife to live virtuously and to resume her relations with him.

(II.)—CONCEDING FOR ARGUMENT, THAT THE DEFENDANT WAS A TRESPASSER IN ENTERING HIS WIFE'S APARTMENTS, NEVERTHELESS, HE HAD A RIGHT TO DEFEND HIMSELF FROM A MURDEROUS ATTACK.

The general rule, undoubtedly, is that where the aggressor produces a difficulty in the course of which the necessity arises to kill, the aggressor is precluded from invoking the doctrine of self-defense, 21 Cyc., 805. But in the very same work and in the same general discussion it is stated that the killing of a wife or her paramour by the husband constituted an exception on the question of aggression. Bear in mind that we are now dealing with the doctrine of self-defense, not with the question of reducing the degree of the crime to manslaughter because of the fact that the defendant caught his wife in adultery with the deceased. The rule with regard to self-defense under the circumstances relied upon by the defendant is as follows:

“The doctrine as to aggression in respect generally to that of self-defense should be relaxed where a husband kills his wife or her paramour in self-defense in a struggle ensuing from his attack upon her and her paramour in or immediately after the act of adultery.”

(21 Cyc., page 810.)

Now, if the jury had the right to consider, as the court did give them the right, whether or not

the defendant caught his wife and the deceased in adultery, or in such a situation as to have the appearance of adulterous conduct, then the jury had the further right to consider that if there was adulterous conduct between the parties, that the fact that the defendant might have been the aggressor in coming in the premises at the time and under the circumstances he did, nevertheless was justified in killing in self-defense.

“A mere trespass on the property of another is not such an act of aggression or provocation as will preclude the trespasser from killing in self-defense.”

(21 Cyc., 809.)

“Although he provokes the combat or produces the occasion by his own wrongful acts, yet, if those acts are not clearly calculated or intended to have such effect, his right of self-defense will not be thereby compromised.”

(21 Cyc., pages 808, 809.)

In note 43 to the above quotation, appears the following:

“If the act, although wrongful, be not illegal and be not intended to provoke a difficulty nor reasonably intended—to produce the occasion and necessity for taking life, and the party kills to save himself, the right of self-defense remains perfect and complete, and he is justified and guilty of no offense.” *Franklin v. State*, 34 Texas Cr., 286, 30 S. W., 231. Compare *Thornton v. State* (Tex. Cr. App., 1901), 65 S. W., 1105.

Also:

“The accused must willingly and know-

ingly use language or do acts reasonably calculated to lead to an affray or deadly conflict, and unless the acts are clearly calculated or intended to have such an effect, the right of self-defense is not compromised, *even though the party armed himself and went there for the purpose of a difficulty.*" *Shannon v. State*, 35 Tex. Cr., 2, 28 S. W., 687, 60 Am. St. Rep., 17; *Beard v. State* (Tex. Cr. App., 1904), 81 S. W., 33.

In considering the above quoted law when applying it to this case, it must be borne in mind that even conceding, as we have for the purpose of argument, that he was a trespasser, nevertheless, his trespass would be only one in a technical sense. His real object according to his story, which the jury should have the right to consider, was that he went there for the purpose of resuming domestic relations with his wife. That he took this revolver with him because of threats made against him by the deceased, Galizio. That he was not visiting that house for the purpose of seeking Galizio or for any discussion or interview with him. If the defendant's story is to be believed, then, his object in visiting his wife was a peaceable one; it was a law abiding one; it was a commendable one, commended by both the divine law and the law of the land that a husband and wife should live together. True, it may be said that his method of entry was unusual; that the hour of his visit was unusual. It may be said that his story was absolutely false in every respect as to the intention of his visit, but all of these questions were questions of fact for the jury. If they found that his story in this respect was untrue, then his self-defense story might fall, but on the other hand if they were to believe his story, they would then believe a story of a perfectly lawful visit, actuated by good intentions, in the course of which visit the defendant was set upon murderously by the deceased.

Section 110 of the Crimes Act provides that:

“Any person who shall kill another by misadventure, or in his or her own defense, or in the defense of his or her husband, wife, parent, child, brother, sister, master, mistress, or servant, or who shall kill any person, attempting to commit arson, burglary, murder, rape, robbery or sodomy, shall be guiltless and totally acquitted and discharged.”

(Compiled Statute, Vol. 2, p. 1781.)

The defendant, however, was not attempting to commit arson, burglary, murder, rape, robbery or sodomy, hence the deceased was not justified in committing the assault which he did. It might be that Galizio might have thought that a burglar was actually in the house, but he could hardly have thought so in view of the fact that the defendant lighted a match and held it up, and in any event, it was for the jury to say what was the appearance of things and what was the state of mind of the deceased.

In the case of the State *vs.* Zellers, 7 N. J. L., 220, Chief Justice Kirkpatrick in his charge to the jury said that the deceased was actually in possession of his own land and that the defendant was in fact a trespasser. Yet the court said:

“If it should be believed that the prisoner did not shoot off the gun intentionally, but that the deceased closed in upon him, seized the gun, and that it went off accidentally in the struggle, the prisoner is not guilty at all. But if you think that was not the case, but believe the principal witness, and that *he fired the gun intentionally*, he must be guilty either of *homicide in self-defense*, manslaughter or murder.” (Page 23.)

Observe that the court allowed the jury to consider the question of self-defense even if they believed that the gun was fired intentionally and that this deceased was on his own land but that the defendant was a trespasser. This, the trial judge, in the case at bar, did not allow. In the Zellers case the Chief Justice also charged the jury with regard to manslaughter upon the foregoing facts. This, the trial judge in the case at bar did not do. The trial judge in the case at bar assumed that because of the manner in which the defendant entered the house and the hour, the decedent as a matter of law had the right to consider him a burglar. But this was a question for the jury.

“The reasonableness of defendant’s apprehension that the deceased was about to commit a felony is a question for the jury.”
State v. Harris, 46 N. C. (1 Jones, Law), 190.

Whether the defendant was about to commit a crime, or merely a trespass, and what his state of mind was under the circumstances, was clearly for the jury, and involved the defendant’s right of self-defense. If defendant was not committing a felony, decedent’s attack was unlawful, and defendant therein had the right to repel it, and be guiltless if death ensued. On the other hand if the defendant was committing a felony (impossible under the facts), then deceased would be justified in repelling the assault of defendant, and if death ensued, the defendant would be responsible therefor, and could not invoke the theory of self-defense. The question, however, to be decided would be a question of fact for the jury to ascertain what the defendant’s intentions were.

In “Criminal Defenses,” Vol. 1, page 71, appears the case of *Harrison v. The State*, 24 Ala., 67, wherein the court held:

“If one man deliberately kill another to prevent a mere trespass upon property, whether such trespass could or could not be otherwise prevented, it is murder.”

In the same work appears the case of the State *vs.* Kennedy, Vol. 1, page 106. In this case the Court held:

“A man may repel force by force in the defense of his person, habitation or property, against one who manifestly intends, by violence or surprise, to commit a felony against either; and if, in making such defense he takes life, the killing is justifiable. But if the assault is not felonious, and there is no reason for a belief on the part of the person assailed, that the danger is actual and imminent, he is not justified in using a deadly weapon in a deadly manner.”

The question, therefore, would be whether or not the defendant if he made the trespass had a felonious intent or not, and to the extent of that intent would rest the right of the deceased to use a deadly weapon to repel the trespass. If he had no right to use the deadly weapon to repel the mere trespass, his assault was murderous, and the defendant was justified in repelling it. But, what the intention of the defendant was and if he was committing a trespass, was a question for the jury, and therein was involved the right of self-defense.

In the last above cited one, the Court said:

“Under the statute I may slay a robber or a burglar in my dwelling in the night time, as I might at common law. But if one attempt to commit an ordinary assault and battery upon me, or take my goods, or cut down my timber, as a trespasser merely, or is simply

attempting to pick my pocket (1 Hale, 488) though I may justify beating him, so as to make him desist, and sufficiently to accomplish the purpose, yet if I make use of a deadly weapon and slay him, I will not stand justified in the eyes of the law. 1 East P. C., 272, sec. 44; 1 Hale, 485-486; 1 Hawk. P. C., ch. 28, sec. 23; *Regina v. Smith*, 8 C. and P., 160, per Bosanquet, J.; *Wild's case*, 2 Lew. C. C., 214."

In all of the cases cited there is some reference to defending one's habitation. It must be further borne in mind that this was not the habitation of the deceased. In this connection it cannot be said that the deceased stood in a position of a man defending his wife and family, or of a servant defending his master. If he was living in concubinage with this woman, the law on this subject is plain.

"The fact that a man and woman live together in a relation of concubinage does not, of itself, justify the man in taking life in self-defense of the person of the woman; and it is not error, upon evidence of such fact, to instruct the jury that the law of justification does not apply."

Parker vs. State, 31 Tex., 132, Am. Digest, p. 314, Vol. 26.

"Concubinage of defendant and one Mollie Harris was established. Deceased a man named Green attacked Mollie Harris and was shot by the defendant. Trial Court refused to charge that such a killing would be a defense of person or property, as there was no lawful relationship of the parties. *Parker vs. Harris* on appeal—no error."

See also Carrol vs. State, 23 Ala., 58, Am. Dec., 282.

We also call the Court's attention to the following cases:

"A verdict of guilty of manslaughter will be reversed for error on the part of the court in failing to give the defendant in charge the full benefit of the law, of self-defense." *Munday v. Commonwealth*, 81 Ky., 233.

Sec. 614, page 1005, of Am. Digest, Vol. 26.

"A homicide, committed by a son, in defense of his father, will be excused only when the same act by the father would have been justifiable." *State vs. Brittain*, 89 N. C., 481.

Am. Digest, Vol. 26, page 314.

"If the trespass is forcible, the owner may resist the entry, but may not kill the assailant, unless it be necessary to prevent a felonious destruction of property, or to defend himself against loss of life or great bodily harm." *Carrol v. State*, 23 Ala., 28, 58 Am. Dec., 282.

Am. Digest, Vol. 26, page 131.

In the case of *Munday vs. Commonwealth*, 81 Ky., 238 (above cited), the court held:

"The rule is established, that if the defendant acts upon reasonable grounds he is to be excused, although it may turn out that the appearances were false, and there was in fact neither design to do him serious injury nor danger that it would be done." (*Holloway vs. Comm.*, 11 Bush, 344.)

"The instruction left it to the jury to say whether it appeared to *them* necessary for

appellant to do the shooting in order to protect himself. While the instruction should have gone to the facts as they appeared to appellant." (P. 239 of Opinion.)

Syl. 3.

"When self-defense is relied upon, the proper inquiry always is, what was the danger as it appeared to defendant, and not what the danger actually was in the judgment of the jury."

Syl. 4.

"The rule is, that if the defendant acted upon reasonable ground, he is excused, although appearances were false."

From any angle of the case the court should not have overruled the defense of self-defense. Such a ruling in effect was a declaration by the Court that the defendant was guilty, and took from the jury the sole right of deciding defendant's guilt or innocence. The following cases are in point:

"As under a plea of not guilty, any number of defenses may be made, whether consistent or not, on a trial for murder evidence of previous threats, made by deceased against defendant, should be admitted, and instructions covering the law of self-defense given though defendant testified that homicide was accidental and that while he feared deceased, who was advancing on him at the time, he did not shoot him for that reason and had no cause to shoot him." *State v. Stephens*, 96 Mo., 637, 10 S. W., 172.

"The evidence showed that the defendant and deceased had had a quarrel, and that deceased was advancing on defendant in a threatening manner with a stone in his hand

when defendant shot him. *Held, that an instruction that if defendant brought on the difficulty terminating in the homicide by his own wilful and unlawful act, or of his own free will and inclination, he could not set up the plea of self-defense, no matter how imminent is his peril is erroneous.*" *State v. Stiltz*, 97 Mo., 20, 10 S. W., 614.

Am. Digest, Sec. 622, Vol. 26.

All of the foregoing is based upon the theory that the defendant was a trespasser, which of course we deny. But on the assumption that he was, what was the object of his trespass, was it lawful or unlawful? What did Galizio think when he saw the defendant, Agnesi, if he saw him? These are all questions that a jury and not the court should decide.

A CONSIDERATION OF THE SUPREME COURT'S OPINION ON THIS POINT.

In the Supreme Court the question of self-defense was dealt with by a quotation from the case of *Brown v. State*, 62 N. J. L., p. 666, to which so far as stating an abstract principle of law, counsel can offer no criticism, nor with what immediately follows in the opinion. (See opinion, P. 215, L. 20 to bottom, and P. 216.)

In a sense the Supreme Court falls into the same error the trial judge did, viz., that of assuming as being without contradiction certain disputed facts, also in placing its own construction upon facts from which the jury should have been entitled to draw its own inferences. Thus in the opinion it is stated:

"The prisoner was under no necessity of breaking in the apartment occupied by Galizio, and that in the dead of night, after

assuring himself that Galizio was asleep.”

(P. 216, L. 2-5.)

Nowhere in the evidence does it appear that the defendant had broken into to see Galizio, and where does it appear in the evidence that the defendant first ascertained that Galizio was asleep? Yet, for the purpose of applying certain legal principles these are assumed to be uncontradicted facts.

Following this quotation appears also a criticism of the defendant in entering an apartment of his wife after agreeing that he should not disturb her in any way. Although making this statement the court made absolutely no reference to the defendant's contention as embraced in his brief with regard to the position the courts take in regard to these agreements to live in a state of separation between husband and wife, neither was there any discussion on the question of whether or not the defendant had a right to enter these apartments. The seriousness of the court's error in this respect is this, that if he had a right to enter because of the fact that he was not a trespasser, and if his motives were good motives, that is, to end the state of separation between himself and his wife, then he was not as stated by the Court in its opinion at page 215, creating a necessity which required him to take the life of the deceased.

The Court further states:

“If we assume further that he supposed Galizio was there and might be caught in the act of adultery, he was under no necessity of breaking in as he did.” (P. 216, L. 14-17.)

It might be true that he might be under no necessity of breaking in to stop adultery, but he would be justified in stopping the act—hence

would be no wrong-doer. Further, he distinctly states that he did not break in for the purpose of catching his wife and Galizio in adultery, and his purpose was to persuade his wife to return to him. If this was true, what happens—the assumption of the Supreme Court in its opinion? Whether true or not, it was a question of fact for the jury, and an important question as bearing upon the inquiry of whether or not he was a wrong-doer, bent upon producing a situation out of which would arise the necessity of taking the deceased's life.

The Court says further:

“He confessedly knew Galizio's violent character and the threats made by Galizio against his life, and the illicit relations with his wife.” (P. 216, L. 18-20.)

The unfairness of this assumption on the part of the Court lies in the fact that the evidence from a multitude of witnesses which counsel made effort to produce as showing the violent character of the deceased and his illicit relations with his wife were overruled. In the various parts of the state of case wherein this is pointed out are discussed under Point Four, and are specifically raised by the 13th, 14th, and 15th assignments. Yet, although this evidence which might have aided the defendant was ruled out, the Supreme Court directly rules it in its opinion for the purpose of using it against the defendant.

“He must have known that his own appearance at that hour armed with a revolver would provoke a combat.” (P. 216, L. 20-23.)

We ask, is it a question of law or a question of fact as to what the defendant must have known if he entered the house of his wife with a revolver? The Court is assuming these matters,—

assuming that the deceased would be bound to know that the defendant had a revolver on his person. Were not these assumptions questions of fact?

“His entry at such a time, in such a manner, so armed, was in any aspect of the case an act of aggression.” (P. 216, L. 22-24.)

We again insist, that if he entered for the legal purpose of persuading his wife to return to him, it was not an act of aggression. In any event, his intentions for entering was a question for the jury. He was not a trespasser and therefore, not an aggressor. The Court, however, is absolutely silent on the point raised by us dealing with this aspect of the case.

“It would of course be too much to say that an aggressor can never justify himself by acting in self-defense, but *prima facie* it is his adversary who has that right. That is particularly so in a case like the present where the situation was such that the decedent probably had the right to kill the prisoner.” (P. 216, L. 24-27.)

The Court laid down as a matter of law that the defendant was an aggressor, without giving the slightest attention to the motives which the defendant says impelled him to enter the house, which motives were legal and their truth a question for the jury, nor dealing with the legal aspect that the defendant could not be an aggressor in entering the apartments of his wife. Under these circumstances where did the deceased “probably” have the right to kill the prisoner? Suppose the defendant had in fact caught his wife and deceased in the act of adultery, would that justify the deceased in immediately committing an assault upon the defendant? If such assault were not justified, but such assault was in fact made

by the deceased, would the defendant have no right to repel that assault? The answers to these questions depend upon what brought the defendant into the place, what were his legal rights when he got in his wife's apartments, and whether or not he was repelling such assault. Were not these all questions of fact for the jury?

The Court attempts to further justify the action of the deceased by quoting Section 2 of the Act Concerning Disorderly Persons, and then without the slightest consideration of the actual facts of the case, proceed to in fact judge the defendant guilty of house-breaking, and thereby makes him a disorderly person, subject to arrest by the deceased. The Court says he was clearly a disorderly person, yet he was only breaking into the apartment of his wife (P. 217 L. 1-20), only as he says for the purpose of inducing her to return to him.

In another aspect of the case would he not have been justified to break in to stop the commission of the crime of adultery? Again the Court as a matter of law says that the defendant breaking in his own wife's apartment to persuade her to give up her evil ways and return to her home with him is on the same level and in the same category as a house-breaker.

"The situation, then, is this: The decedent had the right to slay in self defense if in reasonable apprehension for his own life, *as he must have been.*" (P. 217, L. 35-40).

We have italicized the words "as he might have been," to point out to this court how the Supreme Court assumed without warrant that the deceased must have been in apprehension of his life. Where is the evidence by which the Court was justified in assuming this as a matter of law, and thereby taking the question entirely from the jury? On

the part of the State there was no evidence. The only one witness to the crime was that of the defendant himself, and his story was not that the deceased was under any apprehension, but that the shoe was on the other foot. That he, the defendant, was in apprehension, by reason of a murderous assault made upon him by the deceased with an axe. The truth of his story, was clearly a question for the jury, but the Supreme Court took the position that they have the right to draw their own deductions of fact, and assumed such deductions to be correct as a matter of law.

The Court further states that the decedent was unarmed. The defendant says the decedent was armed with an axe. The Court says:

“The prisoner neither said nor did anything to allay the apprehension which the decedent could not have feeling, nor did he retreat as he might readily have done.” (P. 218, L. 25-29).

If the story of the defendant is to be believed, action was too rapid to do anything. Almost simultaneously with his striking a match, the deceased reached for an axe and swung it towards the defendant. The Court criticized the defendant for not retreating, but whether or not he could have retreated, when he should have retreated, how and where he should have retreated, if he could have retreated at all, were all questions for the consideration of the jury. Yet, the Court takes in its hands as a matter of law and says because of these various assumed propositions of fact, the defendant is absolutely barred from his defense of self defense.

POINT III.

The Court Committed Error in Admitting an

Alleged Dying Statement Reduced to Writing, Signed by the Deceased, Which Statement Was in the English Language and Given Through an Interpreter; the Interpreter, However, Not Being Produced or Any Original in the Language Spoken by the Deceased.

This point is raised under the assignments of errors five, six, seven, eight and nine. The alleged dying statement was admitted in evidence and marked Exhibit A-2.

(a) It appears from the evidence that Recorder Young went to the bedside of the deceased, accompanied by an Italian interpreter (page 70, lines 20 to 30 of State of Case), that when he was spoken to partly in English and partly in Italian. That the Italian questions and answers were given through Officer De Luccia (page 72, lines 1 to 14 of State of Case). All of these questions and answers were reduced to narrative form and then signed by the deceased and sworn to. The Italian words were not set out in Italian, nor was the interpreter produced to testify as to what the words were or to the translation. The language, therefore, that Recorder Young put in the paper was clearly hearsay evidence and should not have been admitted. The truth or the correctness of the language used could only come from the man to whom this was made; namely, Officer De Luccia, the Italian interpreter. The Court, therefore, committed error in admitting the document in question.

(b). The Court committed further error in admitting the paper under any circumstances. The Recorder's own view or notes appears in the affidavit as part of the deceased's statement. For instance, he says in the affidavit:

“This statement is made while the man is upon his death bed.”

Thereby the Recorder was expressing his own opinion and incorporating it in the affidavit to which the deceased had sworn.

(c) The statement should not have been admitted in evidence but the Recorder should have only been permitted to refresh his recollection from the paper. The rule is thus stated:

“Though a copy of dying declarations taken down in writing by the examining magistrate is not admissible unless sworn to, it seems that the written statement would be admissible as secondary evidence, if the magistrate swears that he cannot recollect the statement of the deceased.”

Beets v. State, 19 Tenn. (Meigs), 106.

“Dying declarations, made under belief of impending death, having all the validity of a sworn statement, a written memorandum thereof made by a witness is not primary evidence thereof, even though the memorandum is signed and sworn to by deceased, its purpose being simply to refresh witness’ memory.” *State v. Whitson*, 111 N. C., 695, 16 S. E., 332.

(d) There was absolutely no proof that the deceased, Gaetano Galizio, believed in a supreme being nor in a future state of punishment and reward. The court was requested to charge that if the deceased did not believe in a Supreme Being that the statement should not be believed. This the court should have charged. The jury would have been perfectly justified in concluding from the fact a man who would continuously live in adultery with another man’s wife might not believe in a Supreme Being or in a future state of punishment and reward.

Our point is not that the court should have excluded the paper on this particular ground but that the jury should have been allowed to consider, as a question of fact, what the religious views of the deceased were. Of course, if the jury found that he did not believe in God or in a future state of punishment and reward then the law as laid down in the case of *Donnelly v. State*, 26 N. J. L., 463; 42 N. S., L. R. A., 561, applies:

“Dying declarations are not admissible in evidence if the person making them has no belief in God or a future state of rewards and punishments.”

(e) There is not sufficient evidence that the deceased thought he was dying to justify the admission of the declaration or statement. See the case of the *State v. Guild*, 10 N. J. L. J., 177, for a statement of the rule and the case of *Donnelly v. State*, 26 N. J. L., 463. Absolutely no evidence excepting the statement of the man, “I am dying! I know I am going to die!” is given. See case of *Frank vs. State*, 50 N. J. L.; 12 Atl., 701. In that case the dying declaration was overruled, although the evidence showed that the surgeon had told the patient that she might die at any moment and the deceased had said that she did not think that she would recover.

In any event, the court should have charged the jury upon the subject as a matter for their consideration.

The Supreme Court in its opinion in speaking of dying declarations said:

“Nor did the prisoner in fact suffer any manifest wrong or injury by the admission of the declaration. In material matters it agreed with the testimony of the prisoner, except in the statement that the prisoner’s

wife was in another room. This might have been harmful if the defendant was entitled to have the jury consider whether his offense was not reduced to manslaughter. But the rule is not that the offense is always reduced to manslaughter when a husband kills the paramour of his wife, in the act of adultery, but only when the circumstances are such that the husband may be supposed to have acted in a sudden transport of passion, or heat of blood upon a reasonable provocation, and without malice. The provocation must be of such a character and so close upon the act of killing that, for the moment could be considered as not master of his own understanding. If such an interval of time elapsed between the provocation and the act of killing as is reasonably sufficient for reason to resume its sway, the act is not mitigated to manslaughter. 1 Russell on Crimes, 786; *Brown v. State*, *supra*, at pages 710-711 and 713. *The rule is not applicable to a case like the present where the husband kills the adulterer deliberately and upon revenge after the fact and sufficient cooling time.*"

May we point out to the court that this assumption on the part of the Supreme Court, is without a scintilla of evidence to justify it; it assumes as a matter of law the foregoing as an undisputed state of facts. The best answer to the statement of the Court is the defendant's own story:

"I lit a match and threw the light like this, and I held it up and then I see Galizio and my wife in bed." (P. 115, L. 7-10.)

The testimony therefore, of defendant is that he actually caught his wife and Galizio in bed together, in a position for which he had every right to infer adultery. How, then, can the court say that there was sufficient cooling time, etc.?

POINT IV.

The Court's Refusal to Permit the Admission of Evidence of Threats Made by the Deceased Concerning the Defendant; Also Concerning the Turbulent Character of the Deceased, and to Charge the Jury Concerning the Same Was Error.

This point is raised by the 13th, 14th, 15th and 16th assignments. Under these assignments the court refused to allow the defendant himself to testify as follows:

“Q. Do you know whether or not Galizio had struck his wife with an axe in Italy?”

Objection to this question was sustained.

“Q. Do you know whether or not Galizio ever shot his brother?”

Objection to this question was sustained.

“Q. Do you know whether or not Galizio was ever convicted of shooting a man by the name of Santoro?”

Objection to this question was sustained.

“Q. Do you know whether or not Galizio ever attacked Romare, a man from Philadelphia; whether he attacked him about 15 years ago and hurt him very severely?”

Objection to this question was sustained.

(State of Case, pp. 120-121.)

To all of these questions the defendant would have given an affirmative answer.

Also the Court's refusal to permit Cesare

Palito to testify as to a conversation that he had had with the deceased four months before the killing (P. 148-149), to show threats.

Also the Court's refusal to permit Tony Levardo, a witness for the defendant, to answer the following question:

“Do you remember having a conversation with Galizio and him saying what he would do with Agnesi?” (P. 155, L. 1-10.)

Also the Court's refusal to permit Gilberta Vantura to be asked the following question, a preliminary foundation having first been made:

Q. “Do you know what his reputation was for being a bad, quarrelsome man?” (Referring to Galizio.) (P. 155.)

On objection this question was excluded.

Carmelia Ventre, a witness sworn for the defendant, testified to a conversation he had with Mrs. Agnesi, the defendant's wife, in his store, during which conversation Galizio stood by the door and could hear what was said. The question was:

“Will you tell the Court and jury what was said by Mrs. Agnesi at that time?”

Upon objection counsel for defendant explained that it was for the purpose of showing threats. The question was overruled.

Albert Agnesi, a son of the defendant attempted to testify as to threats Galizio had made to him (P. 160, L. 10-20) and was overruled.

The Court not only refused to admit this evidence but made the following charge:

"I will rule out and exclude all testimony offered by the defendant showing threats by the deceased against this defendant, and also testimony going to show the violent disposition of the deceased as the aggressor." (P. 99.)

The Court improperly rejected this evidence. The law in this State is well settled in the case of the State *v. Scaduto*, 74 N. J. Law, p. 289:

"Upon the trial of an indictment for manslaughter, where the defendant claims that the killing was in self-defense, and it has been proved in the case that the deceased and the defendant were in actual collision at the time of the killing, previous threats by the deceased against the defendant, although not communicated to the defendant, are competent evidence."

We would refer the Court to the opinion in the case by Justice Garrison.

The general rule is also cited in 21 Cyc., page 909, as follows:

"The violent, turbulent and dangerous character of deceased may be shown when from the circumstances of the case it is a part of the *res-gestae*, or when the evidence is well substantiated, or when it is doubtful, as to who was the aggressor, in bringing on the difficulty resulting in the killing or where the immediate circumstances of the killing render it doubtful whether the act was justifiable or not."

"Evidence of previous difficulties between defendant and deceased and of the state of the former's feeling toward the latter is admissible at the trial of the indictment for

murder. It is also proper to introduce evidence of facts tending to show the cause of said difficulties and ill feeling."

21 Cyc., p. 915.

"On a trial for murder previous threats by the defendant to kill the deceased may be shown the fact that the threats were made considerable time before the killing affects their weight and not their admissibility."

21 Cyc., p. 921.

"Where there is evidence tending to show self-defense or the character of the transactions is in doubt, the reputation of the deceased for being a violent and dangerous character can be shown for the purpose of showing a reasonable apprehension of the immediate impending danger on the part of the defendant."

21 Cyc., P. 956.

THE COURT IMPROPERLY OVERRULED EVIDENCE SHOWING PREVIOUS CONVICTIONS OF THE DECEASED.

This point in a measure falls under the same general head as to the previous exceptions with reference to the turbulent character of the deceased. It is raised specifically by assignments 18 and 19.

Assignment 18 deals with the refusal of the Court to admit the evidence of one Patrick Cunningham, a witness on behalf of the defendant, attached to the County Clerk's Office, and the person in charge of the criminal records (P. 140). By this witness an effort was made to prove that the deceased had been convicted of a crime at the September term, 1904, Passaic Quarter Sessions.

Exception was taken to the Court's ruling.

Assignment 19 deals with the refusal of the Court to admit the evidence of one John F. Grossi, Clerk of the Recorder's Court, of the City of Paterson. By this witness an effort was made to show by the records in his possession of a conviction of an assault and battery of the deceased, in that Court (P. 141).

The exclusion of these convictions, we claim was serious error. It was shown in two competent courts what the character of the deceased was, inasmuch as both records disclose that the deceased had been convicted of assault and battery; if the evidence of these two witnesses would have had most convincing weight with the jury.

The only consideration the Supreme Court gave on this point was the following:

"The evidence of threats, so far as it was excluded, was properly excluded; the prisoner sought the decedent notwithstanding his knowledge of the threats." (P. 220, L. 33-36.)

No evidence was pointed out by the Supreme Court to show that the defendant did seek the deceased, for the simple reason that there was no such evidence in the case. The testimony of the defendant is that he sought out his wife. His intention of going to the house, however, was a question for the jury. Logically if the Supreme Court was correct, if a person knew that his wife was living in adultery with another, he would be justified in going to persuade her to change her course of conduct, he would be justified in going to persuade her paramour to give up his actions with his wife, he would be justified in going, perhaps, to deliberately stop them from committing the crime of adultery, but all of these justifications would instantly cease if he knew that the

paramour was quarrelsome or ugly, or what is commonly known as a bad man. It would at once place a premium upon the paramour to throw out to a wronged husband threats of all kinds, because thereby he would with the sanction of the law place a seal of protection upon himself. In fact, the decision of the Supreme Court would mean that the test as to whether or not a man would be justified in seeking his wife out would depend upon whether or not the paramour was ugly or quarrelsome, in which last event he would not be justified in coming to any place where he would come in contact with such ugly paramour.

POINT V.

The Court Improperly Excluded From the Jury the Right to Consider the Defense of Manslaughter Growing Out of the Conflict Between Deceased and Defendant.

It is true that the Court charged the jury that the defendant could be guilty of manslaughter, but this was limited by the provision that the jury must have found that the defendant caught the deceased in adulterous conduct with Mrs. Agnesi. We have already referred to the case of the State *vs.* Zeller, where defendant shot deceased while committing a trespass, and notwithstanding that the deceased was an aggressor and trespasser, yet Chief Justice Kirkpatrick allowed the jury to consider the question of whether or not the crime amounted to manslaughter.

The Court also excluded from the jury the question of whether or not the defendant took the revolver with him for the purpose of using it in self-defense. It surely was a question for the jury to consider the motives which prompted the defendant to take the revolver with him on the night

in question. The ruling of the court likewise excluded from the consideration of the jury the question as to whether or not a just cause for using the revolver might have arisen after the defendant entered the house and actually came in contact with deceased, and that the revolver was shot without intention to kill or do great bodily harm or accidentally or in heat of passion. The Court did, however, touch upon the point in his charge, but only to the extent of distinguishing between the degrees of murder. The Court assumed that the defendant armed himself for an unlawful purpose.

We respectfully call the Court's attention to the charge of Chief Justice Depue in the case of the State *vs.* Blair, 2 N. J. L. Journal, 346. In that case it appeared that the deceased and defendant had a quarrel in a barn. That the deceased was an employe and was discharged by the defendant. That the defendant returned to the house and armed himself with a revolver and then returned to the barn. Said the Chief Justice:

"To justify the accused in returning to the barn with a deadly weapon, you should be satisfied that he provided himself with it solely for the purpose of self-defense, and not with a view of engaging with the deceased in affray, with the advantage of being armed with a deadly weapon, or to provoke his adversary into a renewal of the quarrel."

The Court allowed the defendant in that case, as appears from the charge, to state the reason why he armed himself with a gun, namely, fear for personal safety in the event of the deceased's refusing to leave the premises. The Chief Justice told the jury that such a defense would be an absolute one.

POINT VI.

The Court's Refusal to Permit Testimony as to Warnings Given by the Recorder of the City of Paterson to Galizio to Remain Away From the Defendant's Wife.

This point is raised by assignments 20, 21, 22 and 23.

Three distinct witnesses were offered, viz., John F. Grossi, Clerk of the Recorder's Court, Mr. Rose, a lawyer, who represented the defendant, and Mr. Furrey, a lawyer, who represented the defendant's wife. Galizio had been brought before the Recorder's Court, and the object of offering these witnesses was to prove a conversation between the Recorder and deceased concerning the adulterous conduct of Galizio with defendant's wife, and the warning the Recorder gave him at that time.

This evidence should have been admitted. It was to show the jury whether or not the deceased actually was living in adulterous conduct with Mrs. Agnesi, the wife of the defendant. The jury might well draw the inference that where the person is warned that evil inferences are drawn as to his conduct, and he persists in that conduct, that he must thereby be guilty. It was also pertinent to show the effect it might have had upon the mind of the defendant, when this as well as the other evidence of like kind was being constantly brought to him that his wife was living in adultery with the deceased.

POINT VII.

The Court's Refusal to Charge That the Defendant Was Presumed to be Innocent.

The court not only failed to charge this, but distinctly charged that the defendant was guilty. His language was: "So that if you take his version of this case and consider it as the theory upon which you will decide it you cannot under any circumstances acquit him, but, you must find him guilty of manslaughter at least." The Court then added that manslaughter could only be found if the defendant caught the deceased in adulterous conduct with his wife.

The Court later charged the jury as follows:

"The defendant, except to the extent that he has admitted his guilt, stands before you innocent of any higher crime than the one which he himself has described, of taking the life of the man that he found in this compromising position with his wife, which as I stated would be manslaughter."

CONCLUSION

To summarize the errors complained of it will be seen that although the State did not produce a single eye witness as to this crime, yet, the defendant who presented his version of the case that the deceased was of a quarrelsome character; that he had been convicted of crime; that he had made threats against him; that he actually shot the deceased in self-defense, when attacked by an axe; that he had brought the revolver for no harmful purpose, except if he was attacked by the deceased, was prevented by the Court from presenting these facts, which made up his entire defense.

The effect of the Court's ruling was to practically overrule the entire defense.

It is respectfully submitted that on the various points raised the Supreme Court has either abso-

lutely disregarded them, or disposed of such as it did consider by assuming facts that did not exist, or drawing from disputed facts its own conclusions as a matter of law. It is respectfully submitted that the judgment should be reversed.

November Term, 1918.

WARD & McGINNIS,

*Attorneys and of Counsel With
Plaintiff-in-Error.*

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE STATE OF NEW JERSEY,

Defendant-in-Error,

vs.

SALVATORE AGNESI,

Plaintiff-in-Error.

On Indictment
for Murder.

On writ of
Error to
Supreme Court.

BRIEF OF MICHAEL DUNN, OF COUNSEL FOR THE STATE OF NEW JERSEY, DEFENDANT- IN-ERROR.

Statement of Facts.

The writ of error brings up for review the judgment of the Supreme Court in this case which was entered on June 22, 1918, p. C.

The Court affirmed the judgment of the Court of Oyer and Terminer of Passaic County, in which the defendant was tried and convicted by the verdict of a jury of murder in the second degree. The assignments of error here are identical with those considered by the Supreme Court.

The defendant, Salvatore Agnes was indicted at the September Term, 1917, charged with the murder of Gaetano Galizio on the 11th day of July, 1917, in the City of Paterson, Passaic County, New Jersey (Case, p. 4).

The case was tried October 23rd, 1917, before Justice Minturn holding the Oyer, and a jury, in the County of Passaic. He was found guilty of

murder in the second degree and was sentenced to confinement at hard labor in the State Prison for the maximum term of thirty years and the minimum term of twenty years (Case, p. 7).

The undisputed evidence shows that the defendant was a married man and had resided in Paterson with his wife; that the deceased had been acquainted with the family for a long time; that for some time prior to this shooting, the defendant and his wife had frequent quarrels, and after a trial before the Recorder of the City of Paterson on complaint of his wife, he and his wife on the 19th day of June, 1917, signed a separation agreement, whereby they agreed to live separate and apart from each other, during their natural lives, and the defendant was to pay towards her support and maintenance the sum of One dollar a month (see Exhibit 70, Case, p. 175). After the making of this agreement, the defendant's wife, who was then living separate and apart from him, rented a suite of rooms in her own name in the rear of No. 13 Ellison Street, in the City of Paterson. The apartment consisted of three rooms, the middle room was used as a kitchen, and there was a bedroom located to the right of the kitchen and another to the left of the kitchen as you enter.

The defendant, Agnesi, went to live with his sister at No. 14 Passaic Street, in the City of Paterson, which was a few blocks away from where his wife lived (Case, p. 29). After the wife rented these rooms at No. 13 Ellison Street, in the City of Paterson, Gaetano Galizio engaged room and board from her and occupied the bedroom on the right side as you enter the kitchen, while Mrs. Agnesi had her bedroom on the left side as you enter the kitchen. Mrs. Agnesi supported herself by

working out at different places during the day, and the money paid to her by deceased for his room and board.

About 1.30 on the morning of the 11th of July, 1917, the defendant, who had been in bed at his sister's home at No. 14 Passaic Street, got up and dressed himself and went over to the house where his wife was living and where Gaetano Galizio was rooming and boarding. *He says he took with him his revolver, which was loaded with seven cartridges. He also took along a putty knife to force the catch off the window, if he did not find it open when he got there (Case, p. 173, line 30).* He says that he looked in through the window, but could see nothing, because it was dark. This was about 2.30 in the morning. He then took off his shoes and his hat and he used the putty knife and raised the sash of the window and quietly crawled into the house and he entered the room where Salvatore Agnesi was sleeping in bed (p. 113-115). He lighted a match and saw him, and he then fired three shots from his pistol at him, all of which took effect; one bullet entered on the right side about the sixth rib and perforated the lower portion of both lungs, producing a hemorrhage in the thoracic cavity, and at the autopsy it was found lying on the right side against the inner right chest wall; another bullet entered the right side about four inches below the first one, and this perforated the liver and was found lying in the abdominal cavity; a third bullet struck him on the right jaw, fracturing the jaw bone and glancing off. He then shot twice at his wife, and then rushed out of the house, put on his shoes and ran away. The outcry and noise incident to the shooting attracted the attention of other tenants in the house

and their neighbors, and also the policemen who were on duty in the vicinity. They at once rushed to the scene and made an investigation and discovered that Gaetano Galizio had been shot by the defendant, and that he was lying helpless upon the bed bleeding and in a dangerous condition. He was immediately removed in an ambulance to St. Joseph's Hospital, in the City of Paterson, for treatment. He died the next morning, the 12th day of July, 1917, about 5 o'clock.

An autopsy was performed by Dr. Van Schott, which showed that death was due to pulmonary hemorrhage resulting from these gun shot wounds (Case, p. 22, line 30).

The defendant, after fleeing from the house, went towards Lakeview, about two miles away from the scene of the shooting and there boarded a trolley car, going to Hoboken. He was arrested on that car about 8 o'clock in the morning at Hoboken and taken into custody by the Hoboken Police and afterwards brought back to Paterson and was identified by Galizio at the hospital as the man who had shot him.

The dying declaration of Galizio (Case, p. 172), and the statement of the defendant (Case, p. 173), together with the testimony of the police officers who made the investigation and the arrest prove these facts.

The defense was based upon two grounds: first self defense; second, that the shooting was done in the heat of passion and excitement, owing to the fact, as defendant claimed, that when he entered the bedroom occupied by Galizio, he saw his wife and Galizio both asleep in the same bed, and that

in the excitement and heat of passion, created by witnessing this scene, he shot the deceased. If the shooting was done in self defense, they claimed that he was entitled to an acquittal, but if his act was not done in self defense, then, under the circumstances, if the jury found that the deceased was sleeping in bed with his wife, the defendant would be guilty of no higher crime than manslaughter.

The Court very properly ruled that under the facts and the evidence the defendant was not entitled to claim the benefit of the law of self defense because he was the aggressor. To this ruling exception was taken.

As to the second defense the dying declaration of Galizio denied that the wife of the defendant was in his bed at the time of the shooting. There was other evidence and many important circumstances tending to show that this statement of the defendant was untrue. It was therefore a question for the jury to find what were the true facts. Exceptions were also taken to the admission and rejection of testimony in support of these defenses and to the charge and refusal to charge as requested.

The State contended that the evidence on the part of the State, if believed by the jury, warranted them in finding the defendant guilty of murder in the first degree. The jury found the defendant guilty of murder in the second degree.

The case was brought before the Supreme Court on writ of error to review this judgment and the proceedings of the trial under a strict bill of exceptions and assignments of error thereon.

Under the ruling in *State v. Webber* (77 N. J. L., p. 580), it is held "in order that defendant may have the benefit of Section 136 of the Criminal Procedure Act (P. L. 1898, p. 915) the Trial Judge must, in addition to the formal and ordinary return, to a writ of error, certify that the proceedings transmitted by him to the court of review comprise the entire record of the proceedings had upon the trial. In the absence of such a return, the Court is without authority to review any errors or exceptions of the trial, except those arising upon the record itself or upon bills of exceptions duly taken."

We contend that in rendering the judgment on this indictment there was no error committed by the Trial Court by which the defendant was prejudiced in maintaining his defense upon merits.

The judgment of the Supreme Court should be affirmed. The rulings were most carefully reviewed there and the law most explicitly defined.

I.

ASSIGNMENTS OF ERROR ON EXCEPTIONS TO ADMISSION AND REJECTION OF EVIDENCE.

FIRST EXCEPTION is directed to the overruling of a question (p. 36, line 10) put to James Carr on his cross-examination. He was a police officer of the City of Paterson, and the first man on the scene after the shooting, and in his direct testimony he gives a description of the conditions he found at the house where the shooting occurred, and also of the inspection and investigation he made of the premises, and he states that he saw Mrs. Agnesi

there and that he had known her before the night of the shooting. The question objected to was:

“Q. You had known her on an occasion when her son had asked you to have this man arrested, had you not, for threatening his life?”

The question was objected to and was overruled as leading and immaterial. We contend that this ruling was proper. You will observe that the question implied facts which were irrelevant and immaterial to the issue involved, and was not proper cross-examination.

SECOND EXCEPTION: The question here overruled was subject to the same criticism as above. It sought to elicit irrelevant and immaterial matter from the witness, and, therefore, was not pertinent cross-examination (Case, p. 36, line 20).

THIRD EXCEPTION: The question here overruled contains the same objectionable features as the two former ones. It reads:

“Q. Was the time that you referred to as knowing her (meaning Mrs. Agnesi) before the time when this young man came to you and complained of this Galizio, the dead man, and claiming that he was living with his mother improperly?”

The witness had testified in direct examination that he had known Mrs. Agnesi about six months before the night of the shooting (Case, p. 34, line

15). An inspection of the record will show that it was not proper cross-examination. The counsel for the defendant undertook to inject into the question facts to which the witness had before made no reference. It was simply playing to the jury to give an impression that a complaint had been made to the officer that there was improper relations existing between Mrs. Agnesi and Galizio before the night of the shooting, concerning which fact the witness had given no testimony. It was properly overruled.

FOURTH EXCEPTION (Case, p. 37, line 27): The question was:

“Q. Under what circumstances had you known her?”

The witness had just testified (Case, p. 37, line 12) that he had known her about four or five months. It was clearly irrevelant and immaterial as to the circumstances under which he knew her. When counsel was asked by the Court as to his object in asking these questions, he refused to state it, but said that “The door has been opened under direct examination, and I should be permitted to ask the witness.”

We submit that the ruling here was proper, if the Court is going to retain any control over judicial proceedings.

FIFTH EXCEPTION: This refers to the admission of the dying declaration of Galizio. Objection was made that the state of mind of the deceased as to expectancy of death was not such as to justify its admission. There is no foundation for this objec-

tion. The statement was taken down by William H. Young, Esq., who was then Recorder of the Police Court of the City of Paterson. Galizio had declared that "he knew he could not live and was going to die, and was dying then" (Case, p. 71, line 1; p. 70, line 30). The witness took down the statement in his own handwriting and read it over to Galizio; and he says that it was understood by Galizio and that it was then signed and sworn to by him. He also says on cross-examination, before the statement was read, that the witness spoke English and that he seemed to be perfectly clear in what he meant to say, but his English was not very good; that he wrote the statement in narrative form (Case, p. 72, line 20). This ruling was not error.

SIXTH EXCEPTION: This exception contends that the statement was inadmissible because it was given through an interpreter, and the interpreter was not sworn to prove the correctness of the statement. This contention is also unsupported by the evidence. An inspection of the record of the testimony will show that the admission of the statement was not objected to upon that ground and that no specific exception to its admission was made for that reason. Furthermore, Mr. Young says that while he had with him Mr. DeLuccia, who was a detective, what took place was as follows:

"When I asked him questions he would say in English, some part of it I possibly did not understand and I would have the same question repeated by DeLuccia, who would explain to me in Italian what he said" (Case, p. 72, line 1).

This showed that Mr. Young was exercising proper caution and care.

He further says (Case, p. 72, line 20): That he did not take down the exact language, that he took down the statement in narrative form. *The testimony of Mr. Young was to the effect that the statement had been written by him, read over to the witness, understood by him and sworn to, and was witnessed by officers Lord, Keppler and DeLuccia.* It was not a statement that required the use of an interpreter to get the facts which he wrote down. The witness understood and spoke English. Under the facts here stated, the statement was properly admitted. *The defendant in his statement admits the correctness of nearly everything contained in it (p. 173).*

THE SEVENTH, EIGHTH and NINTH ASSIGNMENTS.

These all pertain to the ruling allowing William H. Young to read the dying declaration of Gaetano Galizio to the jury after he was examined as to the taking of the same.

In the seventh assignment, it is contended that the statement was inadmissible because in addition to the language of the deceased, it contained the opinion of William H. Young as to the condition of mind and body of the deceased at the time of making the statement. There is no error in this contention to be considered here.

An inspection of the record (Case, p. 73, line 12) shows, that no such question was raised or argued before the Court, and consequently there is no exception on this point to be argued or considered

here. The case is here on a strict bill of exceptions, under 135th Section of Crim. Proced. Act. This ruling is settled in *State v. Savage*, 76 *Atl.*, 1079. The record shows no facts on which to base this assignment. The record shows that the deceased declared he was dying at the time he made the statement on July 11th, 1917, at 9.22, and he died the next morning, July 12th, at 5 A. M.

The Supreme Court (p. 219) was right in the opinion in upholding the action of the trial court in admitting the dying declaration, and under the ruling in *State v. Monich*, 74 *N. J. L.* 522, the finding of the trial judge on the point was conclusive.

The rule as to the admissibility of dying declarations was settled in *Donnelly v. The State*, 26 *N. J. L.*, p. 463. If the declaration is made under fear of impending death it is admissible. The admissibility is the question of competency to be decided by the Court. The finding is conclusive, *State v. Monich*, ~~62~~ *N. J. L.* 522.

Eighth Assignment.

Here the alleged error consisted of the Court allowing to be introduced in evidence the dying declaration: it was contended that the same could only have been used by the witness, William H. Young, for the purpose of refreshing his memory. There are no facts in the record to support this contention.

At page 73, line 12, the witness was asked to read the statement, which he did. The fact that afterwards it appears that the statement was marked as

Exhibit A-2, is wholly unimportant. There is nothing on record showing that the question, set forth in this assignment, was raised or discussed.

Ninth Assignment.

Here the contention is that before the dying declaration could be read, it should have been proved that the deceased believed in God or in a future state of punishment.

The ruling in *Donnelly v. The State*, 26 N. J. L., 464, at p. 506, on this subject, must have been overlooked by the defendant in framing this assignment. The objection here made goes to the competency and not to the credibility of the witness. The objection of competency must be proved by the objector. "There is no clearer principle than that if the want of religious belief in the witness is alleged as the ground of incompetency, the disbelief must be proved by the objector." The rule in the *Donnelly case* is thus stated, the burden of proof is not on the party adducing the witness to prove that he is a believer, but it is on the objecting party to prove that he is not. (See also *1 Greenleaf on Evidence*, section 70.)

This assignment is devoid of merit.

II.

THE TRIAL COURT WAS RIGHT IN TAKING THE QUESTION OF SELF DEFENSE FROM THE JURY.

The assignments of error, from the tenth to the twenty-ninth, inclusive (Case, pp. 195 to 202) are all predicated upon the contention that the Trial Court committed error in ruling that under the

admitted facts in the case, the accused could not interpose the defense of self defense under this indictment.

We will first deal with the question generally, and then with the rulings on the specific assignments separately.

A. WHAT IS THE LAW ON THE RIGHT OF SELF DEFENSE?

The right to take life by way of self defense is necessity. There must exist necessity for resorting to violence for self protection and necessity for using the means that were used to secure the defense of person, (*Brown v. State*, 62 N. J. L., p. 666). The necessity which excuses homicide in self defense is not justification of the party who seeks and brings on the quarrel out of which the necessity arises. He cannot excuse himself by a necessity which he himself created. Nor can he be justified or excused for a homicide done upon the plea of necessity, if the necessity arises from his own fault (*May's Criminal Law*, p. 227, parag. 234).

A conflict provoked by the defendant cannot be set up as a defense (*Wharton on Criminal Law*, p. 772, parag. 613). The defendant provoked the conflict in this case. This fact is not denied.

B. THE EVIDENCE FOR THE STATE AND THE ADMISSIONS OF THE DEFENDANT JUSTIFIED THE SUPREME COURT IN UP-HOLDING THE ACTION OF THE TRIAL COURT IN TAKING THE QUESTION OF SELF-DEFENSE FROM THE JURY.

An inspection of the record shows that during

the progress of the trial the counsel for the defendant (Case, p. 93) attempted to introduce evidence from the defendant of matters that occurred nine months before the night of the shooting, which took place July 11th, 1917. The evidence shows that the defendant was living separate and apart from his wife under a separation agreement (Case, Exhibit 70, p. 175). This was signed on the 19th day of June, 1917. They had been living separate and apart before that date. The defendant was living and boarding with his sister. After the separation agreement was made, his wife, Nicholena Agnesi, hired three rooms at No. 13 Ellison Street, and went there to live. The middle room of said apartment was used as a kitchen, the room to the left of the kitchen was used as her bedroom, and the room to the right of the kitchen was used as a bedroom and was rented by her to the said deceased, Gaetano Galizio, who occupied the same and was boarding with the wife of the defendant. This apartment was some distance away from the house where the defendant was living. Between 2 and 3 o'clock on the morning of July 11th, 1917, the defendant, who had been in bed, got up and dressed himself (Case, pp. 114, 115; also p. 175). The defendant then in the dead of night started to go to his wife's house at No. 13 Ellison Street, where he knew she was living, and the deceased was sleeping and boarding. He took his revolver with him. He also took a putty knife to open the window if it was fastened. He went there prepared to commit crime, to break and enter a dwelling house at night. Upon arriving at his wife's house, he claims there was no light in the apartment and he looked in, but could see nothing; that he then went near a window and

took off his shoes and used the putty knife and raised up the window quietly and carefully and crawled in. On entering the room he lighted a match and he saw the defendant in bed, and he claims that his wife, Nicholena, was asleep in the same bed, but this the deceased denies in his dying declaration. The evidence of the police is to the effect that when they inspected the premises immediately after the shooting, that her bed showed that one person had been sleeping there. *The wife, Nicholena, was not called by the defendant to testify. The State could not call her as a witness against her husband. The dying declaration of Galizio (Case, p. 172) is to the effect that he was sleeping alone in his bedroom that night. He says (p. 172) that he heard some noise at his bedroom window, and later that a shot was fired at him, which struck him in the stomach. He opened his eyes and recognized that the defendant was in his room and firing the shots. The defendant immediately fired two more shots at him, one struck him in the chest and the other on the chin. He then heard Nicholena, the wife, screaming in another room, and then there were two more shots fired by the defendant. The defendant then rushed out of the house. The defendant says in his statement to the police (Case, Exhibit 875, p. 173) that on entering the room he lighted a match and saw them in the bed, and then blew it out; that he wanted to get them both. He admits firing three shots at the deceased, and that he turned and fired two shots at his wife. There were two shots left in the gun which he attempted to shoot, but they did not explode. The gun was a seven shooter (Case, p. 174).*

When the revolver was taken from the defendant at Hoboken, there were two cartridges in it, which were not exploded, but which indicated that the hammer of the pistol had struck them. These were produced before the jury.

The defendant claimed that his wife ran out of the room occupied by the deceased when he started to shoot, but the testimony of the deceased in the dying declaration indicates that she was not in that room when he began to shoot, and that he heard her screaming in another room.

The evidence also shows that the deceased was shot in the bedroom right on the bed where he lay and was there prostrated and bleeding when the officers arrived. It also shows (p. 28) that his bed quilt had holes burned in three places. The sheet under him was blood stained (p. 45). This shows that the muzzle of the pistol must have been within a few inches of his body when the shots were fired. The testimony of Dr. Van Schott (p. 22) and Dr. Gery, (p. 25) as to the location of the three wounds shows that he was lying on the bed when shot. He never had had a chance to repel or avoid the attack of defendant. The axe story of defendant is untrue. The defendant never attempted to leave the bed room until he had snapped all the cartridges in his revolver. Five exploded, three bullets struck deceased, one struck the partition and one was missing, and two were left in gun which were snapped but did not explode. It also shows that there was a bullet hole through the partition which separated the bedroom occupied by the wife from the kitchen.

The defendant admits firing five shots; three entered the body of the deceased. We find one in the partition leading to the room of the wife, but did not find the other, and there were two unexploded cartridges in the pistol. This accounts for all the shots fired, as claimed by defendant.

The admitted conduct of defendant and the uncontradicted statements of the witnesses prove conclusively that after premeditation and deliberation, he started out on this night to commit murder.

JOSEPH CORNELLI, the Hoboken police officer who arrested the defendant, testified (Case, p. 58, line 20) that he found the revolver on the defendant with which the shooting was done, and that *the defendant told him that he had shot them both*. He said, "*I hope they are dead.*" At page 59, line 30, the defendant says, "*I went down to get them.*"

WILLIAM KINNEY (p. 62) testified that the defendant told him that he went over and took off his shoes, lit a match to see if they were in bed, together, and they were, and that he shot the man three times. The defendant's own description in his testimony (Case, p. 115) corroborates the fact that he went there to kill and commit murder. His statement to the police (Case, p. 173) also proves this fact.

The Supreme Court in the opinion (p. 217) demonstrates clearly that from the opinion of the Court of Errors in *Brown v. State*, 62 N. J. L., p. 697, that the law of self defense could not be invoked under the evidence in this case. Justice Swayze also points out there that the decedent

"had the right to slay in self defense if in reasonable apprehension for his own life, as he must have done and he had the right to arrest the prisoner as a disorderly person. Whatever he did by way of assaulting the prisoner would have been legal unless he used excessive force. The prisoner could not justify resistance to lawful force."

The only question, then, is whether there was any evidence that the decedent used excessive force, p. 218, l. 20. It would be superfluous to add anything on this subject since the prisoner was armed with a deadly weapon effective at some distance, the decedent unarmed, except, (if the prisoner is to be believed as he must be for the present purpose), with an axe hastily seized as he woke from sleep. The prisoner neither said nor did anything to allay the apprehension which the decedent could not have avoided feeling, nor did he retreat as he might readily have done; he does not even say that the way by which he had entered was not open for retreat, and he had the advantage of a weapon which made it possible for him to "cover" his adversary. We think the Trial Judge was right in taking the question of self defense from the jury. We have dealt with the question as presented by the charge rather than as presented by the rulings on evidence for the reason that the remarks made by the Judge on the original offer of evidence became harmless when the prisoner, the only possible witness, was subsequently permitted to tell his story in full without interruption. The correctness of this conclusion is strengthened when we recall that the deceased was shot three times as he lay in bed with the muzzle of the pistol

so close to his body as to burn holes in the quilt which covered him. The deceased had no chance to defend himself.

III.

THE FOLLOWING AUTHORITIES UPHOLD THE SUPREME COURT AND THE TRIAL COURT IN THEIR RULINGS IN THIS CASE.

The defendant had no right, under the agreement of separation, to annoy, visit or molest his wife. Such an agreement between husband and wife is legal. In *Aspinwall v. Aspinwall*, 49 *N. J. E.*, p. 303, in considering the legality of such an agreement, the Court said:

"It would be singular, indeed, if the Court should refuse to carry into effect stipulations of this character, as there is nothing illegal in the fact of husband and wife living apart by mutual consent."

The rules of construction applied to contracts and deeds in general are applicable to separation agreements or deeds (21 *Cyc.*, 1595).

The Trial Court committed no error in deciding that the doctrine of self defense did not apply to a case such as this. This question is especially raised by the tenth assignment of error. The Court there stated that he "would rule out and exclude all testimony offered by the defendant showing threats by the deceased against the defendant, and testimony going to show the violent disposition of the deceased as the aggressor, and I base that conclusion entirely upon the theory that the act of so-called

self defense as I understand it from the offer of counsel was committed while the defendant was attempting to enter through the window of the premises of another where this homicide was committed at 3 o'clock in the morning, or while he was inside of the premises and on the floor at the time. Under those circumstances it is impossible for the Court to conceive that the doctrine of self defense applies to such a situation in which the defendant was clearly the aggressor." The following authorities support this ruling:

Wharton on Homicide, 3rd Edition, p. 354.

Homicide in self defense occurs when a person kills another while being assaulted upon a sudden affray and in defense of his person, when certain and immediate suffering would be the consequence of waiting for the assistance of the law and there is no other probable means of escape; or when he is suddenly assailed by another *without any fault on his part and under such circumstances as to give him just and reasonable ground to believe that he is in danger of losing his life or suffering some great or enormous bodily harm.*

Elements Necessary to Make Out the Defense.

To justify homicide on the ground of self defense, four things must appear:

(1) The slayer must have been reasonably without fault in bringing on the difficulty.

(2) He must believe at the time that he is in

such immediate danger of losing his own life or of receiving serious bodily harm as renders it *necessary* to take the life of his assailant to save himself therefrom.

(3) *The circumstances must have been such as to have warranted such a belief in the mind of a man of ordinary reason and firmness.*

(4) There must have been no other convenient or reasonable mode of escaping or retreating or declining the combat.

Ibid, Sec. 223.

**A Very Recent and Important Case on the
Question of Self Defense.**

State v. Albano, 102 Atl., p. 333, was decided Oct. 2, 1917, in the Supreme Court of Vermont. It supports the doctrine of self defense, as stated by Justice Minturn in the trial of the case at bar. The opinion is also of great aid to us in that the facts and relations of the parties are quite identical to those in this case. It appears that there the defendant Albano was indicted and convicted for an assault with intent to kill one Cerutti, who was boarding with the wife of the defendant. The accused and his wife were living separate and apart. Albano went to the house and found Cerutti there and shot him. The Court there held that the defendant was the aggressor, and was not, under the law, entitled to the protection of the law of self defense. The Court also held that the boarder, Cerutti, was not a trespasser in that house.

The mere fact that he was boarding in the house,

gave no rights to the defendant to assault or kill him.

The bed room was his castle.

In *Harris v. State*, 96 Ala., 24, 11 So., 255, it is held:

A room rented as a bedroom is the castle of the occupant from which no duty to retreat rests on him when he is assaulted therein, and in which he has a right to stand his ground and defend himself, even to the death of the assailant, where he reasonably appears to be about to kill or inflict grievous bodily harm upon him.

In such a case the law regards the room so occupied as the castle or home of the occupant. (*Young v. State*, 2 L. R. A., N. S., p. 66.)

The great fallacy in the argument for the accused is the failure to recognize the rights of the deceased as a boarder in that house. The wife had rights there also but under the law her rights did not deprive deceased of protection.

In this connection the late Justice Depue, in a charge to the Grand Jury at the Essex Oyer, commented upon what is now Section 110 of our *Crimes Act*, C. S., Vol. 2, page 1781. He says:

"The Statute has always been liberally construed in favor of the security of the dwelling house and the protection of its occupants from the felonious purposes of marauders. * * * Mr. Choate is not deprived of the benefit of the statute by the fact that the deceased was en-

deavoring to escape from the window when he shot. He was under no duty to allow the burglar to escape, nor was he compelled at the risk of his own life to wait and see what the purposes of the deceased were. The coroner's jury on the evidence before it very properly found that the killing of the deceased was justifiable."

The thought here expressed is in harmony with the view of Justice Minturn at the trial of this case (see 7 *N. J. L. J.*, p. 9).

Under the act concerning property and contracts of married women, 2 *C. S.*, pp. 3224-3225, Sections 2, 3 and 5, the wife of the defendant had a perfect right to rent the rooms that she occupied at the time of this murder, and she had a right to let one of these rooms to the deceased. He had a right to be there as occupant and boarder. Under the agreement of separation and under the law it was unlawful for the defendant to attempt to enter that house by force in the dead of the night. He went there armed with a deadly weapon. His own admissions and all the testimony in the case shows that he intended to commit a felony; that the breaking and entering into the house and going into the room occupied by the deceased and shooting him like a dog shows that he did commit a felony. It also shows that he was the aggressor and continued in action until he carried out his purpose. *In his own statement to the police he intended to kill them both.* The defendant, when arrested, said that he had shot them both and "I hope they are dead." He further said, on being arrested, "Yes, I am the man you want and I am glad it is all over." He also said that he had shot both of them

(Case, p. 58, lines 15 and 21). This evidence shows that he was the aggressor and not entitled under any circumstances to claim the benefit of the right of self defense under the law and the facts.

The Court's ruling was, therefore, proper (p. 196).

The Eleventh Assignment

There is nothing to which exception can be taken in the statement made here by the Court. It was simply amplifying the decision which the Court reached on the question of the right to interpose self defense and allowing defendant an exception to the ruling. We have covered the same question under the *tenth assignment*.

The Twelfth Assignment

An inspection of the record (p. 103, line 1) shows that the Court made no such ruling as is here complained of. The Court ruled that under the facts as stated by counsel the defendant could not claim the benefit of the right of self defense in the commission of this crime. The Court also ruled that they might offer evidence of adulterous conduct (Case, p. 104, line 1). The Court said:

"I will allow the defendant to show any adulterous act on the part of this deceased with the defendant's wife, and the disposition of the deceased in that respect. That I assume is the line of defense."

An inspection of the charge also shows that this subject was discussed by him to the jury in keep-

ing with the contention of the defendant's counsel. At page 179, line 20, the Court says:

"And so he justifies his act upon one theory, and that is, that when he entered the house he discovered his wife and this deceased sleeping together in a position to commit an act of adultery. The result of that defense is that the inquiry here is narrowed to a very small compass. Because, under the law, if you concede that the defendant went to that house on this occasion, as he insists, for the purpose of finding the wife and her paramour in the act of adultery, he had no right to take their lives, or the life of either of them. The law in its charity, and regard for human weakness, has reduced the grade of the crime which he committed, under such circumstances, from that of murder in the first degree to manslaughter."

The Court further charged the jury that if they took that view of the case they could not acquit him, but find him guilty of manslaughter.

There was no harmful error in this assignment.

The reasoning of the Supreme Court on the question here raised correctly (p. 219) states the law and cites authority to support its decision. Justice Swayze in the opinion says:

"The rule is not that the offense is always reduced to manslaughter when a husband kills the paramour of his wife in the act of adultery but only when the circumstances are such that the husband may be supposed to have acted in a sudden transport of passion, or heat of blood

upon a reasonable provocation, and without malice. The provocation must be of such a character and so close upon the act of killing that, for the moment the (accused) could be considered as not master of his own understanding. If such an interval of time elapsed between the provocation and the act of killing as is reasonably sufficient for reason to resume its sway, the act is not mitigated to manslaughter." (1 *Russel on Crime*, 786.)

Brown vs. State, Supr. 710-713.

1 *Russel*, 724.

The Thirteenth Assignment

The ruling here complained of referred to the actions of the deceased while in Italy and had no reference whatsoever to this trial. It was asked to show that the deceased, before this shooting, was of a quarrelsome disposition. The Court having decided that the defendant was not entitled to claim the benefit of the right of self defense, the ruling here was perfectly consistent and legal.

The Fourteenth, Fifteenth and Sixteenth Assignments

There was no error in overruling these questions. What is said in the thirteenth assignment above is also applicable to the fourteenth, fifteenth and sixteenth assignments of error. The questions overruled referred to acts that occurred many years ago.

The Seventeenth Assignment.

There was no harm done to the defendant in this ruling.

The defendant was under cross-examination and the State had no right to learn what was influencing his conduct. What was in his mind. The question was asked (Case, p. 127, line 20):

“Q. You knew you had not any right to go there and you say you knew you did not have any right to speak to her on the street under the agreement between you?”

His answer to this question (Case, p. 127, line 35), was:

“A. I never went to the house and I never spoke to her on the street.”

Later on he says (Case, p. 128, line 19), that he didn't speak to her because the judge and the lawyers who drew up the separation papers told him not to.

The Eighteenth, Nineteenth and Twentieth Assignments

These assignments may be considered together (Case, pp. 198, 199). *Patrick Cunningham*, a clerk in the County Clerk's Office, was called to testify to a record of conviction of the deceased for crime. *John F. Grossi*, Clerk of the Recorder's Court of the City of Paterson, was also called for the same purpose as to another offense, and also as to some

conversation had between the Recorder and Galizio with reference to the wife of the defendant prior to this shooting.

The Court overruled the testimony of these witnesses very properly, having decided that this was not a case of self defense. Such testimony was irrelevant and inadmissible, as will be seen by an inspection of the record (Case, pp. 140-142).

The Twenty-first Assignment.

The Court properly overruled the question as to what the Recorder of the City of Paterson may have said to Galizio, the deceased, at the time of the trial before him. Galizio is dead, and such a statement would have no bearing upon this issue. It was irrelevant and immaterial.

The Twenty-second Assignment

For the same reason, the ruling of the Court complained of in this assignment of error was perfectly proper. It is not a question in this homicide case as to what Agnesi had complained of or said about his wife and Gaetano Galizio before the killing. Nor was it of any importance what Joseph A. Furrey, an attorney-at-law, heard the Recorder tell Galizio long before the shooting under investigation. The question was irrelevant.

The Twenty-third Assignment.

For the same reason as stated above, the ruling of the Court complained of in this assignment of error was perfectly proper. It was the same question.

The Twenty-fourth Assignment.

The record does not support this assignment. An inspection of the record (Case, p. 148, line 25), shows that the witness was asked about remembering a conversation that he had with the deceased four or five months before he was shot by the defendant. He was then asked to tell the Court and jury what was said on that occasion. The question was objected to, and it was learned that the defendant was not present at the time of the conversation (Case, p. 149, line 15).

At the request of the Court, the defendant's counsel stated that the object was to prove that Galizio, the deceased, had adulterous relations with Mrs. Agnesi. We contend that this question was properly overruled; (*first*) because it was a statement not made in the presence of the defendant; and (*second*) it did not appear that it had ever been communicated by the witness to the defendant, and (*third*) it was irrelevant and immaterial as justifying defendant's conduct on the night he shot Galizio, and (*fourth*) it did not show that Galizio was having adulterous relations with defendant's wife on the night he was shot. It was clearly irrelevant.

The Twenty-fifth Assignment.

An inspection of the record (Case, p. 153, line 30, and p. 154, line 10), will show to the Court that there was no harmful error from the ruling here complained of. Questions were being propounded to the witness on cross-examination. The questions

were strictly proper and in line with the direct examination, and the State was entitled to the benefit of those answers, and it would have been improper not to have allowed them to stand.

It will also be noticed that the objection to the questions and answers complained of was not made until after the question was answered, and then it was too late to exclude the same. This was not error.

The Twenty-sixth Assignment.

Complaint is made because the Court prevented the witness, Tony LeVardo, from testifying to a conversation that he had with Galizio, the deceased, as to what he would do with Agnesi at a time when Agnesi was not present.

The Court properly excluded the testimony. It was irrelevant and immaterial, in view of the elimination in the case of the right of the defense of self defense. This assignment, like many of the others, seems to be frivolous. In almost every case the defendant was absent at the time the conversation is alleged to have taken place, and it does not appear that he ever had knowledge of the same.

The Twenty-seventh and Twenty-eighth Assignments.

The first was as to the excluding of a question as to the reputation for quarrelsomeness of the deceased (Case, p. 155, line 25). The second was (Case, p. 156, line 15) when the witness was asked to tell the Court the conversation that took place between the witness Carnelia Ventre and Mrs.

Agnesi when Galizio was in his store, and the same was excluded.

Both these rulings were proper. Both questions were irrelevant and immaterial and could have no bearing upon the issue, which the Court had then decided to place before the jury as to the guilt or innocence of the defendant.

The Twenty-ninth Assignment.

Here complaint is made because the Court did not allow Albert Ernest Agnesi to state orally the substance of a complaint that he had made before the Recorder against Galizio, the deceased, when the original complaint was in writing and was in existence.

An inspection of the record (Case, p. 161) shows, that shortly after the Trial Court had ruled out the production of the complaint by the Recorder's clerk, which was considered under the nineteenth assignment of error above. It certainly would have been improper to have allowed this witness to testify as to what was in the complaint which he made against Galizio. It certainly was irrelevant and immaterial evidence and could have no bearing upon the issue of the case. When the Court decided that self defense was eliminated from the case, all such questions were improper.

IV.

THE SUPREME COURT WAS CORRECT IN UPHOLDING THE RULINGS OF THE TRIAL COURT AS TO THE ADMISSION AND REJECTION OF EVIDENCE AS COMPLAINED OF IN ASSIGNMENTS NOS. 30 and 31.

The Thirtieth Assignment.

Here complaint is made because of the overruling of an objection, when John Tracey, Captain of Police, is asked concerning a statement in writing signed by the defendant and taken down by him:

“Q. Tell us how it was taken down, by what method?”

An inspection of the record (Case, pp. 168 and 169) shows counsel objected to any examination on the statement, because, he said, “The defendant is asked some two or three questions as to whether or not he had said certain things,” apparently read from this statement, and then he was shown his signature, a mark at the end of the page, and the Court states at line 10, that he admitted it was his signature, and then follows the ruling, to which exception is taken. The Court said:

“But it is a matter of discretion and in realizing that the officers could not be found around lunch time, I don’t want the State to be in a position of not producing it when they are here in Court, so I will allow it to go in at this time. If it should transpire that it is in any way a matter of inconvenience or prejudice to the defense and they can show me that it is, I will allow the defense to call any witnesses they desire on the subject” (Case, p. 169, line 20).

On page 139, the testimony shows that the defendant admitted that he told the police all about

what had happened, and that they put it down and that he signed it (Case, p. 139, lines 1 to 15). An inspection of the testimony of the defendant also shows, that he spoke English freely and well, and his testimony on this trial was given direct and not through an interpreter.

There was no error in admitting this statement in evidence and allowing the same to be read under the ruling of the Court, as stated above. Under the language of the Court, the defendant's rights were protected.

State v. Pulley, 82 N. J. L., p. 579, holds: Declarations of a party as to the subject-matter of a controversy which are contradictory of statements made by him upon the witness stand are competent to be proven as a substantive matter without first calling his attention to them while he is upon the stand.

The Thirty-first Assignment.

Under this assignment the defense seeks to review the admission in evidence of the written statement signed by the defendant, which was taken down by Captain Tracey and signed in his presence, upon the ground that it appeared from the testimony of Captain Tracey that the statement was produced through one Charles Pirola, an Italian interpreter, who was not produced as a witness to testify as to the correctness of the interpretation.

An inspection of the record (Case, p. 171) shows that no such objection as here stated in this assignment was made (Case, p. 171, line 30). Under the

law stated above the assignment is without merit. The record shows the following on the subject:

"Mr. Dunn: We offer the statement in evidence.

Mr. McGinnis: We object to it, upon the ground that it is not the original evidence, not the original statement.

The Court: I do not understand that it has to be. It was read over to him. He understood it and signed it in the presence of the captain. That is enough. I will admit it."

There was no objection whatever made that the defendant did not understand the statement when he signed it. Captain Tracey had testified (p. 171, line 5) that he took the statement down and wrote it in lead pencil, that he then had it typewritten. It was then read to the defendant and compared and the defendant signed it, and that any words the defendant didn't understand were explained to him by Mr. Pirola, who was an Italian detective officer.

It appears also that Mr. Pirola is a witness to the statement.

An inspection of the record of defendant's testimony (Case, p. 90), in both his direct and cross-examination, given just as therein stated, without the assistance of an interpreter, must go far in convincing this Court, that Justice Minturn in admitting the statement, committed no error, and that the defendant signed it freely, and fully understood its contents. In addition to that, the defense was expressly given the privilege by the Court to make any explanation they saw fit of any matters contained in the statement. They did not recall the

defendant or any witness to make any explanation or denial of the contents or correctness of the statement. Furthermore, most of the matters contained in the statement were testified to by several other witnesses on behalf of the State.

V.

THE SUPREME COURT PROPERLY HELD THAT THE TRIAL COURT COMMITTED NO LEGAL ERROR WHICH WAS PREJUDICIAL TO THE DEFENDANT IN MAINTAINING HIS DEFENSE UPON THE MERITS IN THE CHARGE OR IN THE REFUSAL TO CHARGE AS REQUESTED. THIS INCLUDES ASSIGNMENTS from 32 to 54 inclusive.

We will discuss these assignments separately.

The Thirty-second Assignment.

There is no legal foundation for the complaint made under this assignment. Here, the Court simply stated the rule as to self defense, and when it cannot be taken advantage of as a defense.

What has been said under the tenth and eleventh assignments above is equally applicable here. The Court was convinced from the undisputed evidence, that the defendant was the aggressor in the case, and the charge to the jury was made with this idea in mind, which we contend was correct.

The Thirty-third Assignment.

The language here complained of was a correct statement of the law. The Court simply said that if the jury took the defendant's version of the case, that when he entered the room he found his wife

in bed with the deceased, they could not acquit him of the crime charged, but they must find him guilty of manslaughter at least. This is correct, Opinion, p. 217.

From an inspection of the record (Case, p. 89), you will observe in the opening of the case of the defense, it was stated that they would prove that the deceased and the defendant's wife were found by the defendant in bed together, and that the indications were that they were having adulterous relations, and then counsel stated:

"I think his Honor will charge you that if this man caught his wife in the act of adultery, no matter what the other circumstances in the case are, it will reduce the crime to manslaughter pure and simple."

The charge was in keeping with that insistent. Nevertheless, error is assigned.

The Thirty-fourth Assignment.

What has been said as to the twenty-second assignment is equally appropriate and applicable to the language expected to under the thirty-fourth assignment, and there was no error in the law as there stated by the Court.

The Thirty-fifth Assignment.

There is no error in the statement of the law of manslaughter here complained of. The extract is from the charge (Case, p. 182, line 10), and is a correct statement of the law.

The Thirty-sixth Assignment.

This extract of the charge (Case, p. 182, line 20), is not error. It was in keeping with the law as contended for by the defendant's counsel in his opening (Case, p. 89, line 25).

**Assignments Thirty-seven to Forty-seven, Inclusive,
Deal With Refusal to Charge as Requested.**

To fully appreciate the propriety of the rulings of the Court in refusing to charge these requests, we respectfully refer to the charge as a whole (Case, p. 178 to p. 187, inclusive).

The *thirty-seventh assignment* is a request concerning the law of reasonable doubt. An inspection of the charge at page 180, line 20, shows that the Court said:

"Now, under the facts of this case as presented to you by the State, you may deal with this situation from an entirely different viewpoint, if you think the evidence warrants it; and of course, in deciding this case, you must be guided entirely by the evidence. Every theory that you entertain, every view that you take up for consideration must, in order to support itself, be based upon the evidence in the case, and, so far as this defendant is concerned, it must be based upon evidence that, in your judgment, will convict him of the crime of which you find him guilty beyond a reasonable doubt. Because, under the law, he is presumed to be in-

nocent until the State has proved him guilty beyond a reasonable doubt."

Then, on page 181, line 10, the Court states the view as contended for on behalf of the State and defines specifically, under what circumstances, the defendant would be guilty of murder in the first degree, in the second degree and of manslaughter.

At page 182, line 15, the Court further said:

"As I have said, gentlemen of the jury, the facts in the case are entirely with you. The Court has expressed no opinion on the facts and desires to express none, because you are the judges, the sole judges, of the facts, the Court's function being entirely to explain to you the law as the Court understands the law to be written. Throughout the entire case, if there be a doubt in your mind as to the quality and degree of this crime on the evidence, a reasonable doubt, give the benefit of that doubt to the defendant for the reason that under the law he is entitled to it and must have it."

On page 183, the Court charged several of the defendant's requests on the subject of reasonable doubt. The Court was justified in refusing to charge the eighth request, first, upon the ground that it was an incorrect statement of law; second, because the subject of reasonable doubt had been fully covered by the charge and the requests that were charged, in keeping with the law of our State. The rule stated in *State v. Pulley*, 82 N. J. L., p. 579, shows that this refusal of the Court was not error harmful to the defendant.

The thirty-eighth assignment was a refusal to charge the thirteenth request. This was properly refused. It reads:

"If the jury believes from the evidence that the defendant was of a violent or turbulent character, they are to take such evidence into consideration in determining whether or not the defendant acted in self defense" (Case, p. 188, line 1).

The Court having in the early part of the trial, on the admitted and undisputed facts from the evidence, decided that the defendant was not entitled to claim that he acted in self defense, made this request improper, and it was the duty of the Court to refuse it.

The thirty-ninth assignment also contains a reiteration of the law of self defense (Case, p. 188, line 10). The Court said, in refusing to charge it:

"This legal rule has no application to this case."

This was a correct statement of the law, and it was not error.

The fortieth assignment is as to the ruling of the Court in refusing to charge the fifteenth request as to the belief of the defendant as to being in danger when he made the assault upon the deceased. This ruling was proper, because the principle of law, as stated, was not applicable to the case as decided by the Court. The defendant was admittedly the aggressor.

The forty-first assignment is as to the refusal of the Court to charge the sixteenth request (Case, p. 189, line 1). This states the law as to justification of the defendant in striking such blow as was inflicted upon the deceased.

The Court very properly held that the rule was not applicable to the case.

The forty-second assignment was the seventeenth request (Case, p. 189, line 10). It was refused for the same reason, that the rule there stated was not applicable to the case.

Self defense had been eliminated from the case before.

The forty-third assignment was the eighteenth request (Case, p. 189, line 25). It was properly refused, for the same reason as the previous request.

The forty-fourth and forty-fifth assignments were the nineteenth and twenty-first requests (Case, p. 189, line 35; p. 190, line 15, respectively). These requests were refused for the same reason as the preceding request. They were simply a restatement of the rule that might be applicable in a case where the right of self defense could properly be interposed as a defense to the issue.

The forty-sixth assignment was the twenty-fifth request (Case, p. 190, line 25). It states:

“There is no evidence in the case showing that there was any wilful, deliberate and premeditated intent on the part of the defendant to kill the deceased. Therefore, the defendant cannot be convicted of murder in the first degree.”

An inspection of the charge at page 181, line 10, shows that the State contends that there was evidence that would justify the conviction of the defendant of murder in the first degree. It was necessary, therefore, for the Court to refuse the request and submit the degree of murder to the jury, which was very properly done.

The forty-seventh assignment was the twenty-sixth request (Case, p. 190, line 35). It states that no dying declaration can be received of any person who lacks belief in God and sense of accountability for false swearing, and if the jury believed that the deceased did not believe in God and accountability to him for false swearing, the jury could not consider the dying declaration.

The rule of law stated above under the ninth assignment shows that this request was wholly devoid of merit (see *State v. Donnelly*, 26 N. J. L., p. 464, at p. 506).

The Forty-eighth Assignment.

This assignment refers to the twenty-seventh request of charge. It called upon the Court to disregard its former ruling as to the right of self defense to be interposed in the case. It reads:

“The jury may consider the defense of self defense, and ascertain from the evidence whether or not the defendant committed the act of shooting the deceased, in order to protect himself from great bodily harm or loss of his own life.”

The Court very properly said (p. 191, line 20), in dealing with the request:

"This rule, while strictly correct as an abstract principle of law, has no application to the facts in this case."

Certainly this was not error.

The Forty-ninth Assignment.

This assignment of error reads:

"Because the Court, at the trial of the indictment in its statement to the jury, failed to define manslaughter as an element in the crime, excepting in connection with the defendant catching the deceased and his wife in the act of adultery. The Court put aside all other questions in the case which might have reduced the crime to manslaughter; said ruling was erroneous and to the manifest injury of the defendant."

This assignment can be of no avail to the defendant. It don't appear that there was any request made for a charge on this subject, and no exception was taken to the language used by the Court on this subject that would give ground for this assignment under a strict bill of exceptions.

An inspection of the Court's charge will show that manslaughter was correctly defined by the Court, as well as the other degrees of murder (pp. 180 to 183, inclusive).

The Fiftieth Assignment.

The language here complained of is an extract

from the charge of the Court (p. 179, line 35). It reads:

“So that if you take his version of this case and consider it as the theory on which you will decide it, you cannot under any circumstances acquit him, but you must find him guilty of manslaughter at least.”

To properly understand the meaning of the Court in the use of these words, it is necessary to read what preceded and followed this extract (p. 179, line 20; p. 180, lines 1 to 18).

There was no harmful error in the language used by the Court.

The Fifty-first Assignment.

This is a mere extract from the charge (Case, p. 182, line 25). By itself it is misleading, but the language preceding and following it must be considered. The Court said (Case, p. 182, line 15):

“As I have said, gentlemen of the jury, the facts in the case are entirely with you. The Court has expressed no opinion on the facts and desires to express none, because you are the judges and the sole judges of the facts, the Court’s function being entirely to explain to you the law as the Court understands the law to be written. Throughout the entire case, if there be a doubt in your mind as to the quality or degree of this crime on the evidence, a reasonable doubt, give the benefit of that doubt to the defendant for the reason that under the law

he is entitled to it and must have it. Because, the defendant, except to the extent that he has admitted his guilt, stands before you innocent of any higher crime than the one which he himself has described, of taking the life of the man that he found in this compromising position with his wife which, as I stated, would be manslaughter."

This language was used after the Court had discussed the different degrees of murder and the theory of the defense and the view taken on behalf of the State. No exception was taken to this particular language, and the case is here on a strict bill of exceptions. The language complained of taken in connection with the context, was not error prejudicial to the defendant in maintaining his defense.

The Supreme Court in the opinion points out that the part of the charge here complained of was beneficial to the prisoner if self defense was eliminated, (pp. 220 and 221). It therefore cannot be construed as harmful or prejudicial to the defendant.

The Fifty-second Assignment.

It is claimed under this assignment of error that the jury did wrong in finding the defendant guilty of murder in the second degree, whereas, under the evidence and the law, they should have acquitted the defendant.

This assignment is not based upon any exception to any ruling of the Court. It was a question of fact for the jury to decide the degree of crime. This

Court is reviewing here questions of law and not of fact.

This assignment of error is devoid of merit.

The Fifty-third Assignment.

This assignment states:

“Because the jury found defendant guilty of murder in the second degree, whereas by the evidence and law applicable thereto he should have been convicted of manslaughter only.”

An inspection of the charge and the record will show that the case, with all the facts, was left to the jury by the Court, and their action cannot be made a subject of legal error. The case here is upon a strict bill of exceptions, and not under the 136th and 137th Sections of the Criminal Procedure Act.

The Fifty-fourth Assignment.

This assignment criticizes the sentence imposed. It is not error that this Court can take cognizance of. The statute prescribes the penalty for murder in the second degree. An inspection of the record (Case, p. 7) shows that the defendant was sentenced to the State Prison at hard labor for the maximum term of thirty years and the minimum term of twenty years.

The *fifty-fifth* and *fifty-sixth* assignments of error are directed to the judgment of the Supreme Court and pray that the judgment of affirmance rendered in the case in that Court should be reversed and an-

nulled for the errors set forth in the different assignments. We have replied to them under previous assignments.

CONCLUSION.

The fact that this case comes before the Court on a strict bill of exceptions on which error has been assigned, makes it necessary that the Court should keep in mind that the defendant is not entitled to the benefit of the provisions of the 136th and 137th Sections of the Criminal Procedure Act.

It is a well settled rule in our State that no judgment will be reversed for any error, unless it is such an error as may have prejudiced the defendant in maintaining his defense upon the merits (see *State v. Johnson*, 26 N. J. L., 313; *State v. Hunter*, 40 N. J. L., 495; *State v. Bodde*, 57 N. J. L., 140; *State v. Simon*, 71 N. J. L., 142).

Where the entire record of the proceedings is not brought up under the certificate of the Trial Court and as provided for under the 136th and 137th Sections of the Criminal Procedure Act, the Court will not consider grounds of error not set forth in the assignment of error and the exceptions (*State v. Young*, 67 N. J. L., 223).

In this connection it is well to bear in mind that the defendant is without standing, unless he shall have objected to that by which he thinks himself aggrieved, and shall be taken up on exception to the ruling of the Court thereon (*State v. Brady*, 71 N. J. L., 360).

In interposing an objection counsel should state the ground of his objection, so that such ground

shall be specifically brought to the attention of the Trial Court (*State v. Engle*, 50 N. J. L., 272).

An examination of these exceptions and the assignments thereon will indicate to the Court that many of them are wholly devoid of merit and do not deserve serious consideration. This we have endeavored to point out in dealing with them separately.

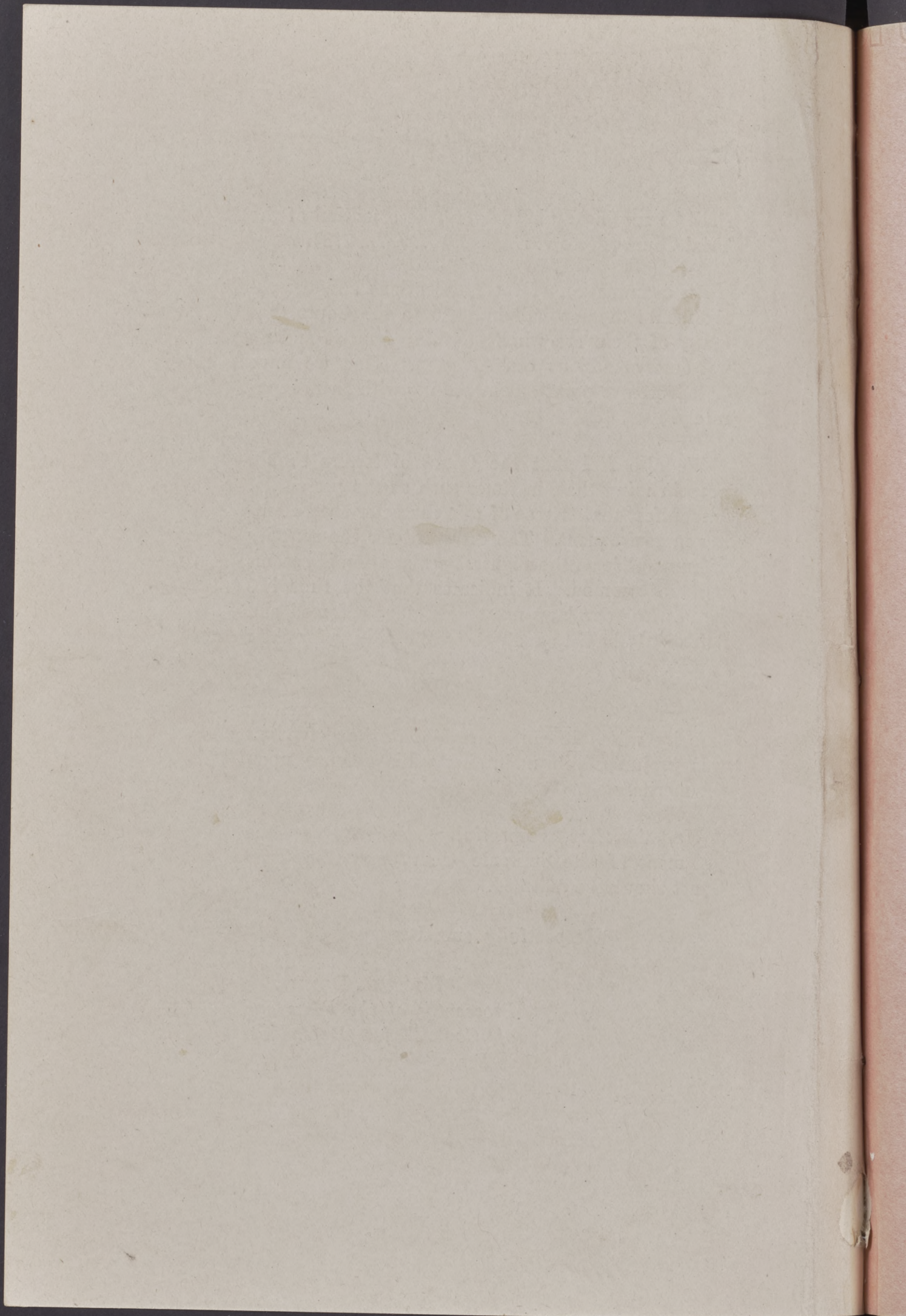
We also feel that the Court of Errors should keep in mind that, in times such as the present, it is manifest that crimes of this character are becoming more frequent. The disregard for the sanctity of human life on the slightest provocation is becoming too common. It indicates that the time has come when our laws must be rigidly enforced and defendants held to a strict accountability for their crimes.

We insist that there was no legal error in this case by which it can be said that the defendant was prejudiced in maintaining his defense upon the merits.

We, therefore, respectfully contend that the judgment of the Supreme Court and the Trial Court should be affirmed.

Respectfully submitted,

MICHAEL DUNN,
*Prosecutor of the Pleas and
of Counsel for Defendant-
in-Error.*



Southern J

