

New Jersey Court of Errors and Appeals.

THE STATE OF NEW JERSEY,

Defendant in Error,

v.

FREDERICK LANG,

Plaintiff in Error.

On Error to
Supreme Court.

Supplemental Brief for Plaintiff in Error.

The opinion of the court below concedes that as the defendant "had been afforded no opportunity to interpose a challenge to either the members of that body who were over the age of sixty-five years, *he was entitled to attack the legality of the body by a motion to quash*, and the determination of the propriety of the action of the trial court in overruling that motion, requires a consideration of the meritorious question presented thereby." (Pg. h, l. 5.)

(The authorities to this effect are cited on page 6 of my original brief.)

The objection based upon the refusal of the motion to quash is denied in the opinion upon three grounds.

I.

It is said that the privilege of challenging a grand juror was not conferred upon a defendant for his protection and is not part of the protection of the laws guaranteed by the Federal Constitution. The Chief Justice remarks in that connection that the reason for

conferring upon a defendant a right to challenge "is not easy to understand"; and indeed it is not possible to understand it upon the theory that the right is not conferred for the benefit and protection of the defendant.

The reason which is advanced in the opinion in support of that theory (namely, that the statute precludes any exception to a juror after he has been sworn) is inconclusive and fallacious. The statutory language is, "provided that no exception to any such juror on account of his *citizenship or age or any other legal disability* shall be allowed after he is sworn or affirmed."

Not only such an objection as the present but *any* objection whatever is disallowed after the swearing either of a grand or petit juror. It is indisputable that objections which are important to the defendant as well as those (if any) which are not important, are included in this language. The fact, therefore, that no objection can be urged after the swearing of the juror affords no argument that the previous right of challenge is not for the protection of the defendant; while the fact that the right of challenge is given at all is not to be accounted for if it was not thought to be of benefit to him.

All of the statutory qualifications, however, are for the benefit of the defendant.

(a) The statute requires that the juror shall be a citizen, presumably because citizenship implies some knowledge of our laws and institutions, and of the duties of a juror. This is a matter of concern to the defendant.

(b) It requires also that the juror shall be a resident of the county, because a resident best represents the sense of the community in which he dwells and may best conduct an inquiry into the circumstances of an alleged crime. This also is of importance to the defendant.

(c) It is further required that the juror shall be above the age of twenty-one years—the age of majority fixed by law for purposes of contract and most other purposes. Obviously the intention of this requirement is to insure maturity of judgment in the juror. Can it be

doubted that it is for the benefit of a defendant that his case shall not be passed upon either by a grand or by a petit jury composed of boys?

(d) So when we come to the requirement immediately involved in this case, that the grand or petit juror shall be under the age of sixty-five years, we find that it rests upon similar considerations. The purpose is to guard against the weakness of age as well as the immaturity of youth. Since in extreme age the faculties approximate the condition of childhood, it is as reasonable to fix a maximum as a minimum,—to guard against senility, as to guard against youthful immaturity.

Doubtless the age of sixty-five may at first thought seem somewhat early to fix as the limit for service as a juror. But any age would necessarily be arbitrary, and most men of sixty-five will confess to some impairment, at least of physical capacity. The duties of a juror often severely tax the physical as well as the mental powers and endurance. This is more conspicuously so in the service upon a petit jury, where a jury not infrequently is required to be kept together over night or longer, under constant strain of discussion and often of heated argument in the efforts of the members to convince each other and to reach a verdict.

And in a capital case (often protracted for many days), the jurors are required to be kept together from the time they are empanelled until the verdict is rendered.

Thus the very life of a defendant may depend upon the physical endurance as well as the mental vigor of those members of the jury who are favorable to him, but who might be obliged to yield their opinion and consent to a verdict against him from inability to hold out longer through the infirmities, or impairment of vigor due to advancing age.

Each of the prescriptions of the statute therefore has direct reference to the interests of the defendant. It is important to him not merely that the jurors shall be *impartial* but that they shall be *competent*.

So, aside from the statute, it would be ground of

challenge if one of the grand or petit jurors summoned was an idiot or lunatic, or was engaged in urging the prosecution through mere enmity toward the defendant. *Yet all of these objections, as well as all others, are shut out by the swearing of the juror.*

No objection, whether based upon the statute or not, is of any avail after the juror is sworn. This, however, is not because such objections are not for the protection of the defendant, but because the statute prescribes a limit of time within which they must be made and in effect declares a waiver of objections not so taken.

2.

It is next said in the opinion by way of answer to the objection based upon the Fourteenth Amendment, that assuming that some benefit is conferred upon a defendant by the right of challenge, the fact that persons charged with having committed crimes since the empanelling of the grand jury, are by the statute excluded from the exercise of such right, does not constitute a violation of the equal protection clause, because all persons under like circumstances are treated alike.

This, however, ignores the question whether there is anything in the circumstance of a grand jury being in session at the time of the alleged commission of the offense, which affords a basis for classification.

In *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 560, the Court said:

"The difficulty is not met by saying that, generally speaking, the State when enacting laws may, in its discretion, make a classification of persons, firms, corporations, and associations, in order to subserve public objects. For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. . . . But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. . . . No duty rests more

imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. . . . It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground,—some difference which bears a just and proper relation to the attempted classification,—and is not a mere arbitrary selection.’ *Gulf C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 155, 159, 160, 165. These principles were recognized and applied in *Cotting v. Kansas City Stock Yards Co.* 183 U. S. 79.”

In *Hayes v. Mo.* 120 U. S. 68, it was held that a different number of peremptory challenges might be allowed in cities of over 100,000 than in other portions of the State without denial of the equal protection of the laws. And in *Mo. v. Lewis*, 101 U. S. 22, it was held that a State might establish one system of law in one portion and another in another portion of its territory, allowing in one an appeal from final judgment of the trial Court to the Supreme Court, while in other places it was not allowed.

In *Brown v. New Jersey*, 175 U. S. 172, it was held that the statute of this State allowing struck jury in discretion of the Court was not in violation of due process or equal protection. That a struck jury was known to the common law and gives to defendant reasonable opportunity to protect himself in its selection. “There is no mere arbitrary power in this respect (in granting the struck jury) any more than in granting or refusing a continuance.”

The earlier cases above mentioned did not call for a critical discussion of the power of classification under the Fourteenth Amendment, and the Missouri cases may have been well decided upon the theory of classification by population. At all events the most that they decide is that the Fourteenth Amendment does not interfere

with the power of a State in creating political subdivisions for municipal purposes and to regulate their local government including the constitution of courts and their jurisdictions.

The Brown case rests upon the determination that a struck jury under our statute involves no exercise of arbitrary power. Other cases contain an express finding that "there was nothing of a special, partial or arbitrary nature or in violation of fundamental right in the proceedings complained of."

Since the object of the statute directing the discharge upon the objection of the defendant of persons returned as jurors but not possessing the necessary qualifications, was the benefit or protection of the defendant, the right of objection to such unqualified persons must be extended to all who are within the reason of the provision. Such a classification alone is valid as shall proceed upon a distinction arising out of or related to the purpose for which such objections are allowed.

If it could be said that persons charged with having committed offenses while a grand jury is in session stand less in need of such protection, or that the exclusion of unqualified persons from the grand jury is less important to them as a class than to those whose offenses have preceded the empanelling of the grand jury, such a classification as this might be supported.

But in the absence of such a basis, to deny to a defendant his right of effectual objections merely out of regard to public convenience or the speedy administration of justice, is to deny him the equal protection of the law.

It is difficult to understand the position of the court below in conceding that the defendant was entitled to make the objection, yet holding that the denial of the motion was not a denial of the equal protection of the laws.

We invoke the Fourteenth Amendment for the purpose of overcoming the clause in the Jury Act which declares that no exception to a juror shall be allowed after he has been sworn. If, as the opinion of the Su-

preme Court admits, we are entitled to make the objection on motion to quash with the same effect as though it were interposed by challenge, we need no further assistance from the Fourteenth Amendment. If the Jury Act does not stand in our way, then the law of the State is sufficient for our relief.

The same statute provides that in case of challenge, the disqualification being verified as in the present instance, the juror shall be discharged; and it follows that if the objection may be made by motion to quash, it was the duty of the court to quash it.

3.

The third ground upon which the Court below refused to give effect to the objection is that the illegality of the grand jury could not have prejudiced the defendant in maintaining his defense upon the merits, inasmuch as he has been convicted by the petit jury.

Certainly this court in deciding the case of *State v. Hoffman*, 42 *Vroom*, 285, had no idea that the objection could be thus summarily disposed of; otherwise the thoroughly considered opinion delivered by the Chancellor was wholly unnecessary and would never have been written.

The reasoning of the Supreme Court reduces the finding of an indictment (except in so far as it seems to apprise the defendant of the accusation which he is to answer), to a useless form. Any defect or illegality in the organization or composition of the grand jury or finding of an indictment is cured by a verdict of guilty. In fact it can not be the verdict which has this effect, for whatever the verdict may be it is obviously impossible that such objections should affect the merits; and if they could affect the merits a verdict of guilty cannot logically be accepted as proof that the defendant has not suffered prejudice in maintaining his defense.

The case of *Gibbs v. State*, 16 *Vr.* 379, is no authority for the position taken in this case. There the defendants pleaded guilty, and it was by reason of the fact

that they were by their own confession without a defense upon the merits that the court held that they could not have been prejudiced in maintaining a defense. It was not the result of the trial or the conclusiveness of it, but the confession of guilt upon the record by the plea of guilty, which was the foundation of the decision in the Gibbs case.

A plea of guilty is a waiver of all merely technical or formal objections which the defendant could have availed himself of by any other plea or motion. *Commonwealth v. Hines*, 101 Mass. 210; *Carper v. State*, 27 Ohio St. 572; *Wharton Crim. Pldg. & Prac. Sec.* 413; 2 *Ency. Pldg. & Pr.* p. 779-780.

Again, the proviso of Section 136 of the Criminal Procedure Act of 1898 is no restraint upon the action of the court upon objections presented independently of that section.

The office of a proviso has been declared in several cases in this State, to be merely to restrain the generality or to influence the construction of the enactment to which it is appended; and the effort to make a proviso do service as an independent enactment by giving it an effect broader than the section in which it occurs, has been uniformly unsuccessful. *Sloat v. McComb*, 13 Vr. 484; *Lanning v. Lanning*, 2 C. E. G. 228; *Siple v. Wass*, 18 Vr. 187; *Roxbury Lodge v. Hocking*, 41 Vr. 439, 442; *Nowrey v. Camden Co.* 39 Vr. 203, 205.

In view of this rule of construction so well settled in this State, the change made in the revision of the Criminal Procedure Act of 1898 by which the clause previously existing as section 89 was degraded to the position and office of a mere proviso to section 136, was significant of the legislative purpose to give to the language an effect less extensive than it had previously possessed. It ceased to have any application to objections taken by exception and assigned for error according to the ancient practice.

The objection to the grand jury in this case was presented not only by specification of causes for reversal under section 136, &c., but also by exceptions (p. 19)

and assignments of error (p. 161), and is found in the judgment record itself (p. 6).

But finally, the Constitution of this State declares that "No person shall be held to answer for a criminal offense unless on the presentment or indictment of a grand jury, except in cases of impeachment," &c. Article I., Pl. 9.

A "grand jury" means a lawful grand jury, not merely a body of men calling themselves such, or even empanelled as such, some or all of whom do not possess the statutory qualifications. The Constitution guarantees to the defendant that he *shall not be held to answer unless upon the indictment or presentment of a lawful grand jury*, and it is not within the power of the legislature to take away this right, by saying that a conviction obtained in disregard of it shall not be reversed.

Doubtless the legislature may regulate the qualifications of jurors and may limit a time within which objections for lack of such qualifications shall be interposed, or if not interposed (the opportunity being afforded), shall be deemed waived.

But it cannot say that where there has been no waiver and no opportunity to present the objection, the absence of a finding by a lawful grand jury shall not be cause for reversal, simply because the denial of the constitutional right did not prejudice the defense upon the merits.

The Constitution prescribed a condition precedent, and until that was complied with by the finding of an indictment by a lawful grand jury, the defendant could not be held to answer. *No investigation of the merits could take place until the Constitution was satisfied.* The proviso of section 136 does not undertake to say that the grand jury was legal or that the refusal to quash or to discharge the juror upon challenge verified, was not erroneous, but only provides *that the judgment shall not be reversed for that error.*

The statute is not particularly applied to this or any other error, but generally to all errors of a non-prejudicial character, and because this one is supposed to be

State v. Rockefeller
1 Hals. 332.339

There ~~was~~ ^{is} answer
from prosecution other
Edwards v. State
16 Vr. 419.

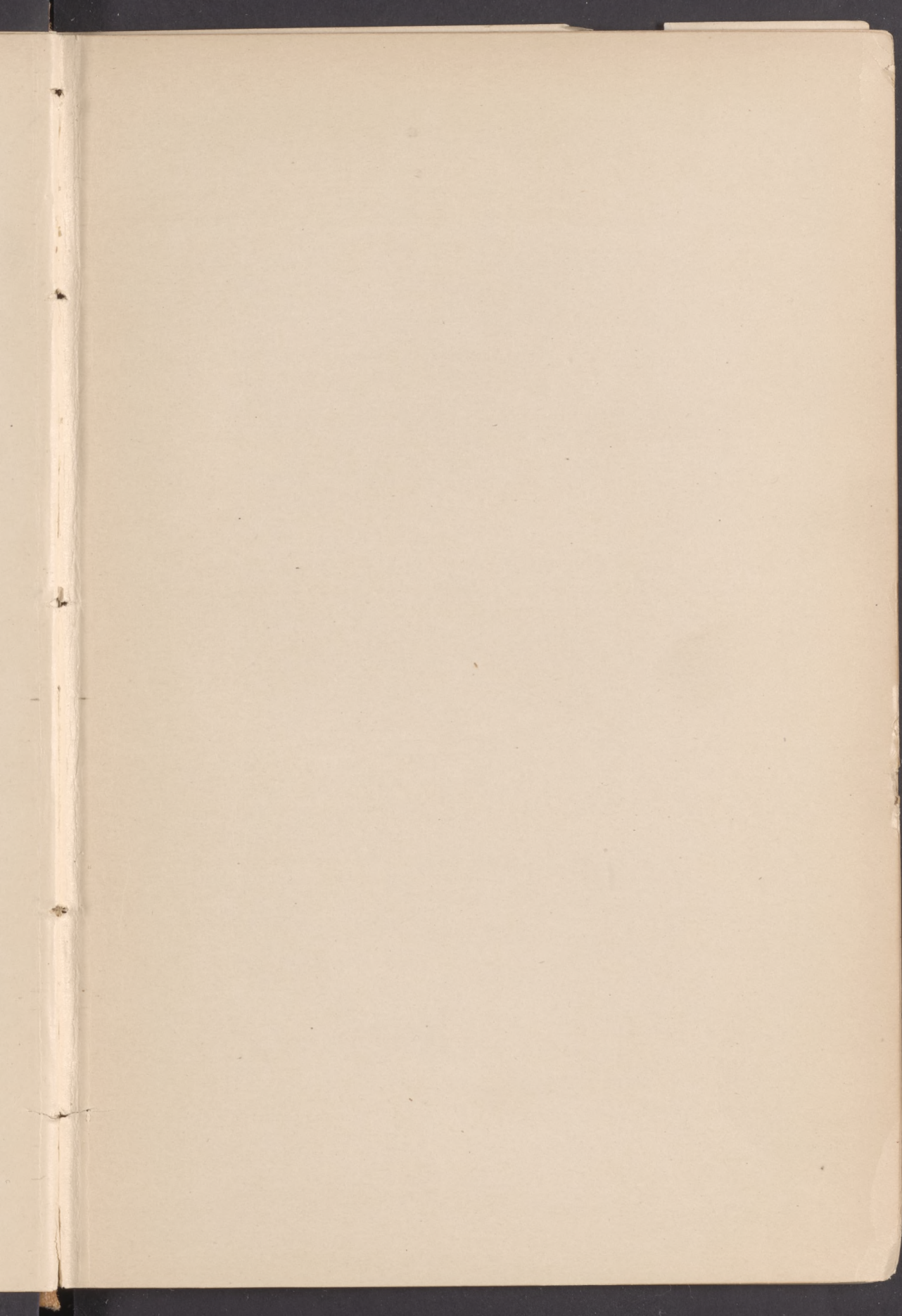
of that character the statute is sought to be applied to it. This is simply to say that a constitutional right may be denied if it appears that such denial has not prejudiced the defendant upon the merits. If the legislature had specifically undertaken to do so it could not have denied the right to review this error of the Oyer by the Supreme Court.

Entries v. State, 18 *Vroom*, 140.

Kohl v. State, 30 *Vroom*, 195, 197.

After all ingenuity has been exhausted it cannot be overlooked or forgotten that if this judgment shall be affirmed the defendant will be put to death without ever having been indicted by a lawful grand jury, notwithstanding that upon every possible occasion and by every possible method, he has sought to exercise the right plainly given by the statute, of objecting to the grand jurors who were proved, without contradiction, not to have possessed the statutory qualifications.

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New Jersey Court of Errors and Appeals.

THE STATE OF NEW JERSEY, <i>Defendant in Error,</i>	} On Error to Supreme Court.
v.	
FREDERICK LANG, <i>Plaintiff in Error.</i>	

BRIEF OF GEORGE BERDINE,

Prosecutor of the Pleas of Middlesex County.

On the twentieth day of April, nineteen hundred and six, Frederick Lang shot and killed Katie Gordon, his niece, in the presence of her two sisters. On the evening preceding the homicide he told Julius Vorhis that "if she could not be his she could not be anybody else's." (P. 111.) He wrote to his mother, after his arrest, "Perhaps I will easier die for I have avenged myself upon the one whom I love the most on earth, and as we cannot be each other's, now what is life without her. I know my mother that I am a living dead because my heart died with the one I killed, and the judges will decide about my body."

Joseph Lengel testified that the prisoner said to him while in the County Jail, "I wanted to love her; she would not have me, and I could not let any one else have her." (P. 138.)

On the eighth day of June, nineteen hundred and six, the defendant was arraigned before the Oyer and Terminer of Middlesex County, and on his arraignment said: "I did shoot the girl," and the Court thereupon ordered a plea of not guilty to be entered. (P. 5.)

On the sixteenth day of July, nineteen hundred and

six, he was placed upon trial, and the jury convicted him of murder in the first degree.

It would seem that if there be any virtue in the jury system, the quest for error in a case so clear and simple as this one was, would be foredoomed. Our Statute, Section 136, page 915, 1898, forbids the reversal of a judgment on error, except for such as shall or may have prejudiced the defendant in maintaining his defence upon the merits. The President of the United States in his last annual message, spoke of the evils which result from reversals in criminal cases in Appellate Courts upon technicalities, where there was no attempt made to show a failure of substantial justice.

THE ALLEGED ERRORS.

The first three assignments of error and the first specification of the cause for reversal, are based upon the refusal of the trial Justice to quash or abate the indictment, because two of the grand jurors were above the statutory age of sixty-five years. The plea in abatement and the motion to quash were made on the sixteenth day of July, more than a month after the defendant had pleaded to the indictment, and had admitted on his arraignment that he had shot the girl.

No reason was assigned for not making the objection earlier, save that the grand jury which found the indictment was empanelled before the commission of the crime. The trial Judge refused to quash or abate the indictment, and it is now claimed that there was error in this refusal, because the defendant was denied the equal protection of the laws. The ruling of the learned Judge was in strict accordance with the plain words of our Statute (Gen. Stats. p. 1, 1853, Sec. 47), which forbids any exception or challenge to either grand or petit juror after being sworn.

If the judge was wrong in his ruling, the forty-seventh section of the statute must be unconstitutional, for the judge could not add an exception which the statute did not contain, nor extend the time within which challenges could be interposed,

First. The forty-seventh section of the Jury Act does not deprive the accused of any fundamental rights, and therefore does not violate the Fourteenth Amendment.

If this section is violative of the Amendment, the effect will be to fetter and degrade the State governments. This section of our law treats all persons alike under like conditions.

Maxwell v. Dow, 176 U. S. 581.

This is a strong case defending the right of the States to administer justice.

This statute forbids any challenge to a grand or petit juror after he is sworn. At common law, a grand juror, if disqualified, could be challenged by any person under prosecution for crime before the bill was presented (Hawkins P. C. b. 2, C. 25, sec. 16), and if certain disqualification in a grand juror existed, by statute of 11 Henry IV. C. G., these particular disqualifications might be pleaded in abatement of the indictment. (See opinion of Chief Justice Beasley in *Gibbs v. State*, 16 *Vr.* at 385, upon this statute.

That the subject of principal challenges is absolutely within the control of the legislature is settled in this State by *Brown v. State*, 33 *Vr.* at 679, and cases there cited, and by the case of *Hayes v. Missouri*, 120 U. S. 68, in which it appears that a certain number of peremptory challenges was allowed in cities over 100,000, while fewer challenges were allowed in other parts of the State. Mr. Justice Field said: "To secure such a body, numerous legislative directions are necessary, prescribing the class from which the jurors are to be taken, the number to be summoned, the objections that may be offered to those returned, and how such objections should be presented, considered and disposed of. All these are matters of legislative discretion."

In *Hurtado v. California*, 110 U. S. 516, &c. it is held that an accused person may be prosecuted to conviction without indictment by a grand juror.

In *Gibbs v. State*, 16 *Vr.* at 382, it is declared by

Chief Justice Beasley that "the requisite that an accusation of this nature shall proceed from a grand inquest is the provision which the law makes against frivolous or malicious public crimination."

A grand jury is nothing but an accusing body, and not a judicial tribunal. Says Blackstone in 4th vol. p. 302: "The finding of an indictment is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined."

In *State v. Dayton*, 3 Zab. 49, it is held that the court will not quash an indictment found upon illegal evidence or without evidence. If such be the nature of the functions of the grand jury, it is within the legislative discretion to limit the time within which the qualifications of a grand juror shall be contested.

The legislature has not deemed that a man over sixty-five years of age is totally unfit to be a member of the grand inquest, so as to make his presence vitiate the entire proceedings, but it has prescribed that if those entitled to challenge him, either the prosecutor representing the people, or such others as might be minded to do so, forbear, afterwards it shall be taken that all were good and lawful men. This qualification does not go to the juror's bias or partiality.

All the cases hold that the Fourteenth Amendment did not divest the States of control over the methods of procedure in their own courts.

In *Kentucky v. Howard*, 200 U. S. 175, it was held that the provision of the statute of Kentucky making the decision of the trial judge final upon the juror's qualification was constitutional, even though the trial judge was wrong in his judgment.

Does the statute go outside of the scope of this decision?

In *Brown v. State of N. J.* 17 U. S. 175, Mr. Justice Brewer said: "The State has full control over the proceedings in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Fed-

eral Constitution. The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities may exist in these respects in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its mode of judicial proceeding. The State is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law. Subject to the limitation heretofore named it may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary. For instance, while at common law an indictment by the grand jury was an essential preliminary to trial, it is within the power of a State to abolish the grand jury and proceed by information. In providing for a trial by a struck jury empanelled in accordance with the provisions of the New Jersey statute, no fundamental right of the defendant is trespassed upon. The manner of selection is one calculated to secure an impartial jury, and the purpose of criminal procedure is not to enable the defendant to select jurors, but to secure an impartial jury. The accused cannot complain if he is still tried by an impartial jury. He can demand nothing more. The right to challenge is the right to reject, not to select, a juror. If from those who remain an impartial jury is obtained, the constitutional right of the accused is maintained."

In *West v. Louisiana*, 194 U. S. 263, Mr. Justice Peckham said:

"The State of Louisiana had the right to alter the common law at any time, although it had theretofore adopted it with certain limitations. If, through its court it erred in deciding what the common law was, *yet if no fundamental and absolutely all-important right were thereby denied to an accused*, he still had due process of law, and could not complain to this court regarding the error, assuming, of course, that the decision did not conflict with some specific provision of the

Federal Constitution. The limit of the full control which the State has in the proceedings of its courts, both in civil and criminal cases, is subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution."

See also *Hardy v. Holman*, 109 U. S. 366.

Cinn. St. Railway Co. v. Snell, 193 U. S. 36.

See also to same effect in a New Jersey case—

Andrews v. Schwartz, 156 U. S. 275.

This statute operates equally upon every member of the community within the province of the Fourteenth Amendment.

Mr. Justice Bradley, in *Lewis v. Missouri*, 101 U. S. 22, said: "The general objects and purposes of the Fourteenth Amendment are to extend United States citizenship to all natives and naturalized persons, and to prohibit the States from abridging their privileges or immunities, and from denying to any person within their jurisdiction the equal protection of the laws. It contemplates persons and classes of persons. The amendment could never have been intended to prevent a State from arranging and parcelling out the jurisdictions of its several courts at its discretion. . . . It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause of the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State. A uniformity which is not essential as regards different States can not be essential as regards different parts of a State, provided that in each and all there is no infraction of the constitutional provisions,"

In *Bachtel v. Wilson*, 204 U. S. 41, Mr. Justice Brewer said: "The power of a State legislature to select certain individuals for the operation of a statute is not an arbitrary power, one that it can exercise without regard to any principle of classification. And yet there is a power of selection. The Fourteenth Amendment was not designed to prevent all exercise of judgment by a State legislature of what the interests of the State require and to compel it to run all its laws in the channels of general legislation. In short, the selection, in order to become obnoxious to the Fourteenth Amendment, must be arbitrary and unreasonable, not merely passively, but clearly and actually so."

In *Cincinnati Railroad Co. v. Snell*, 193 U. S. 30, it was held that when the plaintiff could have the venue changed under certain conditions, and the defendant could not, under the same conditions, that was not a violation of the Amendment, because the same laws were enforced in each forum.

Second. *This plaintiff in error has not been denied the equal protection of the laws.*

The motion to quash and the plea of abatement were disposed of in accordance with the settled jurisprudence of New Jersey. Any defendant presenting the same matters, whether his crime was alleged to have been committed before or after the empanelling of the grand jury, would have received the same disposition of the questions. *There was no discrimination against this defendant* in deciding this question. The motion to quash was the proper one to raise this question.

In *Gibbs et al. v. State*, 16 Vr. 381, Chief Justice Beasley said: "The remedies afforded these defendants situated as they were, were these: First, they had no right to challenge this grand jury, either as a whole or in part, on the grounds now stated in their pleas; or second, if an opportunity for doing this was not afforded to them by reason of their ignorance that they would be proceeded against, or that the objections to the proceedings in question existed, then their right was to apply to the Court in the exercise of its

discretion to quash the entire procedure against them."

In this case a plea of abatement setting up certain exceptions to the grand jurors had been interposed, and the conclusion of the Supreme Court was that such a plea was not the proper method for raising the question, but that the proper method would have been to move the Court in the exercise of its discretion to quash the entire proceedings. This opinion was affirmed by the Court of Appeals in 17 Vr. 353.

In *State v. Hoffman*, 42 Vr. 285, the Court of Appeals declared that the statutory qualifications of a grand juror could not be objected to after he was sworn on a motion to quash and that the section of the statute limited the right to challenge to the time before such grand juror was sworn.

As there was nothing to show that the age of those alleged to be unqualified affected their conduct, and inclined them against defendant, it was right to deny the motion to quash.

Rawlins v. Georgia, 201 U. S. at 640.

In *Agnew v. United States*, 165 U. S. 45, the essentials of a plea in abatement in a criminal prosecution are set forth. Such a plea must be interposed at the earliest opportunity, and on that ground alone the motion was denied. It appeared that the indictment was returned on December twelfth and the plea of abatement filed on the seventeenth of December, but the Court held in the absence of an allegation of lack of knowledge in the accused of the irregularities there objected to, that such a plea could not be sustained.

In the case at bar the prisoner admitted when arraigned that he shot the girl. A plea of "not guilty" was then entered; that was the eighth of June. The alleged disqualification in these grand jurors was not objected to until the sixteenth day of July. Nothing is shown why this objection was not presented before. It is submitted that the trial judge properly refused to quash the indictment. The defendant was not prejudiced by the decision. His admission of having shot

the girl was sufficient to justify his indictment and his being placed on trial for the crime charged in this indictment.

The fifth assignment of error challenges the right of the trial court to excuse the juror, Charles Jackson.

The exception in this case is found on page 40. The juror said:

"I am a member of the National Guards and my regiment is down at Sea Girt. I don't want to claim my exemption."

"The Court: You are entitled to be excused from *this service*. You may be excused."

"Mr. Strong: We pray an exception."

"The Court: Do you object to the matter of proof of his being in the National Guards? I suppose he may be called upon to prove it."

"Mr. Strong: I will take his statement."

"The Court: If you accept his statement I will excuse him. You may have an exception."

The juror did not want to be excused from jury service in general. The Court had a right in its discretion to excuse this juror, inasmuch as he was engaged in a public duty as a member of the National Guards, then at Sea Girt.

Paterson v. The State, 19 Vr. 385.

Aaronson v. The Sate, 27 Vr. 9.

In this latter case Chief Justice said: "In all cases in which a juror shows a reasonable ground for his discharge, such discharge can be legitimately sanctioned. It is admitted that the service of a juror can lawfully be dispensed with upon the circumstance of his own sickness; why should he be detained in court in case his wife or child be at the point of death?"

Those statutes which exempt persons from jury service confer personal privilege. The juror may waive it. The Judge was not construing the statute of 1900, p. 458, Sec. 140, nor the law of 1906, which would have entitled this juror to be exempted from jury service. The Judge was exercising his discretion without regard

to any statute, as to whether or not this juror under the facts stated should be excused. This defendant had an impartial jury, and no harm from any standpoint could possibly have accrued to him from his ruling.

The fourteenth assignment of error raises the question whether the Prosecutor stepped outside of the grounds of proper argument in his summing up when he said that the defendant was a monster in his passions, bestial in his love, brutal when thwarted, and cowardly when caught. The prisoner was the uncle of his victim. He sought her in marriage, but she refused to enter into incestuous marriage with him. The words "bestial and licentious" were the particular words Mr. Strong objected to. The marriage such as the defendant proposed would have been a bestial and licentious one.

The fifteenth, sixteenth and seventeenth assignments of error attack the trial justice for refusing to charge certain requests submitted by the prisoner. There is no error in refusing to charge in the specific language of counsel if the general rules charged are correct. The trial judge in his charge defined murder in the first degree to be the taking of a human life with intent to kill and that intent executed with deliberation and premeditation. He called attention again to the two important elements constituting murder in the first degree and an intent to kill and the execution of that intent with deliberation and premeditation. He defined deliberation and premeditation as implying a weighing of the matter and forethought with regard to it; but he also stated that the weighing of the matter and that forethought need not be for an hour or even for a minute. That it was necessary for the State to satisfy the jury beyond a reasonable doubt that those elements of deliberation and premeditation and intent to kill were present.

The twenty-first assignment of error is answered by the case of *State v. Wilson*, 31 Vr.

It is respectfully submitted that justice has been done

this defendant by the verdict. He has the benefit at the expense of the county of accomplished counsel. The trial was presided over by a Judge of this Court, who delivered an impartial charge. He grouped the facts favorably to the defendant and suggested inferences which reasonable men might draw from the evidence.

The errors complained of are technical. Mr. Justice Van Syckle in *Paterson v. The State*, 19 Vr. 381-383, called attention to the different condition of affairs in the administration of criminal law at this time from that which prevailed when judges seized with great avidity upon the merest technicalities to save those convicted from punishment disproportionate to the crime.

With the safeguards which were thrown around this defendant, it is respectfully submitted that the provision of our criminal procedure act, which confines errors to those which have actually prejudiced the defendant in maintaining his defence upon the merits, should be applied according to its spirit.

Respectfully submitted,

GEORGE BERDINE.

New Jersey ~~Supreme~~ Court of Errors & Appeals

THE STATE OF NEW JERSEY,

Defendant in Error,

v.

FREDERICK LANG,

Plaintiff in Error.

On Error to *Sup. Ct.*

~~Middlesex Oyer~~

~~and Terminer.~~

BRIEF FOR PLAINTIFF IN ERROR.

The plaintiff in error prosecutes this writ of error (the same having been duly ordered by the Chancellor) to review a conviction of murder in the first degree and sentence of death thereupon pronounced against him in the Court of Oyer and Terminer of Middlesex County.

I.

THE INDICTMENT WAS NOT FOUND BY A
LAWFULLY CONSTITUTED GRAND JURY.

Two of the grand jurors at the time of being sworn and empanelled on April 3d, 1906, were above the age of sixty-five years.

The killing of Katie Gordon, upon which the indictment is based, occurred on the twentieth of April, 1906, and was consequently after the disqualified grand jurors had been sworn upon the grand jury.

When the case was called for trial, and before the drawing of the petit jury, counsel for defendant, by leave of the Court, withdrew the plea of not guilty (which had previously been entered by direction of the Court, p. 5, l. 36), for the purpose of moving to quash

the indictment (p. 13). In support of the motion to quash two members of the grand jury were thereupon sworn on the part of the defendant. One of them, Hezekiah Warne, testified that he was past seventy-two years of age, was present as a member of the grand jury at the hearing of the witnesses, and voted for the indictment in question (p. 15.)

Isaac S. Bennett, the other grand juror, testified that he was born in 1839 and was therefore sixty-seven years of age in May, 1906, and that he also took part in the hearing before the grand jury of the charge against Lang (p. 16).

The minutes of the Oyer were put in evidence (pp. 17-18), showing the empanelling of the grand jury on the first Tuesday in April, 1906, including Warne and Bennett as members thereof. It was admitted by the Prosecutor that April 20th, 1906, the date alleged in the indictment, was the true date of the act upon which the indictment was found (p. 16, l. 30, &c.).

The Court overruled the motion to quash based on the above facts, to which ruling exception was duly taken (p. 19, l. 10).

The defendant thereupon filed a plea in abatement duly verified, setting up the same matter (pp. 6-10), to which the Prosecutor at once demurred, and the Court sustained the demurrer (p. 10, p. 19), and exception was taken to that ruling also (p. 19, bottom).

The defendant assigns error upon the refusal of the motion to quash (1st assignment, p. 161), and also upon the sustaining of the demurrer of the State (2nd assignment, p. 161), and also both by the third assignment of errors (p. 161), and the first specification of causes for reversal (p. 166), complains that notwithstanding his objection by motion to quash and by plea in abatement, he has been compelled to answer unto said indictment, and has been tried, convicted and sentenced thereon, although two of the members of said grand jury were at the time of being empanelled and sworn upon said grand jury, over the age of sixty-five years, and the defendant had no opportunity to object

to said persons on account of their being over said age, prior to their being sworn as members of said grand jury.

By which action of the Court below the plaintiff in error alleges that he has been deprived of his liberty and has been adjudged to be deprived of his life without due process of law, and has been therein and thereby denied the equal protection of the laws, all contrary to and in violation of the first section of the Fourteenth Amendment to the Constitution of the United States, upon which he relies in that behalf.

The qualifications of grand jurors are prescribed by Section 6 of the act concerning juries, approved March 27, 1874, as follows:

"6. Every person summoned as a grand juror in any court of this State, and every petit juror returned for the trial of any action or suit of a civil or criminal nature, shall be a citizen of this State and resident within the county from which he shall be taken, and above the age of twenty-one and under the age of sixty-five years; and if any person who is not so qualified, shall be summoned as a grand juror, or as a juror on the trial of any such action in any of the courts of this State, it shall be good cause of challenge to such juror, who shall be discharged upon such challenge being verified according to law, or on his own oath or affirmation in support thereof; *provided*, that no exception to any such juror on account of his citizenship, or age, or any other legal disability, shall be allowed after he is sworn or affirmed." (Revision, p. 371.)

By an amendment approved April 21, 1876, an additional ground of challenge was introduced which is not important in this connection. (2 Gen. Stat. 1853.)

This statute, if enforced literally, deprives a person indicted for an offense committed after the grand jury is sworn, of any opportunity to object to the disqualification of any of the grand jurors. They may *all* be either below or above the legal age, or not citizens, or non-residents, and yet a person in this situation has

absolutely no right under the statute, if strictly enforced, to make the objection in any form.

In *State v. Hoffman*, 42 *Vroom*, 285, the Court of Errors in an opinion by the Chancellor declared without qualification, that an objection presented by motion to quash and grounded on the lack of qualification of one of the grand jurors because he was beyond the age of sixty-five years, which would have been good by way of challenge, came too late after the juror was sworn, and was properly overruled by the trial court (42 *Vroom*, 285, 290); but, in that case (as appears by the printed book) the offense was committed long prior to the swearing of the grand juror, so that the Court had no occasion to consider, and did not in the opinion deal with the question of the right of a person indicted for an offense committed after the jurors were sworn, to present such an objection.

Under such circumstances it is submitted that some method of making objection to the disqualification of one or more of the grand jurors must be secured to the defendant; otherwise he is denied the equal protection of the laws, contrary to the fourteenth amendment of the Constitution of the United States.

Under our State Constitution a person can only be held to answer for crime upon the indictment of a grand jury; and by the statute above quoted the qualifications of grand jurors are fixed. In contemplation of law persons not possessing those qualifications are unfit to serve as grand jurors. The right to be held to answer only upon an indictment found by persons of legal fitness and no others, is part of the protection of the laws guaranteed by the Federal Constitution equally to all.

If any one of the grand jury who find an indictment be within any one of the exceptions in the statute, he vitiates the whole, though never so many unexceptionable persons join with him in finding it.

² *Hawkins*, P. C. Chapter 25, Sec. 28.

¹ *Bishop Crim. Pro. Sec.* 749, Sec. 3884.

16 Chitty Crim Law *307

To challenge a grand juror for any ground of disqualification is the right at common law of any one who is under a prosecution for any crime whatsoever.

2 *Hawkins P. C. Chapter 25, Sec. 16.*

1 *Bishop Crim. Pro. (3d Edition) Sec. 876.*

4 *Criminal Law Magazine, March, 1883, 171, &c.*

And this right is limited to those who are at the time under a prosecution for an offense to be submitted to the grand jury, or against whom a prosecution is threatened.

1 *Wharton Crim. Law, Sec. 469.*

10 *Encyclopedia of Pldg. and Prac. 409.*

It has been said that an *amicus curiae* may object to a disqualified grand juror or to the organization of a grand jury before it is empanelled.

But an *amicus curiae* is heard only by leave of the Court. His intervention is never matter of right. He has no control over the proceedings. He cannot except to the ruling of the Court or put such ruling in course of review.

Martin v. Tapley, 119 Mass. 116, 120.

Campbell v. Swasey, 12 Ind. 71.

Andrews v. Beck, 23 Texas, 455.

9 *Encyclopedia Pldg. and Prac. 723, &c. Title "Friend of Court."*

Therefore if the defendant (who at the time of the empanelling of this grand jury was neither a citizen nor resident of New Jersey, but as the case shows was at South Bethlehem, Pennsylvania), might by favor of the Court, have objected to these grand jurors before they were empanelled and before he had committed or was charged with having committed any offense whatever, still it cannot be said that the *equal* protection of the laws is thereby secured to him, since if his suggestion as *amicus curiae* had been overruled he had no remedy by writ of error.

Mr. Bishop says:

"Doubtless it is competent for the Court to permit an *amicus curiae* to suggest an imperfection in the empanelling of a grand jury; but of right those and those only can object who are held to answer to what may be found against them, or against whom in some other form there is pending an accusation liable to come before such grand jury. Even one notified by the prosecuting officer of a purpose to lay a particular charge against him before the particular grand jury may present his challenges the same as though under bonds to appear. Hence, all such persons may be present at the organization and make their challenges either to the array or to the polls. And if such person chooses not to avail himself of this opportunity, and an indictment is found against him, he cannot afterward according to the more common rulings and by statute in many of our States, take an objection to the panel or a particular juror which he was then entitled to, but neglected to bring forward.

"But there are circumstances such as *where the grand jury was organized before the offense was committed*, and various others wherein the defendant could not have participated in the organization, yet the indictment was rightfully found. Some method of taking an objection other than by challenge must therefore be open in such a case." (1 Bishop Crim. Pro. Sec. 877-879.)

U. S. v. Gale, 109 U. S. 65, 67. Justice Bradley.)

Carter v. Texas, 177 U. S. 442, 447.

Castleberry v. State, 69 Ark. 346.

I have not found any case in which the question of the effect of the fourteenth amendment to the Federal Constitution has been considered or raised under these circumstances, except the case of *State v. Corrigan* in the United States Circuit Court for this district. (139 Fed. 768.)

In that case Judge Cross holds that there is no absolutely controlling decision of the highest court of this

State adverse to the right of a defendant under the conditions here presented to raise the question of the qualification of a grand juror by motion to quash or plea in abatement.

It was upon this ground that it was held by the United States Circuit Court in the case just cited that a petition for removal under Section 641 of United States Revised Statutes would not lie in the case just cited.

The intimations of this case are all favorable to the present contention of plaintiff in error.

In the case of *Gulf C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, the Court held that classification to relieve a law from the charge of a denial of equal protection cannot be made arbitrarily, but must be based upon some difference which bears a just and proper relation to the attempted classification. The opinion by Justice Brewer says, at page 155:

"But it is said that it is not within the scope of the 14th Amendment to withhold from States the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true (citing cases), yet it is equally true that such classification cannot be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

Since that case the question has always been whether a discrimination is based upon characteristics which

have a just and proper relation to the attempted classification.

Some of the other cases dealing with the question of classification under the 14th Amendment are the following:

- Magoun v. Illinois Trust & Safe Dep. Co.* 170 U. S. 283.
- Chappell Chem. & F. Co. v. Sulphur Mines Co.* 172 U. S. 474.
- Central L. & T. Co. v. Campbell Commission Co.* 173 U. S. 84, 98, 99.
- Atch. T. & S. F. R. R. Co. v. Matthews*, 174 U. S. 96, 104, 105.
- St. L. I. M. & Southern Ry. Co. v. Paul*, 173 U. S. 96, 104, 105.
- Tullis v. L. E. & W.* 175 U. S. 348.
- Clark v. Kansas City*, 176 U. S. 114.
- Erb v. Morasch*, 177 U. S. 584.
- Brown v. New Jersey*, 175 U. S. 172.
- Cotting v. Goddard*, 183 U. S. 79, 107.
- Connelly v. Union Sewer Pipe Co.* 184 U. S. 540, 559.

In *Ohio ex rel. Lloyd v. Dollison*, 194 U. S. 445, 447, it was said that the contention that the statute there in question violated the Fourteenth Amendment could only be sustained "if the statute treat the plaintiff in error differently from what it does others who are in the same situation as he—that is in the same relation to the purpose of the statute."

The question of the validity of classification in its relation to the equality required by the Fourteenth Amendment is therefore the same which has become so familiar in the decisions of our courts upon the prohibitions of the State constitution touching special legislation. There is this difference, however, that the Fourteenth Amendment is not limited to special legislation, nor even to legislation general or special. It deals with the result to the individual and forbids and annuls any action by a State through any of its depart-

ments or agencies, the effect of which is to deprive any person within its jurisdiction of life, liberty or property without due process of law, or to deny to him the equal protection of the laws.

Its aim is to protect the individual against the arbitrary or unequal exercise in any form of any of the powers of government.

Virginia v. Rives, 10 Otto, 313.

Neal v. Delaware, 13 Otto, 370.

Yick Wo. v. Hopkins, 118 U. S. 356.

As to what is meant by due process of law in judicial proceedings see *Hurtado v. State of California*, 110 U. S. 516; *Cooley Constl. Lim.* pp. 504-505 (7th Ed.).

May one be denied the right, which others enjoy, to exclude disqualified persons from the grand jury by which he is to be indicted, merely because the matter for which he is indicted occurred after the grand jury was sworn?

Is it a valid classification to say that one who is charged with an offense committed while the grand jury is in session, may at the arbitrary will of that grand jury, be deprived of the right to object to disqualified jurors, while other persons charged with offenses committed when a grand jury is not empanelled, may fully exercise this right?

Surely there is nothing in the fact of there being a grand jury in existence at the time of the alleged offense, which has any relation to qualifications of grand jurors or to the right of the defendant to be indicted only by such grand jurors as possess the qualifications fixed by law.

And so long as the legislature declares that persons above the age of sixty-five years or under the age of twenty-one years, or non-residents or aliens, are disqualified for service as grand jurors and that they may be excluded upon the objection of the defendant, it is a violation of due process of law, as well as a denial of the equal protection of the law, to compel a defendant to answer to an indictment found by persons thus dis-

qualified without giving him any opportunity to object, merely because the swearing of the grand jury has preceded the alleged offense.

It may be suggested that it was of little practical consequence to the defendant that two of the grand jurors were over the statutory age. So it might have been said in *Strauder v. West Virginia*, 10 *Otto*, 303, or in *Rogers v. Alabama*, 192 *U. S.* 226, that the presence of one or more colored men who might *perhaps* (but not necessarily) have been drawn upon the grand jury if the unlawful means complained of had not been used to exclude them from the lists from which such jurors were to be selected, would have made no difference as to the finding of the indictment.

But the decisions of the **U**nited States Supreme Court do not permit a constitutional right to be thus belittled. The attitude of that Court is expressed in the language of Justice Bradley as follows:

"Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon. Their motto should be *obsta principiis*." (*Boyd v. U. S.* 116 *U. S.* 616, 635.)

The fact that an accused person may be unaware of the charge, may have no reason to expect it, or may not know of the disqualification, and thus may be unable to challenge before the swearing of the grand juror, does not militate against our position. Nor is it necessary to consider whether in such cases a defendant could successfully move to quash or plead in abatement.

If this defendant had lost his opportunity to chal-

lenge from such causes, he perhaps could not complain that the law treated him differently from others, since all are liable to such accidents. He has a right to complain, however, if, in addition to the liability to these accidents, he is subjected to a positive disability, to which others are not subjected, and which takes away any possible opportunity of objection which in common with others he otherwise might have had.

It may be that the law is not obliged to provide against accidents not necessarily arising from its own operation; but against inequalities which the law itself produces as its necessary effect, it must provide.

One of two conclusions therefore must follow:

Either it must be held, (1) that the declaration in the statute that no objection shall be made after the juror is sworn must give way, and the right of objection remain, in cases where the offense is charged to have been committed after the empanelling of the grand jury; or else it must be held, (2) (giving full effect to the statute) that a grand jury, one or more members of which are disqualified, is not competent to deal with a case of crime alleged to have been committed after the empanelling of **such** grand jury.

Whichever of these conclusions is adopted, it must further follow that either the motion to quash should have been granted or else the plea in abatement should have been sustained.

In one method or the other the objection to the indictment should have prevailed.

If due process of law, or the equal protection of the laws, requires that an opportunity in some form should be afforded to the defendant to question the qualifications of the grand jurors, no statute of the State or rule of practice can prevent the success of a motion to quash or plea in abatement.

In *Carter v. Texas*, 177 U. S. 442, the Court said:

"When the defendant has had no opportunity to challenge the grand jury which found the indictment against him, the objection to the constitution of the grand jury upon this ground may be taken, either by

plea in abatement or by motion to quash the indictment, before pleading in bar.

"United States v. Gale, 109 U. S. 65, 67.

"The motion to quash on such a ground being based on allegations of facts not appearing in the record, those allegations, if controverted by the attorney for the State, must be supported by evidence on the part of the defendant. *Smith v. Mississippi*, 162 U. S. 592, 601; *Williams v. Mississippi*, 170 U. S. 213.

"But the question whether a right or privilege claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a State Court, is itself a Federal question, in the decision of which this court on writ of error, is not concluded by the view taken by the highest court of the State. *Neal v. Delaware*, 103 U. S. 370, 396, 397; *Mitchell v. Clark*, 110 U. S. 633, 645; *Boyd v. Nebraska ex rel. Thayer*, 143 U. S. 135, 180.

"In the case at bar, as may be inferred from the dates appearing in the record, and as is distinctly stated in the opinion delivered by the court below on denying a rehearing, the grand jury had been empanelled before the commission of the offense for which the defendant was indicted. He therefore never had any opportunity to challenge the array of the grand jury, and was entitled to present the objection on which he relied by motion to quash."

Whether such an objection is more properly matter for motion to quash or for plea in abatement is in the present case a question rather of academic than of practical importance, since the objection was duly presented in both forms. And indeed it may well be that it was available in either form at the election of the defendant.

The case of *State v. Rockafellow*, 1 *Halsted*, 343, however, clearly establishes the propriety of the plea in abatement.

In that case a plea in abatement was sustained setting up the absence of the freehold qualification then

required by statute, as to one of the grand jurors. The qualification in point of age stands upon an exact parity under the statute with the former freehold qualification.

This case has never been overruled, although perhaps its authority would not be extended to cases where the objection does not arise from the express language of a statute.

The case of *Gibbs v. State*, 16 *Vroom*, 379, seems to hold at least as to objections not founded upon express statute, that the only remedy after indictment found is by motion to quash.

But see *State v. Hoffman*, 42 *Vroom*, 285, 287.

II.

THE COURT ERRED IN EXCUSING CHARLES JACKSON FROM SERVICE AS A JUROR.

Jackson being called was challenged to the favor by the State and thereupon sworn on *veir dire*. He then said: "If your Honor please, I am a member of the National Guard and my regiment is down at Sea Girt. I don't want to claim my exemption." To which the Court said: "You are entitled to be excused from this service; you may be excused." An exception was taken by the counsel for the defendant (p. 40).

The only statute in force at the time of the trial exempting a member of the National Guard from service as a juror is section 141 of the act approved May 16, 1906, and which took effect immediately, revising the laws in relation to the militia and the National Guard. Section 141 of said act is as follows:

"141. Every member of the national guard shall be exempt from all jury duty; *provided*, he shall furnish the certificate of his immediate commanding officer that he has performed the duties required of him for the year immediately preceding a summons to act as juror; and every such member who shall have received a full and honorable discharge shall be exempt forever after from all jury duty." (P. L. 1906, 492.)

It is evident that under section 141 no ground was

shown for excusing Jackson. The mere facts that he was a member of the National Guard and that his regiment was then at Sea Girt were not sufficient in the absence of a certificate from his immediate commanding officer that he had performed the duties required of him for the year immediately preceding.

The counsel for the defendant waived proof that the juror was a member of the National Guard, accepting the juror's statement to that effect. There was no waiver, however, of the certificate required by the statute that he had performed his duties as such member of the National Guard for the year preceding.

Moreover, the juror expressly stated and repeated the statement that he did not claim his exemption, and in the absence of such claim by him the Court could not properly excuse him. The defendant was entitled to have him serve as a juror unless he should be regularly excluded by challenge on the part of the State.

The possibility that the State might have challenged him does not deprive the defendant of the right to complain of the action of the Court in excusing him. The fact remains that although it is possible the State might have excluded him, it is also possible that Jackson might have been permitted to serve upon the jury but for the action of the Court in excusing him.

It does not, therefore, appear that the defendant was not prejudiced by such action.

III.

THERE WAS ERROR IN THE CHARGE UPON THE SUBJECT OF DELIBERATION AND PREMEDITATION.

The Court charged as follows (page 153):

"Murder in the first degree consists in the taking of a human life with intent to kill, and that intent must be executed with deliberation and premeditation. It is not necessary that that deliberation and premeditation should continue for an hour or even for a minute; it is enough that the design to kill be fully formed and

purposely executed." "You will see therefore that the two important elements necessary to constitute the crime of murder in the first degree are an intent to kill and the execution of that intent with deliberation and premeditation. I do not know that I can define those words better than they define themselves. Deliberation and premeditation imply a weighing of the matter and a forethought with regard to the matter; but as I have stated, that weighing of the matter and that forethought need not be for an hour or even for a minute."

Among the defendant's requests to charge was the following:

"2. Although the intent to kill may have existed in the mind of the defendant, still if the intent was formed at the instant of firing the fatal shot as the result of impulse and not of deliberation, the defendant is not guilty of murder in the first degree." (Page 159.)

This request the Court refused to charge.

In *State v. Bonofiglio*, 38 *Broom*, 239, 244, the Court of Errors declared that "the presence of a specific intent to take life is not, standing alone, conclusive that the homicidal act was done with deliberation and premeditation."

The present Chief Justice, in the opinion of the Court in the *Bonofiglio* case, also said (p. 243), that the statement of Chief Justice Green in the *Donnelly* case, that "wherever there is in committing homicide a specific intention to take life there is a wilful, deliberate and premeditated killing, and the offense is murder in the first degree," was not included in the definition approved by the Court of Errors in the *Donnelly* case; and that the construction thus put upon the words "deliberate" and "premeditated" nullifies each of them, and makes every homicide murder in the first degree when the killing is wilful. "A reading of our statute shows that the legislature when it used the words 'deliberate' and 'premeditated' meant that something more than the bare intent to kill should exist in order to constitute murder in the first degree, for it first speci-

fied two cases of homicide in which both deliberation and premeditation are present to a marked degree, viz., by the administration and by lying in wait, and then declared that murder perpetrated by *any other kind* of wilful, deliberate and premeditated killing should be murder in the first degree. The specification of these two cases is significant; it emphasizes the meaning which the legislature intended should be given to the words 'deliberate' and 'premeditated.'

And the Court in that case quoted with apparent approval the language of Earle, C., in *People v. Majone*, 91 N. Y. 211, as follows:

"Under the statute (defining murder in the first degree) there must be not only an intention to kill, but there must also be a deliberate and premeditated design to kill. Such design must precede the killing by some appreciable space of time. But the time need not be long. It must be sufficient for some reflection and consideration upon the matter, for the choice to kill or not to kill, and for the formation of a definite purpose to kill. And when the time is sufficient for this, it matters not how brief it is."

In the latter case of *State v. Zdanowiaz*, 40 Vroom, 619, 627, the Court of Errors, speaking by the present Chancellor, after referring to *State v. Bonofiglio*, said:

"The quotation in the opinion, from *People v. Majone*, 91 N. Y. 211, to the effect that, to constitute murder in the first degree, a design to kill must precede the killing by an appreciable space of time, was not designed to indicate that the careful definition of murder in the first degree approved in the Donnelly case was defective with respect to the time required for deliberation and premeditation, but rather to express the importance of that part of the definition which required that the design to kill must be fully and clearly conceived and purposely and deliberately executed. The conception of such a design and its deliberate execution necessarily takes some appreciable time. It was in this language that the charge before us was framed, and I deem it unobjectionable. Time sufficient to fully

and clearly conceive the design to kill, and purposely and deliberately to execute it, satisfies our statute, and this assignment of error cannot prevail."

In *People v. Koenig*, 180 N. Y. 155 (decided after the New Jersey cases above quoted), the Court of Appeals of New York again had under consideration the question of the deliberation necessary to constitute murder in the first degree. The trial court at the request of the prosecution had charged that "if there be sufficient deliberation to form a design to take life, and to put that design into execution by destroying life, there is sufficient deliberation to constitute murder, no matter whether the design is formed at the instant of striking the fatal blow, or whether it be contemplated for months. It is enough that the intention preceded the act although that follows immediately." This request (as the Court of Appeals remarks) is a literal extract from *People v. Clark*, 7 N. Y. 385-394, which *arose under the old law before the legislature had made deliberation as well as premeditation a necessary ingredient* of murder in the first degree, but had been approved in cases arising under the later statute. However, the Court of Appeals (Cullen, C. J.), referring to the statement of the law above quoted, says: "Despite this approval I am frank to say that I would be loath to uphold a charge where the proposition formulated by Judge Johnson constituted the only instruction to the jury on the subject of deliberation. *It may be logically correct, but it may also be liable to mislead a jury.* Probably the best definitions of murder in the first degree under our present law are to be found in the opinions in *Leighton v. People*, 88 N. Y. 117, and *People v. Majone*, 91 N. Y. 211."

The charge which was approved in the *Zdanowicz* case required that the intention should be not merely purposely but *deliberately* executed in order to constitute murder in the first degree. The force of the word "deliberate" in the statute is thus preserved.

The charge in the present case, however (that it is enough that the design to kill be fully formed and pur-

posely executed), eliminates the necessity for deliberation. And although it was previously said in the charge that the intent to kill must be executed with deliberation and premeditation, the statement immediately following that it is enough that the design to kill be fully formed and purposely executed, certainly removes the necessity for deliberation in the ordinary sense of the word. To say that the act must be done with deliberation and premeditation, and yet that it is enough that the design to kill be fully formed and purposely executed, is indeed only to say in more sonorous phrase that there must be an intent to kill carried into effect. For, to be a design at all, it must be fully formed; and to purposely execute is but to do with intent. The charge therefore falls into the error pointed out in the Bonofiglio case of nullifying the words "deliberate" and "premeditated," and making every wilful homicide murder in the first degree.

This criticism is not answered by the second extract from the charge, where the Court again refers to the necessity for deliberation and premeditation, but with the same qualification that the weighing of the matter and the forethought need not be for an hour or even for a minute. The previous statement that it is enough that the design to kill be fully formed and purposely executed, attaches itself to the idea of deliberation and premeditation, of which it is intended to be the definition, and accompanies and qualifies those words wherever they are used in the charge. It rendered the charge on this vitally important point at least confused and contradictory, if not distinctly and positively erroneous.

In this situation it was the more necessary that the Court should have charged the second request (above quoted), which is based upon the Majone and Leighton cases.

The law requires not only that there should exist an intent to kill, but that there should be premeditation and deliberation. It is a sound proposition, therefore, that the mere intent formed at the instant of firing the

fatal shot as the result of impulse and not of deliberation, is not murder in the first degree, and the defendant was entitled to have the jury so charged in distinct terms, especially after the Court had instructed them that it was enough to constitute murder in the first degree that there should have been an intent to kill clearly formed and purposely executed. It cannot be doubted that the charge as given and the refusal to charge the second request were highly prejudicial to the defendant and almost necessitated the verdict in the first degree.

IV.

THE COURT ERRED IN REFUSING TO STOP THE PROSECUTOR IN HIS IMPROPER STATEMENTS TO THE JURY.

In summing up, the Prosecutor said that the defendant was "a monster in his passions, licentious in his desires, beastly in his love, brutal when thwarted, and cowardly when caught."

Objection was at once made by counsel for defendant, who called upon the Court to stop the Prosecutor, insisting that such characterization was unsupported by the evidence. The Court, however, ruled that the Prosecutor was within the lines of comment and refused to interfere with him. To which ruling exception was duly taken on the part of the defendant (p. 152).

The case is absolutely barren of any evidence tending to sustain any part of this language.

It is true that this unfortunate young man (hardly more than a boy), carried away by a frantic burst of jealousy roused by her request that he would send her a nice fellow from Pennsylvania (p. 150, l. 25), instantly shot and killed the girl he loved.

Beyond the mere fact of killing the girl there is not a word of evidence tending to show anything to his discredit. There is nothing to show that his love for her was not pure, or that his desires were not honorable.

The letter to his mother (pp. 126-127) shows an elevation of thought scarcely to have been expected.

The remarks of the Prosecutor holding him up to execration as a person of depraved and degenerate character were calculated to inflame the minds of the jury and create a prejudice against the defendant. They were without foundation in the evidence, and it was the duty of the Court upon objection made to interpose and check the Prosecutor. The refusal of the Court so to do was error, for which the judgment should be reversed.

Blackman v. W. Jersey & Seashore R. R. Co.

39 *Vroom*, 1.

State v. Hernia, 39 *Vroom*, 299.

V.

THE COURT ERRED IN CHARGING THAT IT WAS A NATURAL INFERENCE FROM THE REMARK OF DEFENDANT TO BORS, THAT DEFENDANT INTENDED TO KILL KATIE GORDON.

Bors testified that on the evening preceding the homicide he was in a saloon with defendant and John Gordon and two others, and that defendant then said to him "that if she (Katie) couldn't be his she shall be nobody else's" (p. 111, l. 25).

Referring to this testimony, the Judge charged (p. 155, l. 14, etc.): "Is it or isn't it a natural inference from that statement that he intended to take her life? It is not, you will see, necessary inference. He may have intended to prevent her marriage to some one else in another way. *But it is a natural inference.* That is, upon the assumption that the statement was made to Mr. Bors," etc.

The inference to be drawn from defendant's remark (if made) was entirely for the jury; and to tell them that the inference which the State sought to draw was a natural one, was an invasion of the province of the

jury. It is certainly debatable whether it was a natural inference, and if left to themselves the jury might have concluded that it was not such. She was not contemplating marriage with any other person, and might never.

It is not reasonable therefore to suppose that he had determined to kill her to prevent her marrying. He may have had no more definite idea in his mind than that if she should in the more or less remote future be inclined to marry another, he would then devise some means to prevent it.

Nor if she had been intending marriage, can it be said that killing her would be the natural way of frustrating her intention.

It is just as natural to suppose that Katie herself may have promised him that if she could not marry him she would marry no one else.

VI.

THE VERDICT IS NOT SUSTAINED BY THE EVIDENCE.

The entire record of the proceedings at the trial has been certified by the Judge (p. 160) and returned with the writ of error, pursuant to the command of the writ (p. 2, l. 37, etc.), under Section 136 of the Criminal Procedure Act of 1898.

Such certification is practically the same as if returned upon an ancillary writ of certiorari; and upon such certiorari this Court has unquestioned jurisdiction to deal with the case as the trial Court might have done. *State v. Hummer*, 65 *Atlantic*, 249, 252.

In the case just cited the Court of Errors had before it on error to the Supreme Court a judgment of that Court affirming a conviction in the Hudson Quarter Sessions, and the intimation in the opinion of the Court by Justice Garrison is that the Supreme Court upon a certification of the entire proceedings under the statute may deal with the case as upon certiorari at common law and grant a new trial if the verdict is not sup-

ported by the evidence. But it was held that the refusal of the Supreme Court to grant a new trial upon the weight of testimony is one of those discretionary matters upon which error may not be assigned, and hence such action was not open to review in the Court of Errors.

The defendant was the uncle of Katie Gordon, the girl he killed.

She was in her nineteenth year, and lived with her parents on a farm a few miles east of New Brunswick, and with her younger sisters Rose and Mary came every morning to New Brunswick to work in a cigar factory. There was a trolley line upon the road passing this farm, and the three girls were accustomed to take the first car, leaving about half-past six.

Lang, the defendant, a man of about twenty-two years, in April, 1906, was living and working at South Bethlehem, Pa., and on the 18th of that month came to the Gordon farm on a visit, arriving at two o'clock in the morning of that day. He remained there through the 18th and 19th, and until the early morning of the 20th of April. It was expected that he would take the same car with the three girls on that day; and as the time approached, he bade good-bye to his sister and brother-in-law and the younger children in a perfectly natural and friendly manner, and remained behind talking with the parents after the girls had gone from the house down to the road to wait for the trolley car. The girls, hearing the car approaching, became anxious lest Lang should miss it, and called to him to hurry up, and he then ran down and joined them, so that they all stood by the side of the trolley track waiting for the car.

As the car drew up and had almost stopped to receive them, Katie and Rose and Lang stood side by side, in the order in which they are named, facing the track and their shoulders touching. What then occurred is detailed by Rose on page 150 as follows:

"Q. As you and your sister Katie and Fred were

standing by the trolley track, what was the last conversation you heard between them?

"A. Well, now, my sister says to him, 'Why, Uncle Fred, what are you going to send me from Pennsylvania?' and he says to her, 'What will I send you?' and she says, 'There is a lot of fellows down there. Send me a nice fellow.'

"Q. That was the very last?

"A. Yes, sir; that was the very last words she said.

"Q. And then the shot was fired instantly at that time? A. Yes."

See pages 88-89 (Rose), and 101 (Mary).

They were facing south toward the track, Katie furthest to the east, Rose on her right and Lang to the right of Rose. Mary was a few feet further toward the right. Katie was shot on the right side, near the angle of the jaw (p. 144, l. 35; p. 146, l. 10).

As to the position of Lang and the girls see Rose's testimony, pp. 88-89; Mary's testimony, p. 102, bottom, p. 105.

Rose says that Lang stepped in front of her and placed the pistol against Katie's neck. Rose did not see him draw the pistol or notice his action until he had already pointed it and was in the act of firing (p. 192).

Nor did Mary see where he got the revolver from or when he shot (p. 101, l. 25). She was looking away from him toward New Brunswick. No one had seen him have a pistol previously. It was not strange that he should have had it, as he had come alone a long journey, part of it by night, to a lonely country neighborhood. It was not unnatural that he should have carried a pistol for protection both in coming from South Bethlehem and in returning, as he was then about to do.

No quarrel or disagreement had occurred at any time between Lang and any member of the family (pp. 74-75). He was good friends with them always (p. 109, l. 10). He was fond of the children and they of him, and the night before he had remained up play-

ing with them all after the father and mother had gone to bed (p. 100). He was alone with Katie at one time in the evening outside of the house (p. 100, l. 35). If he had had in mind to kill her then would have been the time to have done it,—her parents in bed, no one near but the younger girls and small children. He would have had a far better chance of escaping in the dark. He must have had a hundred better opportunities of killing her if that had been his purpose. Till the last moment he lingered behind with her parents and the younger children. All three of the girls hallooed at him, for he didn't hurry till the car was in sight and then had to run to avoid missing it (p. 104, bottom). Surely he was not then seeking an opportunity to commit the crime. The deed was done in broad daylight at the moment when a trolley car was stopping in front of them, following instantly the careless words in which Katie asked him to send her a fellow from Pennsylvania.

Nothing more absolutely unpremeditated can be imagined. Her words were the dropping of a spark into gunpowder.

He loved the girl. He says in his letter to his mother that the dead girl was the one he loved most on earth (p. 127, top).

He was her uncle and realized that for that reason he could not marry her. He was bearing his disappointment like a man, till Katie's thoughtless words showed that what was the deepest feeling of his nature could be to her the matter for a jest. Then as sudden and irresistible as the explosion of gunpowder itself his jealous passion, transmuted into action almost without the operation of his will, wreaked itself upon the object of his love and in his madness he would even have killed her sisters.

The only evidence tending to show premeditation was that of Bors who says he heard Lang say the previous evening in a saloon "that if she couldn't be his she should be nobody else's." (P. 111, l. 25.) Bors says that is all Lang said.

John Gordon, the father of Katie, and two others were present, but only Bors testifies to it. He does not give the connection in which the remark was made, and as he gives it, it is most improbable that it was ever made.

But if it was made this remark is not enough to show premeditation.

Nor does the letter to his mother show premeditation. It speaks of avenging himself upon the one he loved most on earth. But that does not necessarily imply premeditated action. If one avenge a blow upon the instant of receiving it the crime is not murder in the first degree. He may in a sense have avenged himself for the words of the girl which had caused him such keen anguish that for the moment he knew not what he did.

At all events it is to be remembered that we have only a translation of the letter. We are obliged to accept its meaning as rendered to us by a mind other than that which framed its words.

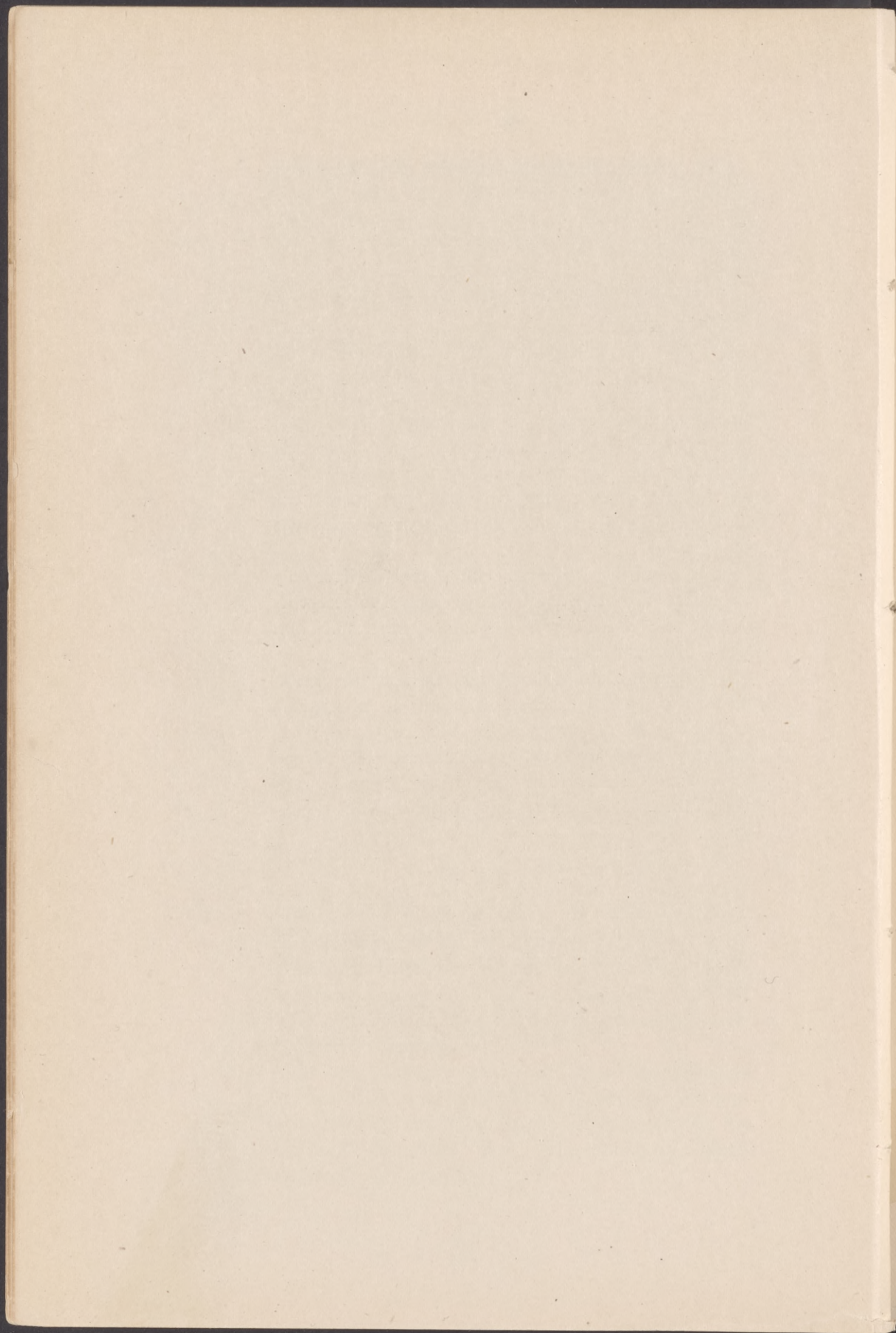
A judgment of death should not rest upon the doubtful turn of a phrase or choice of words in translation.

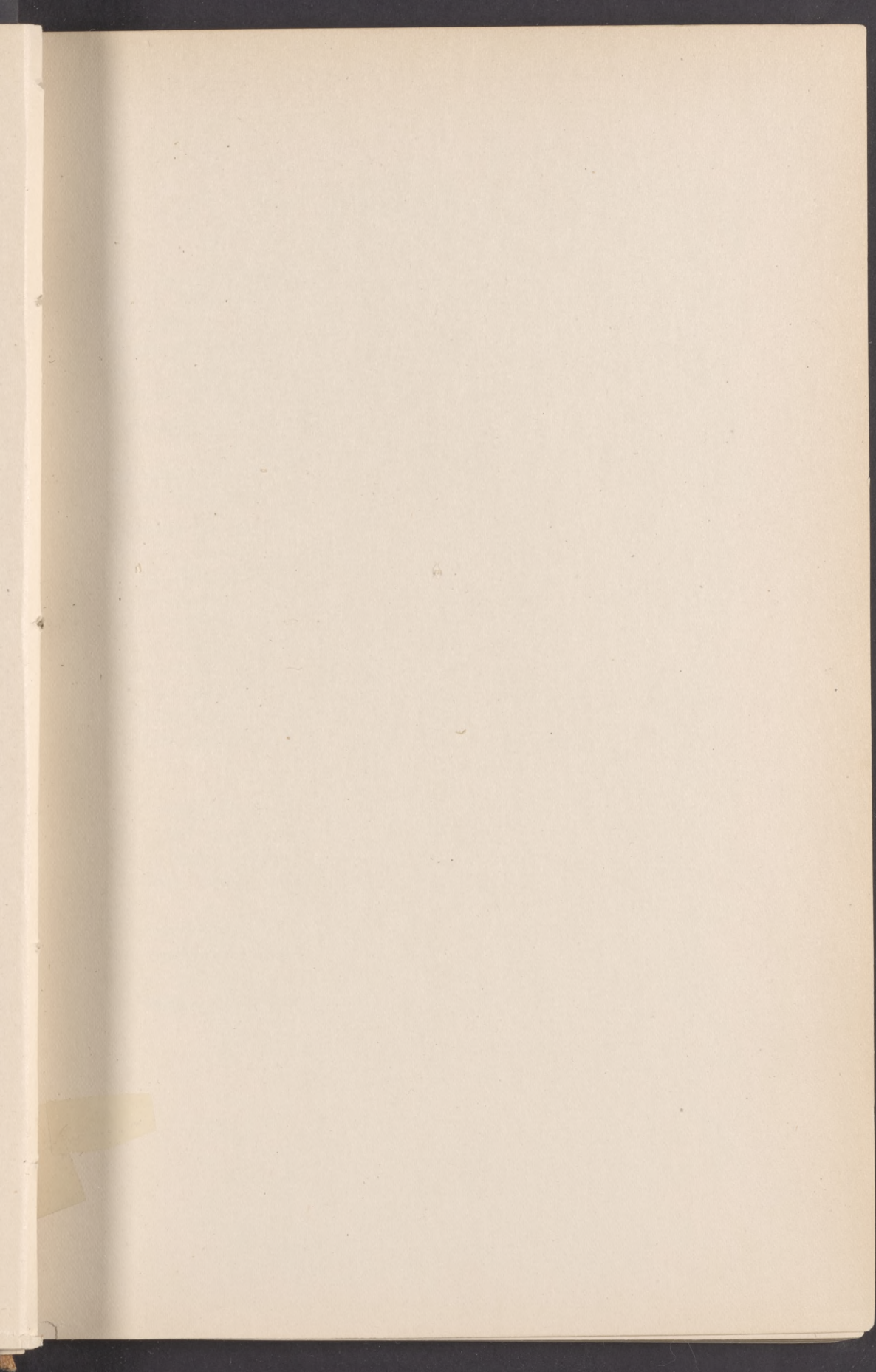
"If after all the evidence has been fully and fairly examined it will not satisfy a considerate mind beyond a reasonable doubt of the guilt of the accused a conviction thereon must be set aside and a new trial granted."

Kohl v. State, 30 Vroom, 445.

Applying this rule, premeditation and deliberation have not been shown beyond a reasonable doubt and the conviction of murder in the first degree cannot be sustained.

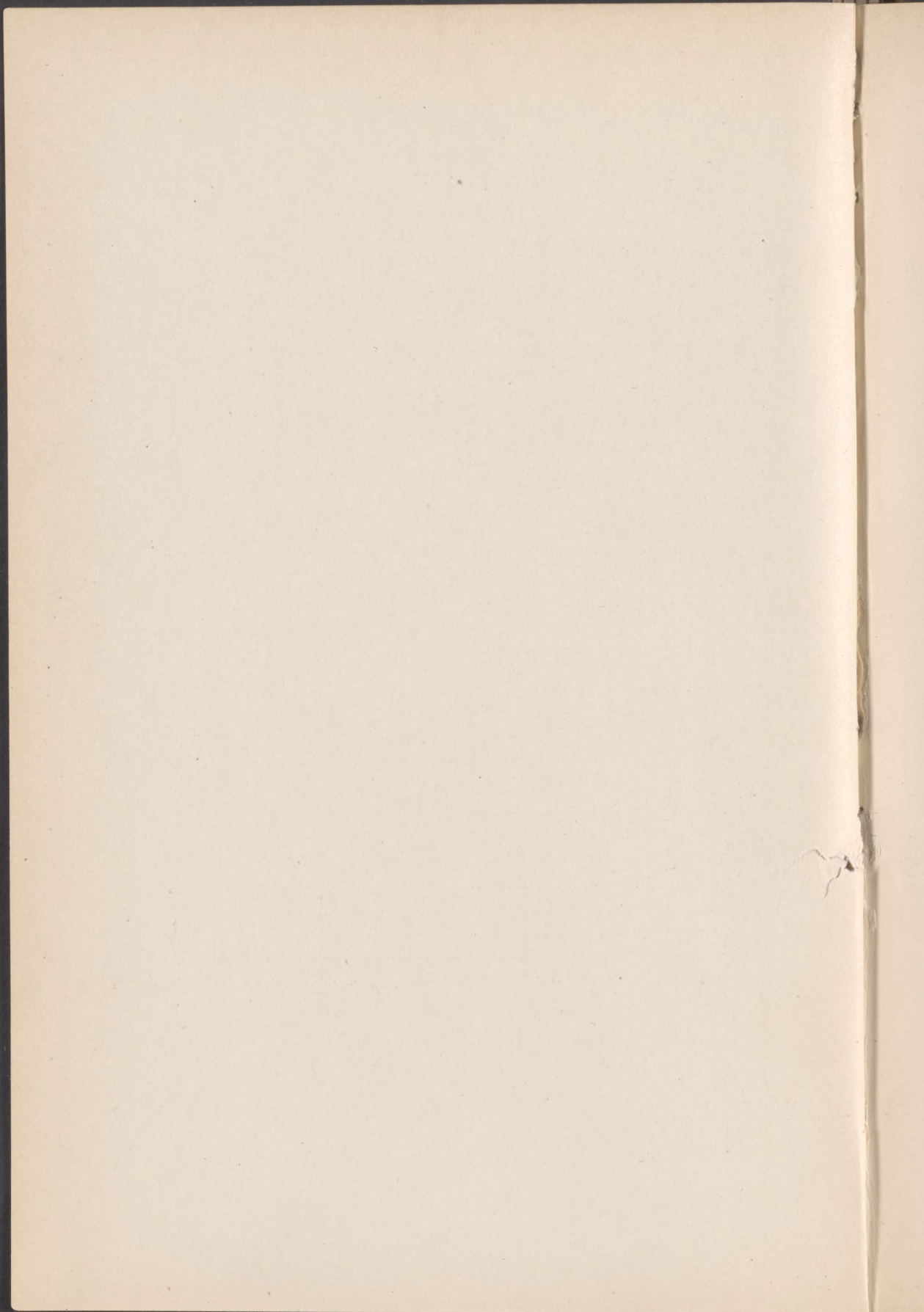
ALAN H. STRONG,
Of Counsel with Plaintiff in Error.

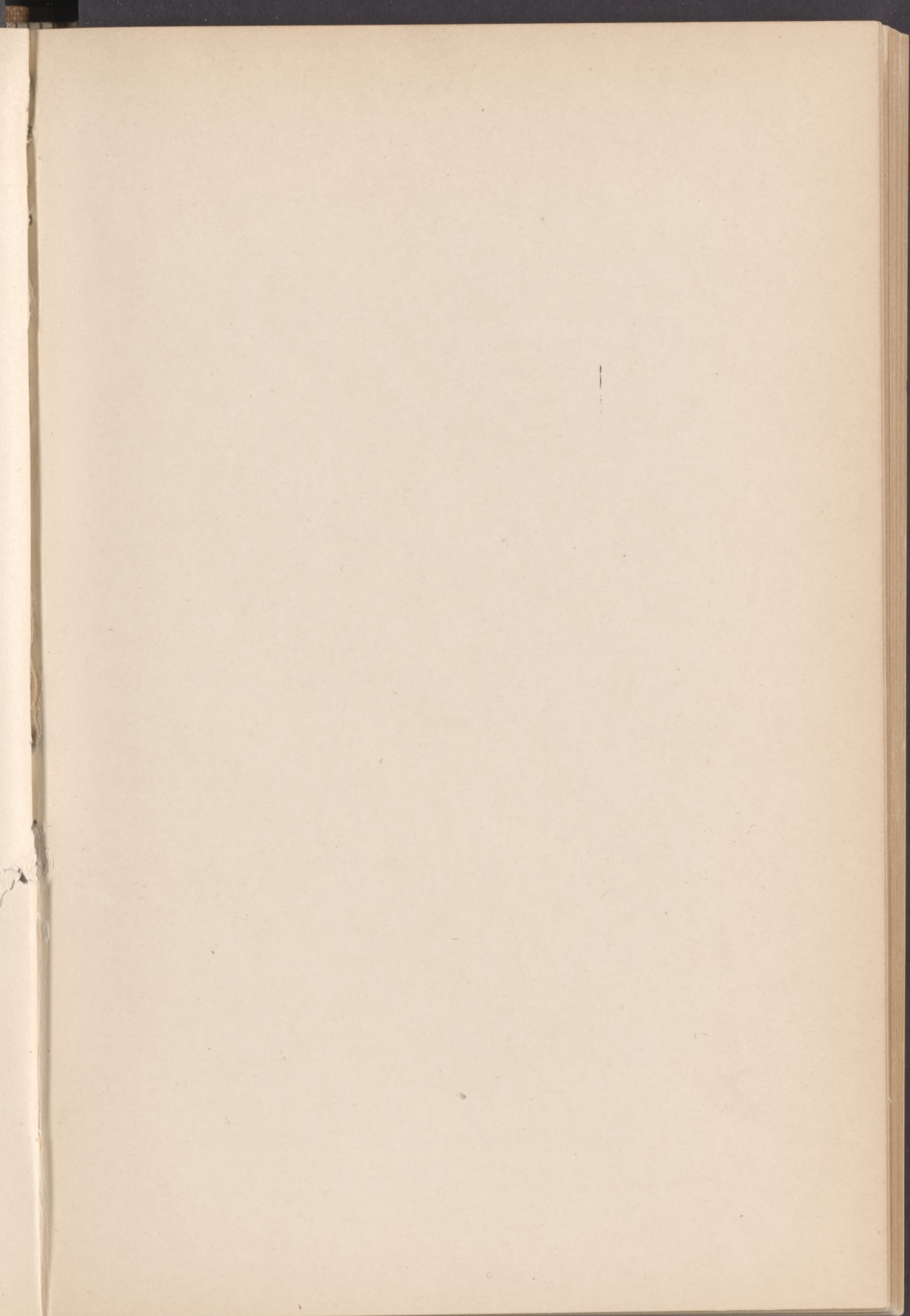


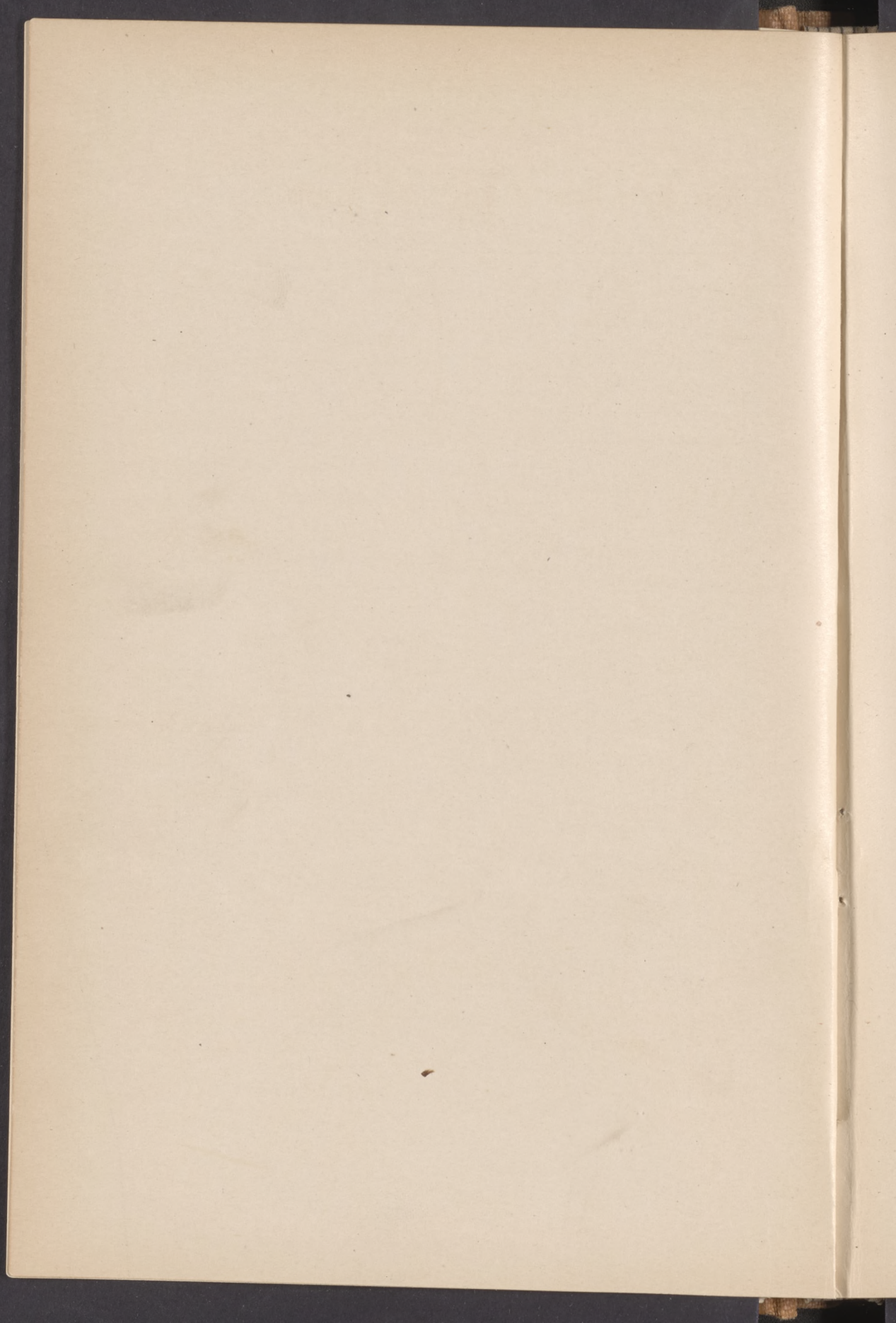


INDEX.

	PAGE.
Order for Writ of Error.....	I
Writ of Error.....	2
Indictment	4
Motion to Quash.....	6, 13-19
Plea in Abatement.....	6-10
Demurrer to Plea in Abatement.....	10
<i>Testimony for Defendant—</i>	
	<i>Direct. Cross. Re-Direct. Re-Cross.</i>
Hezekiah Warne	13 15
Isaac S. Bennett.....	15 16
<i>Testimony for State—</i>	
Fred C. Snyder.....	51 51
Chas. Monaghan	54 57
John Gordon	58 68 84 85
Rose Gordon	87 92, 150
Mary Gordon	99 103
Julius Bors	110 112
Charles Rogers	113 115
William Foeder	126 127
Joseph Lengel	129 131 134 135
	138 140
	142
Dr. Charles T. Maas.....	142 144
Dr. John L. Suydam.....	145
Dr. Albert L. Kirally.....	146 147
Stephen Chonke (struck out)...	148-150
Charge	152
Defendant's Requests to Charge.....	159
Assignments of Error	161
Joinder in Error	165
Specification of Causes for Reversal.....	166







a

New Jersey Court of Errors and Appeals.

THE STATE OF NEW JERSEY,
Defendant in Error,

v.

FREDERICK LANG,
Plaintiff in Error.

On Error to
Supreme Court.

10

C A S E.

For the State:

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GEORGE BERDINE, Prosecutor.

AARON V. DAWES, of Counsel.

For the Defendant:

ALAN H. & THEO. STRONG.

New Jersey, ss.

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The State of New Jersey to the Chief
(Seal.) Justice and other Justices of our Supreme
Court of Judicature, Greeting:

For as much as in the record and proceedings and also
in the giving of judgment in a certain plaint which was
in our Supreme Court of Judicature before you, be-
tween the State of New Jersey, Defendant in Error,
and Frederic Lang, Plaintiff in Error, upon a writ of
error directed to the Court of Oyer and Terminer of

the County of Middlesex, to review a conviction in said Court of Oyer and Terminer of the said Frederick Lang, upon an indictment for murder in the first degree, manifest error hath intervened to the great damage of the said Frederick Lang as is said; we being willing that the error, if any there be, should in due manner be corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be thereupon given and affirmed then

10 you distinctly and openly send under your seal the record and proceedings aforesaid with all things touching and concerning the same, to our Judges of our Court of Errors and Appeals in the last resort in all causes at Trenton on the twenty-fifth day of June, instant, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon for correctng that error, what of right and according to law ought to be done.

Witness, William J. Magie, Esquire, Chancellor and

20 President Judge of our said Court of Errors and Appeals at Trenton aforesaid, the nineteenth day of June, nineteen hundred and seven.

S. D. DICKINSON, Clerk.

ALAN H. & THEO. STRONG,

Attorneys for Plaintiff in Error.

Allowed June 19th, 1907.

W. J. MAGIE, C.

Filed June 20th, 1907.

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S. D. DICKINSON, Clerk.

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.

WM. S. GUMMERE, [Seal.]

New Jersey Supreme Court.

THE STATE OF NEW JERSEY,
Defendant in Error,

v.

FREDERICK LANG,
Plaintiff in Error.

On Error to
Middlesex Oyer
and Terminer.

(Affirmance
and
Remittitur.)

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This cause having been duly argued at the February Term of this Court by Alan H. Strong, Esq., of counsel for plaintiff in error, and George Berdine, Prosecutor of the Pleas for the defendant in error, and the Court having considered the same, and finding no error in the record or proceedings in the Supreme Court.

It is thereupon ordered and adjudged that the judgment of the Court of Oyer and Terminer of the County of Middlesex, removed by the writ of error in this cause be affirmed; and that the record be remitted to the said Court of Oyer and Terminer of Middlesex County to be proceeded with in accordance with the judgment and practice of said Court.

Dated June 15, 1907.

Entered June 15, 1907.

On motion of

GEORGE BERDINE,
Prosecutor and Attorney for
Defendant in Error.

30

I, William Riker, Jr., Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of a rule made by said Court in the above stated cause and entered in the minutes thereof.

In testimony whereof I have set my hand
[Seal.] and the seal of said Court at Trenton, this

twentieth day of June, A. D. nineteen hundred and seven.

WM. RIKER, JR., Clerk.

(The original record of proceedings at the trial is also returned with said writ and marked "Filed June 20, 1907. S. D. Dickinson, Clerk.")

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New Jersey Court of Errors and Appeals.

STATE OF NEW JERSEY,

Defendant in Error,

v.

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FREDERICK LANG,

Plaintiff in Error.

On Error to
Supreme Court.
Assignment
of Errors.

[Filed July 2, 1907.]

And now on this twenty-fifth day of June, in the year nineteen hundred and seven, before the Court of Errors and Appeals of the State of New Jersey, in the last resort in all causes, comes the said Frederick Lang, plaintiff in Error, by Alan H. & Theodore Strong, his attorneys, and says that in the record and proceedings and also in the giving of judgment in the Supreme Court upon the writ of error issued out of said Court to the Court of Oyer and Terminer of the County of Middlesex, at the suit of the said Frederick Lang, there is manifest error in this:

1. That judgment upon the said writ of error was given in favor of the State of New Jersey and against the said defendant, Frederick Lang, affirming the judgment of the said Court of Oyer and Terminer,

whereas judgment should have been given in favor of the said Frederick Lang, reversing the said judgment of the said Court of Oyer and Terminer.

2. And in this, that by the affirmance of said Supreme Court of the said judgment of the Court of Oyer and Terminer the said Frederick Lang, defendant, has been denied the equal protection of the laws, and has been adjudged to be deprived of his life and liberty without due process of law (contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States, upon which the said defendant relies in this behalf), in that the indictment upon which he was convicted of murder in the first degree in the said Court of Oyer and Terminer was found by a grand jury empaneled before the commission of the said alleged offence, two members of which said grand jury, namely, Hezekiah Warne and Isaac S. Bennett, sworn and empanelled as aforesaid prior to the alleged commission of said offence, were at the time of being so sworn and empaneled, above the age of sixty-five years, and therefore not qualified to serve as members of the said grand jury, and the said defendant by reason of the said grand jury and the said members thereof having been sworn and empaneled before the alleged commission of said offence, had no opportunity to challenge said persons, and although the said defendant duly moved to quash the said indictment in the said Court of Oyer and Terminer upon the ground of said two members of said grand jury having been as aforesaid above the lawful age for such service and afterwards pleaded the said facts in abatement of the said indictment, said motion to quash and plea in abatement were respectively denied and overruled by the said Court of Oyer and Terminer, which action of the said Court of Oyer and Terminer was approved and held valid by the said Supreme Court by its affirmance of said judgment, notwithstanding the complaint thereof by the said Frederick Lang upon his said writ of error in said Supreme Court.

Wherefore, because of the said errors and of other

errors appearing in the said record and proceedings, the said Frederick Lang, plaintiff in error, prays that the judgment of the said Supreme Court and also the judgment of the said Court of Oyer and Terminer of the County of Middlesex may be reversed, annulled and for nothing holden, and that he may be restored to all things that he has lost on occasion of said judgment.

ALAN H. & THEODORE STRONG,

Attorneys for Plaintiff in Error.

10

New Jersey Supreme Court.

THE STATE

v.

FREDERICK LANG.

20

On error to Middlesex Oyer and Terminer.
Argued before Gummere, Chief Justice, and
Justices Garretson and Reed.

For the plaintiff in error, Alan H. Strong.

For the State, George Berdine.

The opinion of the Court was delivered by
GUMMERE, Chief Justice.

30 The plaintiff in error was tried and convicted in the
Middlesex Oyer and Terminer upon an indictment
charging him with the murder of one Katie Gordon,
and the jury, by its verdict, fixed the grade of his crime
as murder in the first degree. The entire record of the
proceedings had at the trial has been returned with the
writ as provided by the 136th section of the Criminal
Procedure act of 1898.

The first and second causes of reversal challenge the
correctness of the ruling of the trial court in sustaining
a demurrer to a plea in abatement filed by the defend-
ant, and in overruling a motion to quash the indictment.

Both the plea and the motion were rested upon the same proposition, viz.: that the indictment was not found by a lawfully constituted grand jury, because two of the members of that body were over sixty-five years of age.

By the provision of our statute which prescribes the qualifications of grand jurors it is enacted that "Every person summoned as a grand juror in any court of this State shall be a citizen of this State, and resident within the county from which he shall be taken, and above the age of twenty-one and under the age of sixty-five years; and if any person who is not so qualified shall be summoned as a grand juror it shall be good cause of challenge to any such juror; provided that no exception to any such juror on account of his citizenship or age shall be allowed after he has been sworn or affirmed." *Gent. Stat. 1853, Section 6.* It appears upon the face of the indictment that the crime charged against the defendant was committed by him while the grand inquest was in session. He was, therefore, debarred by the statute from interposing a challenge to any of its members on account of age; and the basis of his plea in abatement, and of his motion to quash, is that the deprivation of this right—which is afforded to all persons who are charged with violations of the criminal law which have occurred prior to the impanelling of the grand jury—is a denial of that equal protection of the laws which is guaranteed to every person by the Fourteenth Amendment to the Federal Constitution.

It is settled in this State that the improper composition of a grand jury will not constitute a ground for a plea in abatement. The remedy in such case is to challenge before indictment found, or to move to quash afterward. *Gibbs and Stanton vs. State*, 16 Vr. 379; *S. C. on Error*, 17 Vr. 353. And where the defendant has had an opportunity to challenge a grand jury before he is sworn, and has neglected to avail himself of it, he cannot afterward take advantage of the lack of qualification of such grand juror by a motion to quash the indictment. *State vs. Hoffman*, 42 Vr. 285. The

ruling of the trial court, therefore, sustaining the demurrer to the plea in abatement was proper, under the cases cited, for the reason that the defendant was not entitled to question the legality of the grand jury by such a plea. But, as he had been afforded no opportunity to interpose a challenge to either of the members of that body who were over the age of sixty-five years, he was entitled to attack the legality of the body by a motion to quash, and the determination of the propriety of the action of the trial court in overruling that motion requires a consideration of the meritorious question presented thereby.

The proposition that the cited provision of our jury act is violative of the Fourteenth Amendment of the Federal Constitution because it does not afford to all persons charged with crime equal protection, seems to us to be unsound. The reason why the legislature has seen fit to confer upon a person who is charged with a criminal offence, the privilege of challenging a grand juror who is over sixty-five years of age, provided the challenge is interposed before the grand juror is sworn, is not easy to understand. It is plain, however, that it was not for the purpose of protecting the alleged criminal against an unfounded indictment, for the legislature, by providing that, after such grand juror is sworn, he shall be as fully qualified to serve as if he had been under the stated age, has recognized that advancing years is no ground for imputing lack of impartiality to a citizen who is drawn for grand jury service. We are not able to perceive, nor has counsel pointed out to us, how the privilege of interposing a challenge on such ground, affords any "protection," within the meaning of the Federal Constitution, to a person charged with crime. But, assuming that some benefit is conferred by the privilege to those persons whose alleged violations have antedated the impanelling of the grand jury, and that the benefit is not shared in by those who are charged with having committed crimes while the grand jury is in session, the fact that the latter class are not permitted to share in the benefit does not constitute a

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violation of the equal protection clause of the Fourteenth Amendment. As was declared by the Supreme Court of the United States in *Hayes vs. Missouri*, 120 U. S. 68, that provision "does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, *under like circumstances and conditions*, both in the privileges conferred and in the liabilities imposed." It was this view of the scope of the provision which lead the same tribunal, in the case of *Missouri v. Lewis*, 101 U. S. 22, to hold that it was not violated by a statute which permitted an appeal from the final judgment of certain of the Circuit Courts of the State of Missouri, and denied it as to judgments rendered by others of such courts; and which led to the conclusion in *Brown v. New Jersey*, 175 U. S. 172, that the Amendment did not prohibit a state from enacting that in a criminal trial had before a struck jury, the defendant should be entitled to only five peremptory challenges, although ordinarily on the trial of indictments the right to twenty peremptory challenges was given. Our act prescribing the qualification of grand jurors treats alike all persons charged with crime, *under like circumstances and conditions*. The province of the grand jury is to make diligent inquiry concerning all alleged violations of the criminal law, not only those which have occurred before its organization, but those which have occurred during its session. All persons who have been charged with violating the law prior to the organization of the grand jury are granted the privilege of challenging a grand juror, who is over sixty-five years of age; the privilege is denied to all persons who are charged with having committed a crime during the sitting of the grand jury. The defendant in error was not denied the equal protection of the laws in not being afforded an opportunity to challenge the two members of the grand jury referred to in his motion to quash, and the trial court, therefore, was guilty of no error in overruling that motion.

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But if our consideration of the question had led us to the conclusion that the criticism upon the indictment was well founded, and that there was error in the refusal to quash, we nevertheless, would not be justified in reversing this judgment on that account. In the case of *Gibbs and Stanton vs. State, supra*, where the defendant sought to reverse a conviction upon a similar ground, this court—after pointing out that, under the legal system which has prevailed in this State since the amendment of the 89th section of the Criminal Procedure act in the year 1855, no error, either of substance or form, will work the reversal of a criminal judgment, unless it is of such a nature that it either did, or might have, prejudiced the defendant on the trial of the cause—sustained the judgment then under review, on the ground that, as the conviction of the defendants was upon their own confession, it was undeniable that the alleged imperfections in the preliminary proceedings could not have prejudiced them upon their trial. The section of the act of 1855 referred to in the cited case, is to the effect that no judgment given upon any indictment shall be reversed “for any error except such as shall, or may, have prejudiced the defendant in maintaining his defense upon the merits.” The 136th section of the Criminal Procedure act of 1898, under which the present review is had, contains the provision of the act of 1855 *in haec verba*, and the question is, therefore, presented for determination, whether the imperfections in the preliminary proceedings could have prejudiced the defendant in maintaining his defense upon the merits. The verdict of the jury declaring the guilt of the defendant is as decisive of the truth of that fact, when based upon a consideration of all the proofs submitted, as when based upon the admission of the defendant himself. That being so (to repeat the declaration in *Gibbs and Stanton vs. State*), “It is consequently undeniable that the alleged imperfections in the preliminary proceedings could not have prejudiced the defendant upon his trial.”

The next ground of reversal attacks the action of the

trial court in excusing one Charles Jackson from service as a juror. It appeared, from the examination of the juror on his *voir dire*, that he was a member of the National Guard of the State, and that his regiment was then in camp at the State camp grounds at Sea Girt. Upon this fact appearing he was excused from service by the court of its own motion. That the trial court has power to discharge a juror who is drawn in a criminal case, provided reasonable cause exists for such judicial action, is fully settled in this State. *Patterson vs. State*, 19 Vr. 381; *Aaronson vs. State*, 27 Vr. 9. Counsel urges before us that in the present case no reasonable cause existed for excusing the juror, and that, therefore, the action of the court was not justified under the cases cited. Matters of this kind arising during the course of the trial, must necessarily be left largely to the discretion of the trial judge, and, unless it be made plain that he has abused his discretion, and that the defendant may have suffered injury thereby, the propriety of his action cannot be challenged upon review. In the present case not only was there no abuse of judicial discretion, but, on the contrary, the excusing of the juror from service was eminently proper under the conditions disclosed.

The next cause of reversal is directed at the instruction of the court to the jury as to the constituents of the crime of murder of the first degree; the contention being that there was error in what was said to the jury upon the subject of deliberation and premeditation. The court charged as follows: "Murder in the first degree consists in the taking of human life with intent to kill, and that intent must be executed with deliberation and premeditation; it is not necessary that that deliberation and premeditation should continue for an hour, or even for a minute; it is enough that the design to kill be fully formed and purposely executed. You will see, therefore, that the two important elements necessary to constitute the crime of murder in the first degree are, an intent to kill, and the execution of that intent with deliberation and premeditation. I do not know that I can

define those words better than they define themselves. Deliberation and premeditation imply a weighing of the matter and a forethought with regard to the matter; but, as I have stated, that weighing of the matter, and that forethought, need not be for an hour, or even a minute." The *ground* of objection to this instruction is that the court, by declaring that "it is enough that the design to kill be fully formed and purposely executed," eliminated the necessity for deliberation, notwithstanding

- 10 ing that the fact that the court had previously instructed the jury that, in order to constitute the crime of murder in the first degree the intent to take life must be executed with deliberation and premeditation. It is enough, in disposing of this attack upon the charge, to say that the definition complained of has received the approval, not only of this court, but of the Court of Errors and Appeals, in every case in which it has been submitted for consideration since the decision in *Donnelly vs. State*, 2 *Dutch*. 601, and that it is no longer
- 20 properly open to criticism.

- The next cause of reversal is directed at an alleged error of the trial court in refusing to stop the Prosecutor of the Pleas, in his summing up to the jury, upon the application of the defendant. The language complained of was that the defendant was "a monster in his passions, licentious in his desires, beastly in his love, brutal when thwarted, and cowardly when caught." The evidence submitted to the jury showed that the defendant was the uncle of the girl whom he killed, a
- 30 brother of her mother; it was fairly to be inferred from the proofs that he desired to marry her, notwithstanding the fact that a marriage between them would have been incestuous, and that if this could not be accomplished he desired to have her submit herself to his embraces, without the sanction of a marriage ceremony. The proofs also fairly support the inference that he killed her because she refused to submit herself to his wishes. In view of these facts it seems to us that the prosecutor was within his privilege in making the statement which

was objected to. It is necessary for the proper administration of justice that, in the summing up to the jury, counsel shall be given the widest latitude, within the four corners of the evidence, and, so long as he confines himself to the evidence, what is said by him in its discussion by way of comment, denunciation or appeal, affords no ground for exception. *State vs. Barker*, 39 *Vr.* 19.

The last cause for reversal assigned is that the verdict is not sustained by the evidence. A reference to the decision of the Court of Errors and Appeals in the case of *State vs. Jagers*, 42 *Vr.* 281, is all that is necessary for the disposition of this point. It is there pointed out that under the 136th section of the Criminal Procedure act, as originally passed in 1894, the court of review was required to examine the evidence for the purpose of determining whether or not it justified the verdict of the jury; but that since the amendment of that section by the revision of 1898, that duty was no longer required of the reviewing tribunal. It is contended by counsel, in his argument, that the certification by the trial judge of the entire record of the proceedings had upon the trial, is practically the same as if this court had issued its certiorari to the Oyer and Terminer to send up the evidence in the cause. He refers to a suggestion to that effect, made by the court in *State vs. Hummer*, 65 *Atl. Rep.* 249; and the argument based upon this suggestion is that the court, having before it the evidence, ought to examine it for the purpose of determining whether it justifies the verdict of the jury. It seems to us, however, that the certification of the proceedings before it, made by the Oyer, cannot be treated as a writ of certiorari. To so hold would be to declare that the legislature could confer the certiorari power upon the Court of Oyer and Terminer, or rather, upon a convicted defendant, for the certification provided by the statute is not left to the discretion of the court which makes it, but to the defendant who sues out the writ of error to review the judgment against him.

We conclude, upon an examination of all the matters

presented to us on the reasons for reversal, and by the assignments of error, that the conviction under review should be affirmed.

In response to a certiorari for that purpose issued out of the Court of Errors and Appeals upon allegation of diminution the following proceedings have been sent up by the Supreme Court.

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New Jersey Supreme Court.

THE STATE OF NEW JERSEY, <i>Defendant in Error,</i>	} On Indictment for Murder. On Error to Middlesex Oyer and Terminer.	10
v. FREDERICK LANG, <i>Plaintiff in Error.</i>		

CASE.

ALAN H. & THEO STRONG,
For Plaintiff in Error.

GEORGE BERDINE, Prosecutor,
For Defendant in Error.

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ORDER FOR WRIT OF ERROR.

Application having been made to me by counsel on behalf of Frederick Lang, upon due notice to George Berdine, Esquire, Prosecutor of the Pleas of the County of Middlesex, for a writ of error as herein-after mentioned, and it appearing that said application should be granted, it is hereby ordered that a writ of error do issue out of the Supreme Court, di-

rected to the Court of Oyer and Terminer of the County of Middlesex, to review the conviction of murder in the first degree and judgment of death thereupon pronounced against the said Frederick Lang in the said Court of Oyer and Terminer.

Dated August 10th, 1906.

W. J. MAGIE, C.

On motion of

ALAN H. & THEO. STRONG,

10

Attorneys for Fred'k Lang.

Entered August 11, 1906.

New Jersey, ss.

[Seal]

The State of New Jersey to the Judges of the Court of Oyer and Terminer in and for the County of Middlesex—
Greeting:

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Forasmuch as in the record and proceedings and also in the giving of judgment upon a certain indictment against Frederick Lang for murder, which was before you in our said Court of Oyer and Terminer in and for the County of Middlesex, whereof the said Frederick Lang has been convicted by a certain jury of the County, taken between the State of New Jersey and the said Frederick Lang, manifest error hath intervened to the great damage of the said Frederick

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Lang as by his complaint we are informed; we being willing that the said error, if any there be, should in due manner be corrected and that full and speedy justice be done to him the said Frederick Lang in this behalf, do command you that if judgment be thereupon given then you do distinctly and openly send under your seal the record and proceedings aforesaid, including the entire record of the proceedings had upon the trial of said cause, with all things touching the same, to our Justices of our Supreme Court of Judicature at Trenton on the first Tuesday of No-

vember next, together with this writ, that the record and proceedings aforesaid being inspected we may further cause to be done thereupon for correcting that error what of right and according to the laws and customs of the State of New Jersey shall be proper to be done.

Witness, William S. Gummere, Esquire, Chief Justice of our said Supreme Court, at Trenton, the eleventh day of August, in the year nineteen hundred and six.

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WM. RIKER, JR., Clerk.

ALAN H. & THEO. STRONG,
Attorneys for Plaintiff in Error.

Presented to me this 13th day of August, 1906.
Let the clerk make return.

F. J. SWAYZE, Judge.

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The answer of Francis J. Swayze, Esquire, Judge of the Court of Oyer and Terminer within named: The record and proceedings of the plaint whereof mention is within named, with all things touching the same, I certify to the Justices of our Supreme Court of the State of New Jersey at Trenton at the day and year within contained, in a certain schedule to this writ annexed, as I am commanded.

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FRANCIS J. SWAYZE, J. S. C.

*State of New Jersey,
Middlesex County, to wit.*

Be it remembered, that at a session of the Court of Oyer and Terminer, held at New Brunswick, in and for the said County of Middlesex, on the first Tuesday of April, in the year of our Lord one thousand

nine hundred and six, before the Hon. J. Franklin Fort, Esquire, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, and Theodore B. Booraem, Judge of the Court of Common Pleas, in and for the said County of Middlesex, the same being the April Term of the said Court of Oyer and Terminer in the year aforesaid, according to the form of the statute in that case made and provided, upon their oaths and affirmations, those who affirm having first alleged themselves conscientiously scrupulous of taking an oath, of James M. Parsons, James E. Berry, Joseph Mark, Henry E. Ayres, Hezekiah Warne, Frederick M. Townley, Isaac A. Bennett, Charles M. Davison, Alphonso L. Mundy, Edward E. Haines, Edward Jaques, Charles W. Hoagland, Walter A. Belcher, Charles Edwards, Charles Fletcher, Adrian G. Chamberlin, Edward Van Pelt, Peter J. Young, John V. Hubbard, Thomas L. Slugg, Lemuel Stults, Charles E. Kelly, William H. Jameson, Heyman Shrogwitz, good and lawful men of the said County of Middlesex, duly summoned and then and there empanelled, sworn and affirmed, and charged to inquire in behalf of the State of New Jersey and for the body of the said County of Middlesex, it is presented in manner and form, to wit:

MIDDLESEX OYER AND TERMINER.

April Term, 1906.

30 *Middlesex County, to wit.*

The Grand Inquest for the State of New Jersey, and for the body of the County of Middlesex, upon their respective oaths and affirmations, those who affirm having first alleged themselves conscientiously scrupulous of taking an oath, present that Frederick Lang, late of the Township of Raritan, in said County of Middlesex, on the twentieth day of April, in the year of our Lord one thousand nine hundred and six, with force and arms at the Township of

Raritan aforesaid, in the county aforesaid, and within the jurisdiction of this Court, wilfully, feloniously and of his malice aforethought did kill and murder one Katie Gordon, against the form of the statute in such case made and provided, and against the peace of this State, the Government and dignity of the same.

GEORGE BERDINE,
Prosecutor of the Pleas.

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And afterwards, that is to say, at the same aforesaid session of the said Court of Oyer and Terminer (and General Jail Delivery), holden at New Brunswick aforesaid, in and for the County of Middlesex aforesaid, on Friday, the eighth day of June, in the year of our Lord one thousand nine hundred and six, as yet of said term of April of the said Court of Oyer and Terminer, before the Honorable Francis J. Swayze, one of the Justices of the Supreme Court of Judicature of New Jersey, and Theodore B. Booraem, Judge of the Court of Common Pleas in and for said County of Middlesex, here cometh the said Frederick Lang, under the custody of Andrew Church, Esquire, Sheriff of the said County of Middlesex (in whose custody in the jail of the county aforesaid, for the cause aforesaid, he, the said Frederick Lang, had been before committed), being brought to the Bar in his proper person by the said Sheriff, to whom he is here also committed. 20

And the said Frederick Lang, now here in his proper person, having heard the said Indictment and forthwith being demanded concerning the premises in the said Indictment above specified and charged upon him how he will acquit himself thereof, he saith, through the interpreter said, I did shoot that girl, and the Court directed that a plea be entered of not guilty thereof, and thereof for good and evil he puts himself upon the country. 30

And George Berdine, Esquire, Prosecutor of the Pleas of the State in and for the County of Middle-

sex, who prosecutes for the said State of New Jersey, in this behalf does the like.

And afterwards, that is to say, at the same aforesaid session of the said Court of Oyer and Terminer, holden at New Brunswick aforesaid, and in and for the County of Middlesex aforesaid, on Monday, the sixteenth day of July, in the year of our Lord one thousand nine hundred and six, as yet of the said Term of April of the said Court of Oyer and Terminer, before the said the Honorable Francis J. Swayze, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, and Theodore B. Booraem, Judge of the Court of Common Pleas in and for the County of Middlesex, cometh the said Frederick Lang, under the custody of Andrew S. Church, Esquire, Sheriff of the said County of Middlesex (in whose custody in the jail of the county aforesaid for the cause aforesaid, he the said Frederick Lang, had been before committed), being brought to the Bar here in his own proper person, by the said Sheriff, to whom he is here also committed.

And the said defendant, through his counsel, retracted his former plea of not guilty, and moved to quash the indictment, for reasons then and there shown. The Court, after hearing the testimony and arguments, refused to grant the motion.

Thereupon the said Frederick Lang filed the following Plea in Abatement:

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MIDDLESEX OYER AND TERMINER.

The State of New Jersey,

vs.

Frederick Lang.

} On Indictment
for Murder.
Plea in
Abatement.

And the said Frederick Lang, defendant in his own proper person, comes and having heard the aforesaid

Indictment read and protesting that he is not guilty of the premises charged in the said Indictment, for the plea nevertheless says that he ought not to be compelled to answer the said Indictment, because he says, that by an Act of the Legislature of the State of New Jersey, entitled "An Act concerning juries" (revision), approved March twenty-seventh, eighteen hundred and seventy-four (and also by a certain other Act of the Legislature of said State, being a supplement to said first mentioned Act, which supplement was approved April twenty-first, eighteen hundred and seventy-six), it is among other things enacted that every person summoned as a Grand Juror in any Court of this State shall be a citizen of this State and resident of the County from which he shall be taken, and above the age of twenty-one and under the age of sixty-five years; and if any person who is not so qualified shall be summoned as a Grand Juror it shall be good of challenge to such juror, who shall be discharged upon such challenge being verified according to law or on his own oath of affirmation in support thereof, provided that no exception to any such juror on account of his citizenship or age or any other legal disability shall be allowed after he is sworn or affirmed, which said statutes remain in full force and unrepealed. 10 20

And this defendant says that at the Court of Oyer and Terminer in and for the County of Middlesex, in the term of April last past, the Sheriff of the County of Middlesex did summon and return Hezekiah Warne and Isaac Scudder Bennett to serve on the Grand Inquest of the County aforesaid, and as Grand Jurors in and for said County for the said Term of April last past; and that the said Hezekiah Warne and Isaac Scudder Bennett were by the Court aforesaid, at the term aforesaid, to wit: on the third day of April, in the year nineteen hundred and six, at New Brunswick, in said County, sworn to serve as Grand Jurors for the County aforesaid upon the Grand Inquest aforesaid, and did thereupon then and 30

there during all the Term of April, until the present time, serve as grand jurors on the Grand Inquest aforesaid, and did take part as said Grand Jurors in the investigation and consideration by said Grand Inquest of the charge against this defendant, upon which the said indictment is based and in said indictment set forth, and did take part as such Grand Jurors in finding said indictment against this defendant, to be a true bill by the said Grand Inquest, that

10 the said Hezekiah Warne and Isaac Scudder Bennett, at the time they were summoned, returned and sworn as aforesaid, and during all the time that they served as such Grand Jurors upon the Grand Inquest aforesaid, were not under the age of sixty-five years, but were and each of them was then and there, and at the time of being so summoned, returned and sworn, over the age of sixty-five years, to wit: the said Hedekiah Warne was then, that is to say, at the time of being sworn as such Grand Juror, at the

20 age of seventy-two years, and the said Isaac Scudder Bennett was then of the age of sixty-six years, and by reason thereof and by force of the statute aforesaid, they were not then and there qualified to be summoned, returned or sworn as such Grand Jurors upon the said Grand Inquest. And this defendant saith that the said Katie Gordon, whom it is charged in said indictment that this defendant on the twentieth day of April, in the year one thousand nine hundred and six, did kill and murder, came to

30 her death on the said twentieth day of April in consequence of a wound received by her on said day, which wound is charged by the said State of New Jersey to have been inflicted by this defendant, and this defendant saith that the matter alleged against him in and by said indictment occurred, if at all, on the said twentieth day of April, in said year, and at no other time, and after the empanelling of the said Grand Inquest and after the swearing of the said Hezekiah Warne and Isaac Scudder Bennett as such Grand Jurors upon the said Grand Inquest as afore-

said, and that at the time of the swearing of Hezekiah Warne and Isaac Scudder Bennett as such Grand Jurors upon the Grand Inquest as aforesaid, to wit: on the said third day of April, in the year nineteen hundred and six, no criminal complaint or prosecution had been made or was pending nor was there any cause of such complaint or prosecution or allegation or claim of such cause against this defendant, nor was there any matter which had then occurred to be presented before the Grand Inquest 10 in which the said defendant was in any manner concerned or interested, and the said defendant had no right (not being then interested in any matter to be presented to said Grand Inquest) to challenge or except to the said Hezekiah Warne and Isaac Scudder Bennett, or either of them, before or at the time when they were sworn as such Grand Jurors upon the said Grand Inquest as aforesaid.

And this defendant saith that the said indictment found against this defendant on account of matter 20 which occurred after the swearing of the said Grand Inquest and after the swearing of the said Hezekiah Warne and Isaac Scudder Bennett as such members thereof by the said Grand Inquest two members thereof, to wit: the said Hezekiah Warne and Isaac Scudder Bennett were disqualified by reason of being at the time of being sworn upon said Grand Inquest over the age of sixty-five years as aforesaid, and without this defendant having had any opportunity at any time to challenge or except to the said Grand Jurors 30 on account of such disqualification, was and is contrary to and in violation of the constitution and laws of the State of New Jersey in that behalf, and also was and is further contrary to and in violation of section one of the fourteenth amendment to the Constitution of the United States, in that the said indictment and the finding there in manner aforesaid under the circumstances aforesaid, was no due process of law, and also that in the equal protection of the laws was and is thereby denied to this defendant.

All of which the said defendant is ready to aver, verify and prove; wherefore he prays judgment of the said indictment and whether he shall be called or required further to answer the same, and he prays that said indictment may be quashed and that he may be dismissed the Court hereof and upon the premises.

And the said State of New Jersey, by George Berdine, Prosecutor of the Pleas, demurred to the plea of abatement of the defendant, Frederick Lang, upon
 10 the following grounds, to wit: that the said matters alleged therein are insufficient in law to abate the said indictment.

GEORGE BERDINE,

Prosecutor of the Pleas.

And thereupon all and singular the premises being seen and by the Court aforesaid, now here fully understood, it is considered that the said indictment is sufficient and that the said defendant, Frederick
 20 Lang, answer and plead over thereto.

And the said Frederick Lang now here in his proper person having heard the said indictment read and forthwith being demanded concerning the premises in the said indictment above specified and charged upon him how he will acquit himself thereof, did not answer, and the Court thereupon ordered that a plea of not guilty be entered, and thereof for good and evil he puts himself upon the country.

And George Berdine, Esquire, Prosecutor of the
 30 Pleas of the State in and for the County of Middlesex, for the State of New Jersey, in the behalf does the like.

Therefore let a jury therefrom here come, to wit; on Monday, the sixteenth day of July, in the year of our Lord one thousand nine hundred and six, as yet of the Term of April, and at the same aforesaid session of the said Court of Oyer and Terminer, before the Honorable Francis J. Swayze, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, and Theodore B. Booraem, Judge of

the Court of Common Pleas in and for the said County of Middlesex, of good and lawful men of the said County of Middlesex, by whom the truth of the matter may be the better known, and who are not of kin to the said Frederick Lang, to recognize upon their oath whether the said Frederick Lang be guilty of the murder in the indictment aforesaid above specified, or not guilty because as well the said George Berdine, Esquire, who prosecutes for the State of New Jersey in this behalf, as the said Frederick Lang have put themselves upon the said jury. 10

And now, to wit, on the said Monday, the sixteenth day of July, in the year of our Lord one thousand nine hundred and six, at the same aforesaid session of the said Court of Oyer and Terminer, holden at New Brunswick aforesaid, as yet of the said Term of April of the said Court of Oyer and Terminer, before the said the Honorable Francis J. Swayze, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, and Theodore B. Booraem, Esquire, Judge of the Court of Common Pleas in and for said County of Middlesex, here comes as well the said George Berdine, Esquire, who prosecutes for the State of New Jersey in this behalf, and the said Frederick Lang in his own proper person under the custody of the said Sheriff as aforesaid. 20

And the jurors of the said jury, by the said Sheriff for this purpose empanelled and returned agreeably to the statute in such case made and provided, to wit: 30

John V. Tappen, Thomas J. Perrine, Josiah Maitland, George McDowell, Andrew Rowland, Samuel Lawrence, Frederick Van Deursen, Wesley Kempton, Andrew J. Wyckoff, Joseph Okerson, Richard Beekman, Leonard C. Smith, being called come, who being elected, chosen, tried and sworn to speak the truth of and concerning the premises, upon their oath say that the said Frederick Lang is guilty of murder of the first degree as above charged in manner and form as in and by said indictment is above alleged against him.

And upon this it is forthwith demanded of the said Frederick Lang if he hath or knoweth anything to say wherefore the said Justice and Judge as aforesaid, here ought not upon the premises and verdict aforesaid to proceed to judgment and execution against him, who nothing further saith unless as he before had said.

Whereupon all and singular the premises being seen, and by the said Justice and Judge as aforesaid here fully understood. It is considered by the Court
 10 here that the said Frederick Lang be taken to the jail of the said County of Middlesex, from whence he came, and that he be there kept in strict custody until Tuesday, the twenty-eighth day of August next ensuing, and that between the hours of eight and ten in the forenoon of that day he be taken to the place of execution, to be provided by the Sheriff of the County of Middlesex, in accordance with the law, and there to be hanged by the neck until dead.

FRANCIS J. SWAYZE,
 Judge.

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Middlesex Oyer and Terminer.

THE STATE
vs.
FREDERICK LANG,

} Indictment
for Murder.

New Brunswick, N. J., July 16, 1906. 10

Testimony and proceedings at the trial, before
HONORABLE E. J. SWAYZE, Judge, and a Jury.

Appearances:

For the State—PROSECUTOR GEORGE BERDINE.

For Defendant—ALAN H. & THEODORE STRONG.

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Mr. Strong: If the Court please, I desire to withdraw the plea of not guilty and make a motion to quash the indictment.

The Court: I will hear you. The plea may be considered withdrawn for that purpose.

Mr. Strong: I wish to call a witness, Mr. Hezekiah Warne.

The Court: On motion to quash, Mr. Strong? 30

Mr. Strong: Yes, sir.

Hezekiah Warne, sworn.

The Prosecutor: Shouldn't we have the basis of the motion?

The Court:

That is a novel practice to me. I will hear the question now.

Mr. Strong: Does your Honor wish me to proceed with the question?

The Court: I don't know what your aim is, Mr. Strong. You may ask a question.

By Mr. Strong.

Q. You were a member of the Grand Jury at the present April Term of this Court?

A. A little louder.

10 Q. You are a member of the Grand Jury at the present April Term?

A. Yes.

The Prosecutor: I object to this.

The Court: What is the object?

Mr. Strong: The object is to prove that this Grand Juror, at the time he was sworn and impanelled on the Grand Jury was over the age of sixty-five years, and that he participated in the investigation of the complaint and finding of the indictment. It should be called to your Honor's attention in connection with this examination that the Grand Jury was impanelled on the third of April—that appears by the minutes—and that the offense charged against this defendant occurred—the acts which are charged as the offense occurred on the twentieth day of April.

The Court: So there was no opportunity to interpose a challenge?

30 Mr. Strong: That is the point. I presume it will be conceded on the part of the State that the date alleged in the indictment is the twentieth of April. Is that true?

The Prosecutor: Of course.

Mr. Strong: That is the date?

The Prosecutor: Yes.

The Court: I think that this ought to be presented in a more formal way, Mr. Strong. Ought not it to be presented by a plea in abatement?

Mr. Strong: I have prepared myself to present it in both ways, thinking there might be doubt which was the better. The preliminary motion, of course, is the motion to quash. If your Honor thinks then that it should be presented by that other method, I have prepared a plea in abatement, which I shall then file, so as to cover both methods of presenting the objection.

The Court: I will allow you to make proof 10 of this fact.

Q. What is your age, Mr. Warne?

A. I am seventy-two.

Q. Seventy-two?

A. Yes, past seventy-two.

Q. Past seventy-two?

A. Yes, sir.

Q. Did you serve as a member of the Grand Jury in finding the indictment against Lang?

A. I was there.

20

Q. Present at the hearing of the witnesses?

A. Yes, sir.

Q. And voted for it?

A. Yes, sir.

No cross examination.

30

Isaac S. Bennett, affirmed.

By Mr. Strong.

Q. Are you a member of the Grand Jury at the present term?

A. Yes, sir.

Q. You have served on the Grand Jury?

A. Yes, sir.

Q. As a member of it?

A. Yes, sir.

Q. What is your age?

A. Sixty-five years of age.

Q. Any more than that?

A. Since May.

By the Prosecutor.

Q. Sixty-five in May?

A. Yes, sir.

By Mr. Strong.

10 Q. Do you mean that May was your sixty-fifth birthday?

A. Yes, sir.

Q. Were you born in the year 1839?

A. I think I was. That is sixty-seven.

Q. Sixty-seven?

A. Yes, sir.

Q. You took part in the hearing of an investigation of the charge in the indictment against Lang,
20 did you?

A. I did.

No cross examination.

Mr. Strong: I desire to offer the minutes showing the empanelling of the Grand Jury on, I believe it is the third of April, at any rate, the first Tuesday in April of the present year, and I desire to have on
30 the record the admission on the part of the State that the act charged against the defendant occurred on the twentieth of April.

The Court: The indictment alleges it occurred on the twentieth. I take that, of course.

Mr. Strong: I presume the date would not be binding, but I will make proof that that is the true date. I understand it to be admitted on the part of the State.

The Prosecutor: Yes.

Mr. Strong: That is the completion of our proof.

Minutes of Middlesex Oyer and Terminer,

Page 385, &c.

April Term, 1906.

At a session of the Court of Oyer and Terminer and General Jail Delivery, holden at New Brunswick, in and for said County of Middlesex, on the first Tuesday in April, 1906.

HON. J. FRANKLIN FORT, Justice of the Supreme Court of Judicature, and HON. THEODORE B. BOOR-
AEM, Judge of the Court of Common Pleas of the County of Middlesex, constituting a Court of Oyer and Terminer and General Jail Delivery in and for said County. 10

The following return was made by the Sheriff of said County:

"To the Judges of the Court of Oyer and Terminer and General Jail Delivery, holden at New Brunswick, in and for the said County of Middlesex, the first Tuesday of April, 1906, I, Andrew S. Church, Sheriff of the said County, do hereby certify and that I have duly summoned the following named twenty-four good lawful men of the body of said County, qualified by law to serve to make a Grand Jury in the Court aforesaid, according to the form of the statute in such case made and provided: 20

1. James M. Parsons, North Brunswick.
2. James E. Berry, Woodbridge.
3. Joseph Mark, South River.
4. Henry E. Ayres, Metuchen.
5. Hezekiah Warne, Madison.
6. Frederick M. Townley, Sayreville.
7. Isaac S. Bennett, South Brunswick.
8. Charles M. Davison, Jamesburg.
9. Alphonso S. Mundy, New Brunswick.
10. Edward E. Haines, South Amboy.
11. Edward Jaques, South Amboy.
12. Charles W. Hoagland, Monroe.
13. Walter A. Belcher, Perth Amboy.

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14. Charles Edwards, Perth Amboy.
15. Charles Fletcher, Perth Amboy.
16. Adrain G. Chamberlain, New Brunswick.
17. Edward Van Pelt, New Brunswick.
18. Peter J. Young, New Brunswick.
19. John V. Hubbard, New Brunswick.
20. Thomas L. Slugg, Carteret.
21. Lemuel Stults, Cranbury.
22. Charles E. Kelley, Piscataway.
23. William H. Jameson, South Brunswick.
- 10 24. Heyman Shragowitz, Perth Amboy.

Summoned by me, ANDREW S. CHURCH,
Sheriff.

The names of the Grand Jurors so summoned being called, answered to their names except W. E. Jameson, who was excused by the Court. The following named persons were duly sworn:

- 20 1. James M. Parsons.
2. James E. Berry.
3. Joseph Mark.
4. Henry E. Ayres.
5. Hezekiah Warne.
6. Frederick M. Townley.
7. Isaac S. Bennett, affirmed.
8. Charles M. Davison.
9. Alphonso L. Mundy.
10. Edward E. Haines.
- 30 11. Edward Jaques.
12. Charles W. Hoagland.
13. Walter A. Belcher.
14. Charles Edwards.
15. Charles Fletcher.
16. Adrain G. Chamberlain.
17. Edward Van Pelt.
18. Peter J. Young.
19. John V. Hubbard.
20. Thomas L. Slugg.
21. Samuel Stults.

22. Charles E. Kelley.

23. Heyman Schragowitz.

Constables Jacob Gordon and Richard Peltier were appointed to attend to the Grand Jury during their sessions.

The Court: I overrule the motion to quash.

(Whereupon the defendant, by his counsel, prays
a bill of exceptions, which is hereby allowed and
sealed accordingly.) 10

F. J. SWAYZE, J. [L.S.]

Mr. Strong: I desire to present a plea in abatement, setting up the same matter. (Reads plea in abatement.)

The Prosecutor: The State demurs to that plea.

The Court: I sustain the demurrer to that plea.

Mr. Strong: I was going to say perhaps there
should accompany the plea an affidavit, which I have
not prepared, but I can prepare it very shortly if your
Honor will allow me to supply it. 20

The Court: I will allow you to supply the affidavit required by statute verifying the facts stated in the plea.

Mr. Strong: I thought possibly in view of the proof made in the presence of the Court it might not be required, but it is better to have it.

(Affidavit verifying the plea was thereupon made
and filed with said plea.) 30

The Court: If there is nothing further, the defendant may plead again to the indictment.

Mr. Strong: I pray an exception to the sustaining of the demurrer.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

F. J. SWAYZE, J. [L.S.]

(The clerk reads the indictment to the defendant and asks him what he pleads.)

Mr. Strong: I think perhaps it would be safer for the defendant not to plead. He does not plead.

The Court: Let a plea of not guilty be entered.

Empaneling of the Jury.

10 *Herman Maddock*, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

By the Prosecutor.

Q. Have you any conscientious scruples against capital punishment?

Mr. Strong: I submit this is not a proper method. I do not think the juror can be inter-
20 rogated until the challenge is interposed.

The Court: Very well. There is a challenge to the favor. Ought not the juror be put upon his voir dire?

(Juror sworn upon voir dire.)

By the Prosecutor.

Q. Have you any conscientious scruples against capital punishment?

30 A. No, sir.

Q. Would you vote for the conviction of a man that might involve hanging, if the testimony warranted it?

A. If the evidence brought before me would so justify me in doing so.

The Prosecutor: I withdraw the challenge.

Mr. Strong: We challenge.

John P. Tapken, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

The Prosecutor: We challenge for the favor.

(Juror sworn upon voir dire.)

By the Prosecutor.

Q. Have you any conscientious scruples against capital punishment? 10

A. I have, I must say.

Q. Explain what you mean?

A. Well, I never wanted to be on a jury on a case of this kind; that is, on a murder trial. I never cared to be.

Q. Should the evidence produced before you in the trial of the case warrant the conviction of a man for murder of the first degree, knowing that that would involve his hanging, would you vote for a conviction? 20

A. I should; yes, sir; if it warranted it. As I say, I have those scruples that I don't care to be on a jury.

Q. Simply that you don't wish to be on a jury to hear a case where the life of a man is involved?

A. Yes.

Q. But you have no conscientious scruples against it?

A. No, I don't think I have, but it is that way.

The Prosecutor: Do you swear them individually? 30

The Court: After they have finished.

The Prosecutor: I will only withdraw the challenge for the favor after they have finished.

Mr. Strong: We do not cross examine. Does the State challenge?

The Court: I overrule the challenge to the favor. Is there any peremptory challenge?

The Prosecutor: None on the part of the State.

Mr. Strong: None on the part of the defendant.

The Court: Let the juror be sworn.

(Juror sworn.)

Frank Nezrad, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

10 The Prosecutor: Challenge to the favor.

(Juror sworn on voir dire.)

By the Prosecutor.

Q. Have you any conscientious scruples against capital punishment?

A. No, sir.

Q. If evidence were produced showing that a man was guilty of murder, knowing that it would involve
20 his life, would you vote for a conviction?

A. Yes, sir.

Mr. Strong: No cross examination.

The Court: I overrule the challenge.

Mr. Strong: The defence challenges.

Thomas J. Pryor, called.

30 The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

The Prosecutor: We challenge for the favor.

(Juror sworn on voir dire.)

By the Prosecutor.

Q. Have you any conscientious scruples against capital punishment?

A. No, sir; if I were satisfied the man was really guilty. I would want to be well satisfied.

Q. If the testimony warranted his conviction, knowing that conviction would lead to his hanging, would you vote for a conviction?

A. Yes, sir.

The Prosecutor: I withdraw the challenge.

The Court: Is there any challenge to the favor on the part of the defence?

Mr. Strong: No challenge.

(Juror sworn.)

10

Harry Potts, called but did not appear.

Josiah Maitland, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

20

The Prosecutor: Challenge for the favor.

(Juror sworn on voir dire.)

By the Prosecutor.

Q. Have you any conscientious scruples against capital punishment?

A. I have not.

Q. If the testimony warranted a conviction of murder in the first degree and you knew the penalty would be the life of the man, would you vote for a conviction?

30

A. If it warranted, if there was proof enough for me, then I would.

(Challenge withdrawn.)

The Court: Is there any peremptory challenge?

(Juror sworn.)

George McDowell, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

The Prosecutor: Challenge for the favor.

(Juror sworn on voir dire.)

By the Prosecutor.

Q. Have you any conscientious scruples against
10 capital punishment?

A. No, sir.

Q. If the testimony presented to you in a case warranted a conviction of a defendant for murder in the first degree, involving his life, would you vote for a conviction?

A. I would.

The Court: Is there any peremptory challenge on either side?

20

The Prosecutor: It is their turn now.

Mr. Strong: The State challenges first.

The Court: The State challenged to the favor and that challenge was withdrawn. Now, I understand the defence has no peremptory challenge.

The Prosecutor: We have none.

Mr. Strong: What I suggested was that the State should be called upon for the peremptory challenge first.

30

The Prosecutor: Every time?

Mr. Strong: Every time.

The Court: That has not been my practice, and I will make no rule as to order in which peremptory challenges shall be interposed. If counsel can agree, it would be fair that the State and defence should be called on alternately. If they cannot agree, they must interpose their peremptory challenge before the juror is sworn. There is none in this case. Let the juror be sworn.

(Juror sworn.)

Andrew Roland, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

The Prosecutor: Challenge for the favor.

(Juror sworn on voir dire.)

By the Prosecutor.

Q. Can you hear distinctly, Mr. Roland?

A. Well, yes, sir; I can hear.

10

Q. You can hear me now, can you?

A. I would rather be excused.

Q. Have you conscientious scruples against capital punishment?

A. No, sir; I have not.

Q. If the testimony should warrant a conviction of a man for murder in the first degree, knowing that his sentence might be hanging, would you vote for a conviction?

A. Yes, sir.

20

The Court: I overrule the challenge. Is there any peremptory challenge? I hear none. Let the juror be sworn.

(Juror sworn.)

John Donahue, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

30

The Prosecutor: Challenge for the favor.

(Juror sworn on voir dire.)

By the Prosecutor.

Q. Have you any conscientious scruples against capital punishment?

A. No, sir.

Q. If the testimony produced before you warrant-

ed a conviction of a man for murder in the first degree, knowing that it would impose hanging, would you vote for a conviction?

A. I would.

The Court: The challenge is overruled. Is there any peremptory challenge?

Mr. Strong: We submit, if your Honor please, that the question should be: "Does the State challenge peremptorily?"

10 The Court: I decline to put the question in that way.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

F. J. SWAYZE, J. [L.S.]

The Court: I ask now is there any peremptory challenge? I hear none.

Mr. Strong: Challenged.

20

William W. Stokes, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

The Prosecutor: Challenge for the favor.

(Juror sworn on voir dire.)

30 *By the Prosecutor.*

Q. Have you conscientious scruples against capital punishment?

A. No, sir.

Q. Could you find a conviction against a man charged with murder in the first degree, if the testimony warranted it?

A. Yes, sir.

Q. Knowing that the sentence imposed would be his life?

A. Yes, sir.

The Court: I overrule the challenge. Is there a peremptory challenge?

Mr. Strong: Your Honor, I would like the same exception without repeating it.

The Court: Take the exception.

Mr. Strong: That is, the question should be, "Does the State challenge peremptorily?"

The Court: Yes, it may be considered in each case you require that I should put that question, and I decline to do so and you have an exception.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

F. J. SWAYZE, J. [L.S.]

Mr. Strong: Defence challenges.

20

Peter Allen, called and did not answer.

Henry Backer, Senior, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

The Prosecutor: We challenge for the favor.

(Juror sworn upon voir dire.)

30

By the Prosecutor.

Q. What is your age, Mr. Backer?

A. Seventy-two.

Q. Hearing good?

A. Oh, yes; can see good, too.

The Prosecutor: He is over the age.

The Court: The juror may stand aside.

(Whereupon the defendant, by his counsel,

prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

F. J. SWAYZE, J. [L.S.]

John B. Hogan, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

10 The Prosecutor: We challenge for the favor.

(Juror sworn on voir dire.)

By the Prosecutor.

Q. Have you conscientious scruples against capital punishment?

A. I have not.

Q. Would you vote for the conviction of a man charged with murder in the first degree, if the testimony warranted it?

20 A. I would.

Q. Although it might involve his life as the sentence imposed?

A. Yes, sir.

The Court: I overrule the challenge to the favor. Is there a peremptory challenge?

(Whereupon the defendant, by his counsel, prays a bill of exceptions to the form of the Court's question, which is hereby allowed and sealed accordingly.)

30

Mr. Strong: We challenge.

Edwin A. Brown, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

The Prosecutor: We challenge for the favor.

(Juror sworn on voir dire.)

By the Prosecutor.

Q. Have you conscientious scruples against capital punishment?

A. No, sir.

Q. Would you vote for the conviction of a man charged with murder in the first degree, if the testimony warranted it? 10

A. I should.

Q. Although the punishment would be his life?

A. Yes, sir.

The Court: I overrule the challenge. Is there a peremptory challenge?

(Whereupon the defendant, by his counsel, prays a bill of exceptions to the form of the Court's question, which is hereby allowed and sealed accordingly.) 20

Mr. Strong: We challenge.

William B. Sutton, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

The Prosecutor: We challenge for the favor. 30

(Juror sworn on voir dire.)

By the Prosecutor.

Q. Have you conscientious scruples against capital punishment?

A. No, sir.

Q. If the testimony should warrant a conviction of a man charged with murder in the first degree, would you so vote?

A. Yes, sir.

Q. Although you would know that the sentence imposed would be his life?

A. Yes, sir.

The Court: I overrule the challenge. Is there a peremptory challenge?

(Whereupon the defendant, by his counsel, prays a bill of exceptions to the form of the Court's question, which is hereby allowed and sealed accordingly.)

Mr. Strong: We challenge.

F. A. Friese, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

The Prosecutor: We challenge for the favor.

(Juror sworn on voir dire.)

By the Prosecutor.

Q. Have you conscientious scruples against capital punishment?

A. None whatever.

Q. Would you find a conviction against a man charged with murder in the first degree, if the testimony warranted it?

A. Yes, sir.

Q. Although the sentence imposed would be his life?

A. Yes, sir.

The Court: I overrule the challenge. Is there a peremptory challenge?

(Whereupon the defendant, by his counsel, prays a bill of exceptions to the form of the Court's question, which exception is hereby allowed and sealed accordingly.)

Mr. Strong: We challenge.

James W. Runyon, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

The Prosecutor: We challenge for the favor.

(Juror sworn on voir dire.)

By the Prosecutor.

Q. Have you conscientious scruples against capital punishment? 10

A. No, sir.

Q. Would you vote for a conviction with a man charged with murder in the first degree, if the evidence warranted it?

A. If the evidence warranted it.

The Court: I overrule the challenge. Is there a peremptory challenge?

(Whereupon the defendant, by his counsel, prays a bill of exceptions to the form of the Court's question, which exception is hereby allowed and sealed accordingly.) 20

The Prosecutor: The State challenges.

Samuel Warren, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge? 30

The Prosecutor: We challenge for the favor.

(Juror sworn on voir dire.)

By the Prosecutor.

Q. Where do you live?

A. Cranbury.

Q. Have you conscientious scruples against capital punishment?

A. I have not.

Q. Would you vote for the conviction of a man for murder in the first degree, if the testimony warranted it?

A. Would have to be sure of it, that there was sufficient evidence to prove him guilty.

Q. Notwithstanding the fact that the sentence imposed would be his life?

A. If the evidence was sufficient.

10 The Court: I overrule the challenge. Is there a peremptory challenge? I hear none. Let the juror be sworn.

(Whereupon the defendant, by his counsel, prays a bill of exceptions to the form of the Court's question, which exception is hereby allowed and sealed accordingly.)

(Juror sworn.)

20

George W. Grove, called.

The Prosecutor: The defendant and the State have agreed to excuse this juror because he is in such condition it would not be well to have him stay.

The Court: He may be excused.

30 *Frederick Van Dusen*, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

The Prosecutor: We challenge for the favor.

(Juror sworn on voir dire.)

By the Prosecutor.

Q. Have you conscientious scruples against capital punishment?

A. No, sir.

Q. Would you vote to convict a man of murder in the first degree if the testimony warranted it?

A. Yes.

Q. Even though the sentence imposed was his life?

A. Yes.

The Court: I overrule the challenge. Is there a peremptory challenge? Let the juror be sworn.

(Whereupon the defendant, by his counsel, prays a bill of exceptions to the form of the Court's question, which exception is hereby allowed and sealed accordingly.)

(Juror sworn.)

Robert Stewart, Senior, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge? 20

The Prosecutor: We challenge for the favor.

(Juror sworn on voir dire.)

By the Prosecutor.

Q. How old are you, Mr. Stewart?

A. Sixty-three.

Q. Have you conscientious scruples against capital punishment?

A. No, sir. 30

Q. Would you vote for the conviction of a man of murder in the first degree, if the testimony warranted it?

A. If it warranted it; yes.

Q. Although the sentence imposed might be hanging?

A. Yes, sir.

The Court: I overrule the challenge. Is there a peremptory challenge?

(Whereupon the defendant, by his counsel, prays a bill of exceptions to the form of the Court's question, which exception is hereby allowed and sealed accordingly.)

The Prosecutor: The State challenges.

10 *Wesley Kempton*, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

The Prosecutor: We challenge for the favor.

(Juror sworn on voir dire.)

By the Prosecutor:

Q. Have you conscientious scruples against capital punishment?

A. No, sir.

20 Q. Would you vote for the conviction of a man for murder in the first degree, if the testimony warranted it?

A. Yes, sir.

Q. Even though the penalty be his life?

A. I would have to.

The Court: I overrule the challenge. Is there a peremptory challenge? I hear none. Let the juror be sworn.

30

(Whereupon the defendant, by his counsel, prays a bill of exceptions to the form of the Court's question, which exception is hereby allowed and sealed accordingly.)

(Juror sworn.)

George P. Vanderveer, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

The Prosecutor: We challenge for the favor.

(Juror sworn on voir dire.)

By the Prosecutor.

Q. What is your age, Mr. Vanderveer?

A. Fifty-five.

10

Q. Have you conscientious scruples against capital punishment?

A. No, sir.

Q. Would you vote for the conviction of a man of murder in the first degree if the testimony warranted it, although the penalty would be his life?

A. Yes, sir.

The Court: I overrule the challenge. Is there a peremptory challenge?

20

(Whereupon the defendant, by his counsel, prays a bill of exceptions to the form of the Court's question, which exception is hereby allowed and sealed accordingly.)

The Prosecutor: The State challenges.

John Lynch, called.

30

Mr. Strong: Mr. Lynch is on duty as a night watchman and wishes to be excused, and the Prosecutor has consented.

The Court: The juror will be excused.

Edward Engelson, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

The Prosecutor: We challenge for the favor.

(Juror sworn on voir dire.)

By the Prosecutor.

Q. Have you conscientious scruples against capital punishment?

A. No, sir.

10 The Prosecutor: I just thought that this juror should be excused. He assisted in working up the case, I think, to some extent.

The Court: He assisted the State? Let him stand aside.

Andrew J. White, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

The Prosecutor: We challenge for the favor.

20 (Juror sworn on voir dire.)

By the Prosecutor.

Q. Have you conscientious scruples against capital punishment?

A. No, sir.

Q. Would you vote for the conviction of a man for murder in the first degree if the testimony should warrant, it, although the punishment would be his life?

30 A. Yes, sir.

The Court: I overrule the challenge. Is there a peremptory challenge? I hear none. Let the juror be sworn.

(Whereupon the defendant, by his counsel, prays a bill of exceptions to the form of the Court's question, which exception is hereby allowed and sealed accordingly.)

(Juror sworn.)

James Okerson, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

The Prosecutor: We challenge for the favor.

(Juror sworn on voir dire.)

By the Prosecutor.

Q. Have you conscientious scruples against capital punishment? 10

A. No, sir.

Q. Would you vote for the conviction of a man of murder in the first degree if the testimony warranted it, although the penalty would be his life?

A. Yes, sir.

The Court: I overrule the challenge. Is there a peremptory challenge? I hear none. Let the juror be sworn.

20

(Whereupon the defendant, by his counsel, prays a bill of exceptions to the form of the Court's question, which exception is hereby allowed and sealed accordingly.)

(Juror sworn.)

Michael White, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge? 30

The Prosecutor: We challenge for the favor.

(Juror sworn on voir dire.)

By the Prosecutor.

Q. Have you conscientious scruples against capital punishment?

A. No, sir.

Q. Would you vote for the conviction of a man

for murder in the first degree if the testimony produced before you warranted it, even though the penalty would be death?

A. Yes, sir.

The Court: I overrule the challenge. Is there a peremptory challenge?

(Whereupon the defendant, by his counsel, prays for a bill of exceptions to the form of the Court's question, which exception is hereby allowed and sealed accordingly.)

Mr. Strong: We challenge.

Joseph Brock, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

20 The Prosecutor: We challenge for the favor.

(Juror sworn on voir dire.)

By the Prosecutor.

Q. Have you conscientious scruples against capital punishment?

A. No, sir.

Q. Would you vote for the conviction of a man for murder in the first degree, if the testimony warranted it, even though the penalty would be his life?

30 A. Yes, sir.

The Court: I overrule the challenge. Is there a peremptory challenge?

(Whereupon the defendant, by his counsel, prays a bill of exceptions to the form of the Court's question, which exception is hereby allowed and sealed accordingly.)

Mr. Strong: We challenge.

Frank L. Dye, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

The Prosecutor: We challenge for the favor.

(Juror sworn on voir dire.)

By the Prosecutor.

Q. Have you conscientious scruples against capital punishment? 10

A. No, sir.

Q. Would you vote for the conviction of a man for murder in the first degree, if the testimony warranted it, even though the penalty would be his life?

A. Yes, sir.

The Court: I overrule the challenge. Is there a peremptory challenge?

(Whereupon the defendant, by his counsel, prays a bill of exceptions to the form of the Court's question, which exception is hereby allowed and sealed accordingly.) 20

Mr. Strong: We challenge.

William D. Crossan, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge? 30

The Prosecutor: We challenge for the favor.

(Juror sworn on voir dire.)

By the Prosecutor.

Q. Have you conscientious scruples against capital punishment?

A. No, sir.

Q. Would you vote for the conviction of a man

for murder in the first degree, if the testimony warranted it, even though the penalty would be his life?

A. Yes, sir.

The Court: I overrule the challenge. Is there a peremptory challenge?

(Whereupon the defendant, by his counsel, prays a bill of exceptions to the form of the Court's question, which exception is hereby allowed and sealed accordingly.)

10

Mr. Strong: We challenge.

Charles Jackson, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

The Prosecutor: We challenge for the favor.

20

(Juror sworn on voir dire.)

The Juror: If your Honor please, I am a member of the National Guard and my regiment is down at Sea Girt. I don't want to claim my exemption.

The Court: You are entitled to be excused from this service. You may be excused.

Mr. Strong: We pray an exception.

The Court: One moment. Do you object to the method of proof of his being in the National Guard.

30 I suppose that he may be called upon to prove it.

Mr. Strong: I will take his statement.

The Court: Very well, if you accept his statement I will excuse him. You may have your exception.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

F. J. SWAYZE, J. [L.S.]

The Juror: If there is any necessity or trouble to it, I will stay.

The Court: You have claimed your exemption. I will, under the statute, sustain your right to be excused.

The Juror: I don't want to claim my exemption that way, being a member of this panel.

The Court: It is a personal privilege with you. I will excuse you.

10

Richard M. Beekman, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

The Prosecutor: We challenge for the favor.

(Juror sworn on voir dire.)

By the Prosecutor.

20

Q. Have you conscientious scruples against capital punishment?

A. No, sir.

Q. Would you vote for the conviction of a man for murder in the first degree if the testimony warranted it?

A. I would.

Q. Though the penalty would be the defendant's life?

A. Yes, sir.

30

The Court: Challenge is overruled. Is there a peremptory challenge? I hear none. Let the juror be sworn.

(Whereupon the defendant, by his counsel, prays a bill of exceptions to the form of the Court's question, which exception is hereby allowed and sealed accordingly.)

(Juror sworn.)

Thomas Roque, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

The Prosecutor: We challenge for the favor.

(Juror sworn on voir dire.)

By the Prosecutor.

Q. Have you conscientious scruples against capital
10 punishment?

A. No, sir.

Q. Would you vote for the conviction of a man of murder in the first degree, should the testimony warrant it?

A. Yes, sir.

Q. Even though the penalty would be his life?

A. Yes, sir.

20 The Court: I overrule the challenge. Is there a peremptory challenge?

(Whereupon the defendant, by his counsel, prays a bill of exceptions to the form of the Court's question, which exception is hereby allowed and sealed accordingly.)

Mr. Strong: Challenge.

30 *Charles Tombley*, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

The Prosecutor: We challenge for the favor.

(Juror sworn on voir dire.)

By the Prosecutor.

Q. Is your hearing good?

A. Yes, sir.

Q. Have you conscientious scruples against capital punishment?

A. No, sir.

Q. Would you vote for conviction of a man for murder in the first degree should the testimony warrant it?

A. Yes, sir.

The Court: I overrule the challenge. Is there a peremptory challenge?

10

(Whereupon the defendant, by its counsel, prays a bill of exceptions to the form of the Court's question, which exception is hereby allowed and sealed accordingly.)

Mr. Strong: We challenge.

James Mullin, called.

20

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

The Prosecutor: We challenge for the favor.

(Juror sworn on voir dire.)

By the Prosecutor.

Q. Have you conscientious scruples against capital punishment?

A. I have not.

30

Q. Would you vote for the conviction of a man of murder in the first degree should the evidence warrant it?

A. I would.

Q. Even though the penalty would be his life?

A. Yes, sir.

The Court: I overrule the challenge. Is there a peremptory challenge?

(Whereupon the defendant, by his counsel,

prays a bill of exceptions to the form of the Court's question, which exception is hereby allowed and sealed accordingly.)

Mr. Strong: We challenge.

Thomas Bunting, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

The Prosecutor: We challenge for the favor.

(Juror sworn on voir dire.)

By the Prosecutor.

Q. Have you conscientious scruples against capital punishment?

A. None at all, sir.

Q. Would you vote for the conviction of a man for murder in the first degree should the evidence produced warrant it?

A. Yes, sir.

Q. Even though the penalty is life?

A. Yes, sir.

Q. What is your age?

Mr. Strong: I object.

The Court: I overrule the objection.

Mr. Strong: On what grounds? This is the challenge to the favor.

The Court: I overruled the objection.

A. Fifty-five, sir.

The Court: I overrule the challenge to the favor. Is there a peremptory challenge?

(Whereupon the defendant, by his counsel, prays a bill of exceptions to the form of the Court's question, which exception is hereby allowed and sealed accordingly.)

Mr. Strong: We challenge.

David Robotham, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

The Prosecutor: We challenge for the favor.

(Juror sworn on voir dire.)

By the Prosecutor.

Q. What is your age, Mr. Robotham?

Objected to.

10

Objection overruled.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

A. Sixty-three past.

Q. Have you conscientious scruples against capital punishment?

A. No, sir.

Q. Would you vote for the conviction of a defendant of murder in the first degree should the testimony warrant it? 20

A. Yes, sir.

Q. Even though the penalty would be death?

A. Yes, sir.

The Court: I overrule the challenge. Is there a peremptory challenge?

(Whereupon the defendant, by his counsel, prays a bill of exceptions to the form of the Court's question, which exception is hereby allowed and sealed accordingly.) 30

Mr. Strong: We challenge.

Peter Dubolt, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

The Prosecutor: We challenge for the favor.

(Juror sworn on voir dire.)

By the Prosecutor.

Q. Have you conscientious scruples against capital punishment?

A. No, sir.

Q. Would you vote for the conviction of a defendant for murder in the first degree should the testimony warrant it?

A. Yes, sir.

Q. Even though the penalty would be death?

A. Yes, sir.

The Court: I overrule the challenge. Is there a peremptory challenge?

(Whereupon the defendant, by his counsel, prays a bill of exceptions to the form of the Court's question, which exception is hereby allowed and sealed accordingly.)

Mr. Strong: We challenge.

Isaac S. Dickson, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

The Prosecutor: We challenge for the favor.

(Juror sworn on voir dire.)

By the Prosecutor.

Q. Have you conscientious scruples against capital punishment?

A. No, sir.

Q. Would you vote for the conviction of a defendant of murder in the first degree should the testimony warrant it?

A. Yes, sir.

Q. Even though the penalty would be death?

A. Yes.

The Court: I overrule the challenge. Is there a peremptory challenge?

(Whereupon the defendant, by his counsel, prays a bill of exceptions to the form of the Court's question, which exception is hereby allowed and sealed accordingly.)

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Mr. Strong: We challenge.

Louis Minzer, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

The Prosecutor: We challenge for the favor.

(Juror sworn on voir dire.)

20

By the Prosecutor.

Q. Have you conscientious scruples against capital punishment?

No, sir.

Q. Would you vote for the conviction of a defendant of murder in the first degree should the testimony warrant it?

A. Yes, sir.

Q. Even though the penalty would be death?

30

A. Yes.

The Court: I overrule the challenge. Is there a peremptory challenge?

(Whereupon the defendant, by his counsel, prays a bill of exceptions to the form of the Court's question, which exception is hereby allowed and sealed accordingly.)

Mr. Strong: We challenge.

James Dooley, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

The Prosecutor: We challenge for the favor.

(Juror sworn on voir dire.)

By the Prosecutor.

Q. Are you over sixty-five years of age?

10

Objected to.

Question permitted.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

A. I couldn't say myself. They claim I am sixty-five this fall. I am not sure myself. I was born in Ireland. Well, I will tell you, they don't keep the record there exactly.

21

Q. Have you conscientious scruples against capital punishment?

A. No, sir.

Q. Would you vote for the conviction of a defendant for murder in the first degree, although the penalty would be death, should the evidence warrant it?

A. Well, that is what I am here for.

By the Court.

30

Q. What do you mean by saying that is what you are here for?

A. Well, to go according to the evidence as given.

The Court: I overrule the challenge to the favor. What do counsel say as to the witness's testimony as to his age? Does the defence or the State, either one, object to the juror on that ground?

The Prosecutor: I do not.

The Court: Is there any peremptory challenge?

(Whereupon the defendant, by his counsel, prays a bill of exceptions to the form of the Court's questions, which exception is hereby allowed and sealed accordingly.)

Mr. Strong: We object to the juror as being over age.

The Court: I will let the juror stand aside.

10

James A. Lyon, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

The Prosecutor: We challenge for the favor.

(Juror sworn on voir dire.)

By the Prosecutor.

Q. Have you conscientious scruples against capital punishment? 20

A. Somewhat.

Q. What are they?

A. Well, I don't like it.

Q. Would you vote for the conviction of a man for murder in the first degree should the testimony produced before you warrant it, even though the penalty would be death?

A. Yes, sir.

Q. You would vote for his conviction? 30

A. Yes, sir.

The Court: I overrule the challenge to the favor. Is there a peremptory challenge?

(Whereupon the defendant, by his counsel, prays a bill of exceptions to the form of the Court's question, which exception is hereby allowed and sealed accordingly.)

Mr. Strong: We challenge.

Leonard C. Smith, called.

The Clerk: Juror, look upon the prisoner. Prisoner, look upon the juror. Do you challenge?

The Prosecutor: We challenge for the favor.

(Juror sworn on voir dire.)

By the Prosecutor.

Q. Have you conscientious scruples against capital punishment?

10 A. No, sir.

Q. Would you vote for the conviction of a man of murder in the first degree if the evidence produced warranted it?

A. Yes, sir.

Q. Even though the penalty would be death?

A. Yes, sir.

The Court: I overrule the challenge. Is there a peremptory challenge?

20 The Prosecutor: None.

The Court: Let the juror be sworn.

Mr. Strong: Does the Court say our challenges are exhausted?

The Court: Your challenges are exhausted.

(Juror sworn.)

30 The Court: Let the Sheriff designate two officers to attend to the jury and let them be sworn.

The Prosecutor: My Court interpreter is not here. I have here a competent man, I think, known to the defendant too, Mr. William Foeder, the banker.

The Court: I will appoint the gentleman as interpreter.

Mr. Foeder sworn as interpreter.

Fred C. Snyder, sworn.

Direct Examination, by the Prosecutor.

Q. What is your business, Mr. Snyder?

A. Civil Engineer of New Brunswick.

Q. Where is your place of business?

A. George street, corner Paterson.

Q. Will you look at that map, please—did you ever visit the house or place of Mr. Gordon on the line of the trolley?

10

A. Yes, sir.

Q. Known as Bonham Hill?

A. Yes, sir.

Q. When?

A. On April 20th.

Q. Of the present year?

A. April 20th, 1906; yes, sir.

Q. What did you do there?

A. I made a survey of the road and house, the house that Gordon lives in and the road which passes the house, showing the tracks and the width of the road.

20

Q. Showing anything about the trolley line?

A. Showing where the tracks of the trolley are, and also the trolley car. The arrow points to New Brunswick, and this is the north end and here is shown the carriageway and footpath leading from the house to the road. This line from my pointer is a carriageway and foot path.

Q. What did you do after you made the survey?

30

A. I drew the map, this map.

Q. Is that the map?

A. Yes, sir.

Cross Examination, by Mr. Strong.

Q. The portion of the map colored in red, is what?

A. Showing carriage tracks and foot path. There is a little grass which is shown in green on the side of the footpath. They could have walked down here between the two grass plots.

Q. One second. The red indicates soil on which there is no grass.

A. Yes, sir.

Q. And the green indicates what?

A. The grass.

Q. On each side?

A. Yes, sir.

Q. Are there trees? Where?

A. Trees are in there. I didn't locate them.

10 *Q.* Scattered through the green?

A. Yes, scattered along through here, and this is the spring.

Q. A spring you say?

A. Yes, sir.

Q. And did you locate that?

A. I have not located the spring.

Q. How is it marked?

A. Just a little spring and is about—

Q. Have you the word "Spring" there?

20 *A.* Yes, sir.

Q. On the other side of the path or carriage way, are there trees there too?

A. Yes, sir; a row of trees.

Q. Is there a thick growth of trees there, or not?

A. I think not.

Q. Scattered?

A. Just scattered; trees scattered along through here.

Q. On both sides of the drive?

30 *A.* On both sides.

Q. Is your map drawn to a scale?

A. Yes, sir.

Q. What scale?

A. Scale of six feet equal one inch.

Q. Does that scale apply throughout?

A. Yes, sir.

Q. And your map is accurately drawn to that scale?

A. Yes, sir.

Q. There is some lettering on the map with rela-

tion to one of the doors which should not appear there?

The Prosecutor: We will erase anything that you want.

The Court: Let it be obliterated so it can't be read.

Q. There are two doors shown on your map leading from the house into the red portion of the map, I see. Are those the front or back doors? 10

A. Front doors.

Q. Which is the front door?

A. This is the front door.

Q. Adjoining the garden?

A. Adjoining the garden.

Q. The other openings on that side of the house are what—windows?

A. Windows.

Q. There are two windows opening on the garden, are there? 20

A. Two windows.

Q. And two opening on the end of the house upon the green?

A. Yes, sir.

Q. Are those the first story windows that you are speaking of?

A. First story windows.

Q. What you have shown with respect to the house is the first floor plan, the ground floor plan, is it?

A. Yes, sir. 30

Q. Is there a fence along the road?

A. Yes, sir.

Q. That you have shown, have you?

A. Yes, sir; eight feet high those posts are.

Q. You have shown the posts of the fence?

A. Yes, sir.

Q. What is the character of the fence?

A. Just a rail fence, three rails on the posts.

Q. And a gate closing it?

A. Yes, sir.

Q. What is that gate?

A. The gate was made just out of ordinary boards four inches wide.

Q. Is it a close board gate?

A. Not entirely.

Q. Or picket?

Q. Not picket either; it is just boards nailed about four inches wide and four inches between each board.

10 Q. Now this carriage way and footpath, as you have it marked, it seems to be divided off lengthwise by green portions. What do you mean to indicate by that?

A. The place where the grass grew in the center. The reddish portion is where they walked, and in the outside of the green is where the carriage came down.

Q. You mean you can tell by looking at the ground that there was a footpath in the center and carriage tracks on either side? Does that show on the ground?

A. Yes, that shows on the ground.

20 Q. And that is what you intend to indicate by the method which you have shown that on the map?

A. Yes, sir.

The Prosecutor: We offer the map.

Mr. Strong: I suppose it is receivable as an illustration in connection with the testimony?

The Court: Yes, I suppose so. Let the surveyor obliterate those words during the recess.

30

Charles Monaghan, sworn.

Direct Examination, by the Prosecutor.

Q. What is your business?

A. Photographer.

Q. Have you been to the Gordon property referred to in this map?

A. Yes, sir.

Q. When?

A. I was there on the 20th. I was there on Saturday past, the 20th of April, 1906.

Q. And when then?

A. I was here this last Saturday past.

Q. You mean the 14th?

A. Yes, sir; of June.

Q. What did you do while there?

A. Took photographs of the scene of the murder.

Q. Of what?

10

A. Took the Gordon murder.

Q. No. Photographs of what?

Mr. Strong: The photographs, I suppose, will show what.

A. These show the location where the shooting occurred.

The Court: Don't state anything that you don't know. You took photographs, I suppose, of the Gordon house?

20

A. Yes, sir.

Q. Are they the photographs you took (indicating).

A. Yes, sir.

Q. All of them?

A. Yes, sir; everyone of them.

Q. You identify them as the ones you took?

A. Yes, sir.

(Photographs marked Exhibits A, B, C, D, E, F, for identification.)

30

The Court: Tear off those descriptions on the back of the photographs.

(Witness complies.)

Q. What does that photograph represent? (Showing witness Exhibit A.)

A. That represents the carriage path leading from the trolley to the house.

Q. Anything else?

A. There is three stones there.

Q. Does it represent the house too?

A. These illustrate the house. Those three stones—

Objected to.

Q. I show you Exhibit B, for identification.

A. That is a picture showing from the house to the trolley.

10 *Q.* Taken from what standpoint?

A. From the kitchen door shown on the map there.

Q. What does that represent?

A. That is the part of the house showing the kitchen door.

Q. That is marked C. What does D represent or illustrate?

A. That represents the back door and window.

Q. What does E represent or illustrate?

20 *A.* That shows the trolley car at the entrance to the Gordon home, and one man and three women.

Q. Where did you get your information respecting the trolley car and the women?

The Court: Strike out the statement as to the trolley car and the women.

Q. What does that illustrate?

A. That is the same thing only taken from a different standpoint.

30 The Prosecutor: This is marked F. I offer all six in their order, subject to objection.

Mr. Strong: I object to the last two, E and F.

The Court: I exclude them.

Mr. Strong: I object to C also, on the ground that there seems to be an effort to introduce some person into the picture, for what purpose I don't know, and I think it is incompetent on that ground.

The Court: I will admit that photograph, the other two I will exclude.

(Whereupon the defendant, by his counsel, prays a bill of exception, which is hereby allowed and sealed accordingly.)

Mr. Strong: And as to the other photographs, I do not object.

Photographs marked Exhibits S 1, 2, 3 and 4.

Cross Examination, by Mr. Strong.

10

Q. What time of day was it you took the photographs?

A. Right after dinner—two o'clock.

Q. This picture A—is there another path leading directly from the house to the road?

A. I have never seen any; no, sir.

Q. What is there that looks like a path, a white streak leading directly from the house?

A. It might be a path, but I couldn't have noticed it. 20

Q. Just tell what it is that shows on your map.

A. I don't know.

Q. Can't you tell what it is?

A. It looks like a path, but I can't tell positively, because I never looked at it.

Q. But from your recollection you can't tell what this indicates?

A. No, sir; I can't.

Q. Is it a fault—

30

A. It looks very much like it in the picture. But I can't say positively.

Q. You have no recollection?

A. No, sir.

Q. Is it a fault in your photograph?

A. No. My camera never lies. Whatever there was is there in the photograph.

John Gordon, sworn.

By the Prosecutor.

Q. What is your name?

A. My name is John Gordon.

Q. Speak out so the jurymen can hear you. Where do you live?

A. I live the other side of Piscataway. It is called Dunham Hill.

10 *Q.* What do you do there?

A. Why, I am a farmer there.

Q. Whose farm is that?

A. Mr. Wm. Kellar's.

Q. How long have you lived there?

A. It is about three years now.

Q. How old are you?

A. I am forty-three.

Q. How long have you been in this country?

A. Sixteen years.

20 *Q.* Before going on the farm what was your business?

A. I was a foreman on the elevation here.

Q. Foreman on the elevation?

A. Yes, sir.

Q. Are you married?

A. Yes, sir.

Q. Wife living?

A. Yes, sir.

Q. What is her name?

30 *A.* Justinia Gordon.

Q. Have a family?

A. Yes, sir.

Q. How many in the family?

Question objected to.

Question excluded.

Q. Was Katie Gordon a member of your family in April of the present year?

A. Yes, sir.

Q. When did you see her alive last?

A. On the 20th of April, about 20 minutes after six.

Q. Do you know the defendant, Fred Lang?

A. Oh, yes; I know him.

Q. Is he any relation to you or your wife?

A. He is a brother of my woman.

Q. Do you know what his work has been in the past year or so? What has he been doing? I mean what kind of work? Is he a laborer, or what is he?

A. He is a laborer; yes, sir.

10

Q. Do you know with whom he worked?

A. Yes, sir.

Q. Who?

A. Why, I don't know.

Q. Do you want the interpreter to help you?

(Interpreter, put the question to the witness.)

A. He doesn't know where he has been working the last time.

Q. Ever work under you?

20

A. Yes, he worked under me.

Q. When?

A. It was two years ago when he left me. It is going on to three.

Q. What kind of work did he work under you?

A. Worked up at the elevation.

Q. On the elevation? Going through New Brunswick on the Pennsylvania Railroad.

A. Yes, sir; he was a laborer over there.

Q. When did you see him the last time before the accident?

30

A. I see the last fall.

Q. No; what month.

A. I think last October; something like that.

Q. Where was that?

A. He was over there by me.

Q. At your home, do you mean?

A. Yes, sir.

Q. What was he doing there?

A. Well, doing nothing over there.

Q. Was he visiting or working there?

A. He was working. He was over there—he was out of work and came on to me.

Q. He was out of work and came over to see you?

A. Yes, sir.

Q. How long did he stay?

A. He stayed over there about two weeks, something like that.

Q. After October, when did you next see him?

10 *A.* Well, I don't see him after; just only come to me again the 18th of April.

Q. Where was that?

A. Out there to my home.

Q. Now, do you know what hour of the day he came?

A. Yes, sir; he came about two o'clock at night.

Q. How did you know he came there?

A. How I know? Why, I let him in the house.

Q. How did you know he was there? Did he
20 make a noise or knock?

A. He knocked the door and asked me, "Brother, open the door." That is what he said.

Q. And you did what?

A. I opened the door and let him in.

Q. Where did he go in your house?

A. He go right in the kitchen.

Q. Where did he go after that?

A. After that he go and sleep upstairs.

Q. For the balance of the night, you mean?

30 *A.* Yes, sir.

Q. He remained with you all night—and did you see him the next morning?

A. I saw him the next morning again when he came down.

Q. He stayed over Wednesday with you?

A. Stayed over there all day Wednesday.

Q. Did he stay Wednesday night?

A. Yes, sir.

Q. Stay Thursday night?

A. Stay Thursday night.

Q. Now begin on Friday morning, the day of this occurrence. When did you first see him Friday morning?

A. When I see him? I see him first Friday morning behind the window where we sleep, you know, and I got a little back room over there and he came out the front way. He have to get out the back way, and I seen him in front of the window.

Q. Where did he sleep with respect to the room that you occupied on Thursday night? 10

A. I slept a little room; it is in the back there.

Q. Where did he sleep?

A. He sleep upstairs top of me.

Q. Just over you?

A. Just top of me.

Q. Will you look at that photograph marked "S 4." Do you know what that represents or illustrates?

A. Well, that is the back. That is the window I sleep. 20

Q. What is this?

A. That is the house here.

Q. That is a doorway?

A. That is a doorway. He can't go out the other way except that door.

Q. That is the only way that he could get out of where he slept?

A. Yes, sir.

Q. Then when did you hear him next morning, and how early? 30

Mr. Strong: He doesn't say he heard him.
He said he saw him.

Q. Go on and state where he was the next morning, and the hour on Friday morning, when you say he said "Come brother-in-law—

A. He was at the back door and he can't come in the other way, and when I get up from the bed I open the kitchen door on the front and he come in the front.

Q. Now, before you let him in, and when you heard him at the window, what did he say to you, if anything?

A. Oh, when I saw him out the window I looked out the window and he stand over there, and he said, "Brother-in-law, get up; it is six o'clock," and I said, "It ain't six o'clock yet. It ain't yet five." I say, "I have lots of time," I say, "not five o'clock yet." And he said, "you told me last night you come early to town," and I say "Yes," and I told him "I come early when I can," I say.

Q. Now where did your children sleep?

A. My three biggest girls sleep in the front room and the rest—

Q. Whom do you mean by your biggest girls, which ones?

A. Katie, Rosie and Mary.

Q. What do you mean by the front room, another part of the house?

20 *A.* Another part of the house, a front part of the house, yes, sir; and the small children sleep upstairs.

Q. Now, after he came around and you said you let him into the house, what next did he say or do that you saw?

A. Why, when I let him in the house he says he wants to go away this morning, and I told him you got lots of time. I says, "You wait for the breakfast," and he says, "I don't need no breakfast. I can't eat so early. I am going to eat my breakfast 30 when I get to Bound Brook," and I had a drink in the bottle, and I had about an inch, and I told him, "Brother-in-law you drink a little whiskey," I said, "you don't need any breakfast." He said, "Thank you, brother-in-law, I don't drink no more whiskey, because I am temperance." That is what he said.

Q. Go on and tell what took place next.

A. And after I told him, "Well, brother-in-law," I says, "I am very hard of money, I am short of money," and I says, "I want some money," because he owed me \$33.40 yet.

Objected to.

The Court: One minute. Strike that out, the statement as to owing him.

A. And he said, "I will help you out, brother-in-law, when I get to South Bethlehem, and I send you money right away; the money will be here next Monday." And he says, "I give you my address."

Q. What next took place between you and him at this particular time, about five or six o'clock in the morning? 10

A. Well, we had nothing; just we talked, understand.

Q. Where were your three daughters, that you have spoken of, Katie, and Rosie and Mary. Where were they?

A. Well, she was inside dressed up, you know, make ready for to go to shop.

Q. You mean all three or only one?

A. All three.

Q. What shop were they going to? 20

A. The cigar shop.

Q. Where is that shop?

A. At New Brunswick.

Q. Here in New Brunswick?

A. Yes, sir.

Q. What shop?

A. At Somerset street.

Q. Is that the Hirschorn & Mack shops?

A. Yes, sir; that is the one.

Q. How do they go from your home to the shop? 30

A. Why they go down to get it. To get the trolley.

Q. That is to go to New Brunswick by trolley?

A. Yes, sir.

Q. Will you look at this map a moment. Will you show the house that you lived in and the path that they took, and the location of the trolley, as nearly as you can?

A. Well, here is the kitchen door.

Q. That is the house?

A. Yes, sir; that is the house, that is the kitchen door, and he came out that door and come right down here.

• Mr. Strong: Who did that?

A. Lang, with my three daughters were together. Here is the gate and here is the trolley car and where he stand right in front of the car when he shot her.

Q. Wait a minute.

10

Mr. Strong: Let that be stricken out.

The Prosecutor: It is not on the map and I would like to have it.

Q. Did you see your three daughters and Lang going from your house down to the place where the trolley stops and they took the trolley to New Brunswick?

A. Well, I can't see down, of course; there was a fog, and I can't see.

20 Q. What did you see?

A. Why I just see when he bent down and I saw when my daughter got about middle way of the road, And then I got a spring here and then three daughters go down to the spring, when he ran after them girls.

Q. Which way were they all going?

A. All the way down here.

Q. Toward the trolley?

A. Yes, going down to the trolley, and I can't see any more, because it was so dark and foggy, and I

30 can't see down to the road.

Q. Well, did you hear anything?

A. Yes, I heard.

Q. How soon after you last saw them?

A. About a couple of minutes.

Q. What did you hear?

A. I go down to the stable and I unhook my horse and I want to go to New Brunswick, and I heard a shot, and I don't think what he could fire at.

Q. You didn't know what he meant?

A. No.

Mr. Strong: I don't think the Prosecutor ought to assist too much.

The Court: No.

Q. You heard the shot. Then what did you next see or hear?

A. Well, I go down to the road.

The Court: Then what?

A. I run after him.

10

By the Prosecutor.

Q. After whom?

A. After Fred Lang. When I see my daughter is dying, is dead, I ran after him and he was down the hole when—

Q. What do you mean by the hole, bottom of the hill?

A. That is where a little bridge ran there. A little bit this side of the bridge, and he turned around and took the revolver and come right to me, and I picked up a stone and fired at him back the stone.

Q. Then what?

A. I fired back with a stone and he saw he can't do anything with the revolver and he started to run away.

Objected to.

Q. What did he do? What did you see him do?

30

Mr. Strong: He had some statement in there that he couldn't do anything with the revolver, and I move to strike it out.

The Prosecutor: I consent to that.

The Court: Strike it out.

Q. What did you do after he had pointed the revolver at you, and you had thrown a stone at him?

A. He turned around and ran away.

Q. Which way?

A. Right straight up to Brunswick. Up the trolley line, right up the hill.

Q. How was he going, walking or running, or how?

A. Running.

Q. Fast?

A. Fast, yes.

Q. Then what did you do?

10 A. Well, I ran after him but I can't catch him, and I go back and pick up my girl and take her in the house.

Q. You ran after him but couldn't catch him, and you you went back and picked up the girl and took her in the house?

A. Yes, sir.

By the Prosecutor.

Q. What condition was your daughter Katie—you
20 mean by your girl, your daughter Katie?

A. Yes, sir.

Q. What condition was she in? How was she, dead or alive?

A. She was dead when we picked her up, when we took her in.

Q. Do you remember how her death was brought about?

Mr. Strong: I object.

30 The Court: I will overrule the question, not because it is improper, but because you had better put it in a more intelligible form for the witness.

Q. What did you see on your daughter at the time?

A. Well, I see one shot, that is all.

Q. Where?

A. Right in the neck.

Q. Describe that as it appeared to you as nearly as you can. Tell us what you saw so that the jury and

all understand it, as nearly as you can. Do you understand me?

A. No.

(Question put through interpreter.)

A. Well, I see her has died. I suppose, one shot here right in the neck, the bullet come right here in the neck, goes up to the head, that is what I see.

Q. The shot hit her in the neck?

A. Shot her in the neck and the bullet come right 10
up in the head.

Q. What was done with your daughter afterwards?

A. Well, after I lay her down on the floor and ran right in the city and took the doctor out.

Q. What doctor?

A. Dr. Maas.

Q. Did you see Fred Lang after that?

A. No, I didn't see him after that. Well, when he shotted, yes, I see him when he ran up the hill, and 20
I didn't see him after that.

Q. After that did you see him anywhere, after the occurrence?

A. No.

Q. See him in the county jail?

A. Why, I see him in jail; yes, once.

Q. Did you talk with him?

A. No, he didn't spoke to me.

Q. Did you ever see a pistol excepting that time you have described? 30

A. No, I never see the pistol just except when he shot my daughter.

Q. Did you before that time see it when he was visiting you?

A. No, I don't see him at all.

Q. Didn't see the pistol at all while he was visiting you?

A. No.

Q. Now bring that out clearly. Begin at the point when you saw him point the pistol at you, at that

period. Did you see that pistol before that time, at any time?

A. No, I didn't see it before.

Q. Did you see him with any pistol before that time?

A. No, I never seen him.

Q. And have yo useen that pistol or any other on him since?

A. No.

10 Q. Did you find that pistol?

A. I seen him since when—

Q. Is that the only time you ever talked?

A. That is the only time I saw him.

Cross Examination, by Mr. Strong.

Q. The first you saw of Lang that morning was when he looked in your window?

A. What for he look in my window?

20 Q. Was that the first time you saw him that morning?

A. Yes.

Q. And at that time he called you brother?

A. Yes.

Q. And said it was time to get up? Is that what he said?

A. Yes.

Q. That night before had he told you that he was going to go away?

30 A. The night before he told me he was going away Friday morning. That is what he said.

Q. He told you so.

A. Yes.

Q. And did he say where he was going?

A. He told me he go back to South Bethlehem to the old work where he was doing.

Q. That is where he had been working?

A. Yes, sir.

Q. And did he tell you how he was going, what way he would take to go back?

A. No, he didn't say; he didn't tell me that.

Q. Did he say what time he was going?

A. No, he didn't tell me that, what time he was going.

Q. Whether it was early in the morning?

A. Well, he is going the first trolley.

Q. He said he was going the first trolley?

A. He said the last minute when he started to go.

He didn't say that before.

Q. Oh, the night before?

A. No, he didn't say that the night before. Just he told me the last minute when he started to go. 10

Q. When he came to your house on the 18th?

A. Eighteenth, two o'clock in the night.

Q. At that time when he came did he have any clothing with him? State what he was wearing?

A. No, sir; just—

Q. He had no bundle?

A. No.

Q. No bag?

A. He had nothing just what he had on.

Q. And when he went away that morning he had no baggage or bundle? 20

A. No. He hain't got nothing, because he says—

Q. Wait one moment. What time was it when your daughters came down stairs that morning? Did they sleep down stairs?

A. My daughters sleep down stairs.

Q. What time was it when they came out first?

A. Well, I don't know exactly what time it was. Well, he generally came out about half-past six; I mean half-past five; and start to dress and such things. 30

Q. That morning do you remember whether they came out about the usual time?

A. Well, I don't remember, because I had to work outside; the stable, you know.

Q. You had work to do at the stable?

A. Yes, sir.

Q. And as soon as you got up did you go out to your stables to work?

A. Yes, I go out.

Q. What time was it when you got out?

A. Pretty near five o'clock.

Q. Was it after five o'clock?

A. No; nearly five.

Q. Before five?

A. Before five. It was only about ten minutes or I don't know what, something like that when I saw him up to the window.

Q. Did you go out before you saw him at the win-
10 dow?

A. No.

Q. Where were you when you saw him at the win-
dow?

A. Well, I was in bed.

Q. Lying in bed?

A. Yes, sir.

Q. And he called you and you said there was
plenty of time?

A. Yes, because I know he is not six o'clock yet.

20 *Q.* What time was it then?

A. I told you before five.

Q. It was before five?

A. Yes.

Q. How soon after that did you get up?

A. How soon? Right away.

Q. Got up right away?

A. Yes, sir.

Q. And did you have breakfast right away or did
you go out to your stable?

30 *A.* No, I never eat any breakfast.

Q. Then you didn't wait for breakfast?

A. Yes, I went right out to my stable.

Q. Whereabouts is your stable?

A. Well, behind the house.

Q. Behind the house?

A. Yes, sir.

Q. How far is it away from the house?

A. Well, how far? I can't tell you exactly. About
the same as the fence over there. (Indicates Court
House yard.)

Q. As far as the fence?

A. Nearly so far as the fence.

Q. It is about a hundred yards?

A. Oh, yes, I think so.

Q. Here is a picture. It is marked S1. Does that show your house?

A. Yes.

Q. Does it show your stable too?

A. Yes, sir.

Q. You can see your stable in the picture?

A. In here.

10

Q. Then there is another building beyond the stable, isn't there?

A. Well, it is a corn shed.

Q. You went out to your stable?

A. Yes, sir.

Q. Which is the next building to your house?

A. Yes, sir.

Q. Is that right?

A. That is right.

Q. And when you went to your stable, had your daughters come out of their room yet, Katie and the others? 20

A. Well, I didn't see them, you know.

Q. You didn't see them?

A. No.

Q. You didn't see them until after you went out to the stable, is that right?

A. Well, when I go in from the stable she was out in the kitchen.

Q. About how long did you stay out at the stable? 30

A. Well, I stayed out about a couple of minutes.

Q. What were you doing?

A. Feeding my horses and cows.

Q. How many cows have you?

A. I got two cows. I had three at that time and two horses.

Q. And did you feed them before you came back?

A. Yes, sir.

Q. And when you had fed them you came back to

your house? After you had given feed to your three cows and two horses then you came back to your house?

A. Yes, sir.

Q. Did you see Katie at that time, or hadn't she come out yet?

A. Well, I can't remember, you know.

Q. Did you see Lang when you came back from your stable?

10 A. Yes, I saw him.

Q. Where was he then?

A. He was right in front of the kitchen.

Q. Outdoors?

A. By the door.

Q. Right by the door?

A. Yes, sir; outside the door.

Q. What was he doing, anything?

A. He ain't doing anything; just standing like I am standing (illustrating).

20 Q. Standing with his arms folded?

A. Yes, sir; and he says—

Q. One moment. I haven't asked that. When did you speak to him about having breakfast?

A. Well, when he started to go away.

Q. That is, just when he was going away?

A. Yes. I told him, "You had lots of time to get your breakfast. Take the next car."

Q. Take the next car?

A. Yes, sir.

30 Q. Just sit down again. What time did the car leave that he was going to take?

A. Well, he take the first car.

Q. What time did that first car leave?

A. I can't tell you exactly. Six thirty is the regular time; sometime a little early and sometime a little late; I can't tell exactly the minute.

Q. About six-thirty?

A. Yes, sir.

Q. And that is the car that your daughters took every morning?

A. Yes, sir.

Q. Did all three of them go to New Brunswick every morning by that car?

A. Yes, sir.

Q. That was the first car, was it?

Q. How long after that was the next car?

A. Every half hour.

Q. When you spoke to him about taking his breakfast was it about time for the first car then, just about time?

A. Well, the first car come pretty soon, about a 10 couple of minutes yet, and I told him wait till the next car, and I say, "You have lots of time to go up. You can't go to Bethlehem until about night time. You take your breakfast." He said, "Thank you, I don't wish no breakfast."

Q. Where was Katie then at that time?

A. Katie was all dressed up, and I don't know, maybe packing her dinner or something like that.

Q. You don't know just what she was doing? She was in the house? 20

A. She was in the house; yes, sir.

Q. And this talk, what you said to Lang about having breakfast, that was outside, was it?

A. No; in the kitchen.

Q. In the kitchen? He was in the kitchen at that time?

A. He was in the kitchen, close the door by the kitchen.

Q. Had the other persons in the house had breakfast that morning? 30

A. Well, my children, my daughter, my three daughters, was inside and ate their breakfast.

Q. They were eating breakfast?

A. Yes, sir.

Q. Now, did you see your daughters start from the house to go to the road?

A. Yes, I saw them; yes.

Q. And where was Lang at the time your daughters left the house?

A. Well, he was right up to the door and speaking to me.

Q. He was talking to you?

A. Yes, sir.

Q. And he stayed behind then for a little while, did he?

A. Yes, sir.

Q. They went ahead?

A. Yes, sir; stay behind.

Q. What was he talking to you about?

A. Well, he don't talk nothing; just he help me out and send the money right away when he go to
10 South Bethlehem, that is what he said, "Money be here on Monday morning."

Q. Did you speak to him about sending you money?

A. Well, I speak to him; yes. I speak to him, yes; because I was in need of money; I am short of money.

Q. And then he said that he would send you the money by next Monday?

A. And he says he help me out, he send me money, I get the money by next Monday.

20 *Q.* And was there anything more that he said to you while you were standing there together?

A. No, he didn't say nothing. He started to go. The car pretty near come down and he started to go off after the girls.

Q. Did he say good-bye to you?

A. Oh, yes; shook hands with me and shook hands with my wife. He is going out nicely.

Q. Everything was pleasant, nice and friendly, wasn't it?

30 *A.* Yes, sir.

Q. Everything good friends?

A. Seem as the good friend; yes. I don't know what he mean that time.

Q. Well, I mean the way it appeared to you, everything was friendly? You didn't expect that there was going to be any trouble or harm?

A. No.

Q. And he wasn't angry in any way against you, was he? Wasn't talking angry?

A. No.

Q. Not to you?

A. No, not to me.

Q. You hadn't any quarrel with him at all, no bad words with him?

A. No.

Q. Neither he to you nor you to him?

A. Yes, sir.

Q. No; you didn't have any words with him?

A. We didn't wait for him.

Q. You didn't have any bad words? 10

A. No.

Q. Angry words?

A. No.

Q. And at the time that he left you, where were the girls?

A. Well, the girls go down the road, you know.

Q. They were ahead of him, were they?

A. Yes, sir.

Q. Were they down at the side of the road before he left you? 20

A. Well, them girls was pretty near the middle of the road, down the middle of the road, you know, not quite to the gate.

Q. Not quite to the gate?

A. About midway.

Q. You mean middle way between the house and your gate?

A. Yes, sir.

Q. They were going down the path?

A. Yes, sir. 30

Q. Well, did any of them call out to Lang to hurry up?

A. Well, my Katie say, "Hurry up, Fred," and speak in Hungarian, because the car was nearly there.

Q. And said it in Hungarian?

A. Yes, sir.

Q. She called out to him to hurry up because the car was nearly there?

A. Yes, sir.

Q. What did Fred do then?

A. Well, he started to run after the girls.

Q. Did he run or did he walk?

A. He ran right down, because the both three girls goes together, and he started to run after the girls.

Q. Lang and Katie were good friends that morning, weren't they?

A. Well, they were good friends, the same as the young folks, the same as the other time.

Q. Same as always?

10

A. Yes, sir.

Q. They didn't have any quarrels, any bad words between him and Katie that morning?

A. No.

Q. Now, after Lang ran down, when Katie called to him, and he ran down the path after the three girls, what did you do then?

A. Why, I go down and I go down the stable and I unhook the horse.

Q. You went right down to the stable?

20

A. I went right down the stable and I unhook my horse. I was going to New Brunswick.

Q. Had you got your horse hooked?

A. Not yet.

Q. What were you doing when you heard the shot fired?

A. I ran out the stable.

Q. When you heard it?

A. Yes.

Q. Were you in the stable then?

30

A. I was in the stable.

Q. What were you doing in the stable?

A. I told you I unhooked the horse.

Q. You were hooking the horse?

A. Yes.

Q. Did you have the harness on the horse?

A. No; just as I take the harness to put on the horse I heard the shooting and I—

Q. Then you ran out?

A. I put the harness down and I jumped right out.

Q. You heard just one shot, did you?

A. No, I heard more than one, and I was outside the stable and I heard another one again, and heard my daughter when she screamed and run down the road.

Q. How many shots did you hear altogether?

A. Well, I don't remember, you know, how many shots I heard.

Q. Are you sure you heard more than one shot?

A. Oh, yes; I am sure I heard three or four, I 10
don't know how many. Oh, I ain't that sure. It was three anyway. And when I run out I was pretty near—

Q. Just wait. How many did you hear first when you were in the stable?

A. How many? Only one.

Q. Then after that you heard one more?

A. After that right away quick the other one.

Q. And where were you when you heard the second shot? 20

A. I was outside of the stable now.

Q. And whereabouts were you?

A. Whereabout?

Q. Yes.

A. I was in front of the stable. I started to run down.

Q. Did you start to run down before you heard the second shot?

A. Well, not for them. I don't talk, for he do that. 30

Q. No. I asked you if you started to run down before you heard the second shot?

A. No; I start to run when I heard the second shot.

Q. When you heard the second shot?

A. And scream of my daughter.

Recess until 2 P. M.

Afternoon session, 2 P. M.

Q. You ran right down to the road, did you, when you heard this second shot and scream?

A. Yes, sir.

Q. Right down as quick as you could?

A. Right down as quick as what I could.

Q. Did you go down by the same path?

A. I go around, all the way around the road.

Q. That is, down the carriage road?

10 *A.* Yes.

Q. Through the gate?

A. Through the gate.

Q. When you got there where was Lang?

A. Well, he ran away that time.

Q. Where was he the first you saw of him when you got down the road? How far away was he?

A. Well, I can't tell you how far he was. I run after and I catch him right in the hole.

20 *Q.* Well, which way did he go? Come down here a minute (indicating map on easel). You know about this map, do you?

A. Yes; oh, yes. I got out right here, run right down here, and when I run here I see my girl right here. Katie was lying near the trolley tracks.

Q. That is, near the gate and near the trolley tracks?

A. Yes, sir.

Q. Right in front of the gate?

A. Yes, sir.

30 *Q.* Where was Fred?

A. And Fred run right straight down to New Brunswick.

Q. Along the road?

A. Yes, sir.

Q. Toward New Brunswick?

A. And I found him down to the hole, and when I go in after the hole—

Q. Wait a minute. When you first saw him how far was he from the gate?

A. Well, I can't see, you know, where I run down to the gate, because it was foggy, and I started to run after him, and I ask my girl which way he was going.

Q. Never mind. You started down the road towards New Brunswick?

A. Yes, sir.

Q. And did you see Fred running?

A. Well, I don't see him running because it was foggy. Just I run after him and I catch him right 10
down to the hole.

Q. Do you mean you got right close up to him?

A. Yes, sir.

Q. How close to him?

A. Well, about same as that corner over there (indicating).

Q. You mean the corner of the room?

A. Yes, that corner over there.

Q. And is that the nearest you got to him?

A. No. And after he come close to me. 20

Q. Did he come towards you?

A. He came close to me, take the revolver and run right like that to me, and I picked up the stone and knocked him back with the stone.

Q. Did you hit him with the stone?

A. Well, I can't tell you. I think I hit him. I don't know, and I suppose I was mad and I was angry and I can't see whether I hit him or not, just I knocked him down with the stone; hit him back.

Q. You threw a stone at him? 30

A. Yes, sir.

Q. Whether you hit him or not you don't know?

A. I don't know exactly.

Q. Then he turned around and ran again, did he?

A. And he turned around and he started to run when I called to the motorman to let the car go; I says, "Let the car go," I says, "because I thought I—

Q. Never mind about that. Did Fred turn around then and run further away?

A. Ran away further; yes, sir.

Q. And then you lost sight of him?

A. I lost him because it was foggy. I can't see him,

Q. When you got as near to him as from here over to the furthest corner of the room, then he came back toward you?

A. He ran right back to me (illustrating).

Q. How near did he come to you?

A. Not very near.

Q. Don't you know how near he came to you?

10 *A.* I can't tell you exactly. About fifteen or twenty feet, something like that. I suppose I fired the stone—

Q. Never mind. He came about fifteen or twenty feet?

A. Yes, sir.

Q. You came out of your road into the public road, you saw your daughter lying between the gate and the trolley tracks?

A. Yes, sir.

20 *Q.* How near was she to the trolley tracks?

A. How near she was? She lay right middle of the road, you know, the public road.

Q. Was she nearer to the gate or to the track?

A. She was near to the track with the gate.

Q. She was nearer the track than the gate?

A. Yes, sir.

Q. How many tracks are there?

A. Only one track.

30 *Q.* Only one track? Where were your other daughters at that time?

A. Well, one standing over there and running after me.

Q. Which one was that?

A. Rosie; and she saw I run and the other one run from him, you know, and he shot her twice after her.

Q. You didn't see him shoot at her?

A. I didn't see him, but she see him.

The Court: Strike it out.

Q. I asked you when you came down to the street where your daughters were when you first came there?

A. Well, I can't tell you. When I saw my oldest daughter lying in the road—

Q. You don't know. That is all.

A. I can't see any more.

Q. Where was your wife?

A. She was in the house, I think.

Q. In the house?

10

A. I think so.

Q. Did she come out to the road at all?

A. Well, certainly she came out. She heard me calling Katie.

Q. After you came back, after you had chased Fred?

A. Yes.

Q. Then your wife came?

A. When I came back my woman was there now.

Q. What was Lang doing the day before this happened?

A. Well, he ain't do anything.

Q. Just sitting around the house?

A. Just walk around the house and hang around, that is all he did.

Q. What were you doing?

A. Why, what we do?

Q. Were you around the house too?

A. No; I was out in the field and I ploughed and everything, done my work, you know, what a farmer have to do. That is what I do.

30

Q. And Fred sat around the house?

A. Yes.

Q. He didn't help you in the field?

A. Oh, no.

Q. And were your daughters working?

A. She was working; yes, sir.

Q. Katie?

A. Yes; all three was working.

Q. The day before or the night before this happened, were you and Fred drinking at all?

A. What is it?

Q. The day before this happened were you and Fred drinking at all?

A. Well, we was not drinking. We was up to Metuchen. My brother-in-law he had a little farm and I was over there to plough, and he came to me—

Q. Who was your brother?

10 A. John Wider, and he says—

Q. Never mind. I don't care about that. Who said I asked you whether you and Fred Lang were drinking the day before?

A. Well, I tell you. When we come back and he with me we went to Fader's.

Q. Who went with you?

A. Fred.

Q. Were you together?

A. Yes; and we drink two glass of beer and take
20 each a cigar and we go out and start home again. That is what we drink.

Q. Whereabouts is that?

A. Up to Parktown.

Q. At somebody's saloon, was it?

A. Yes.

Q. Whose saloon was it?

A. Mike Fader.

Q. What time was it?

A. Well, pretty near; why, I can't really tell you
30 exactly. About between six and seven; something like that.

Q. In the evening?

A. Yes, sir.

Q. And after that did you and Fred come home together?

A. Yes, sir.

Q. Was that all the drink you had?

A. That is all the drink.

Q. And was that all the drink that he had while you were there?

A. Yes, that is all while I was over there.

Q. After that where did Fred spend the evening,
do you know?

A. Well, he was all the time home.

Q. At your house?

A. Yes; he is coming upstairs, go to bed.

Q. What time?

A. Why, I can't tell you exactly what time.

Q. Were you there when he went to bed?

A. I go to bed around nine o'clock, and he was
down in the kitchen. 10

Q. He was in the kitchen?

A. Yes, sir.

Q. What time he went up to bed you don't know?

A. No, I don't know, but he don't go up very long.

Q. Wait a minute. Who was with him in the kitchen?

A. Well, my three daughters and my woman.

Q. Do you know whether they had anything to
drink?

A. No. 20

Q. Was there anything in the house to drink?

A. No, sir.

Q. Well, you had a bottle of something the next
morning?

A. No, sir.

Q. Didn't you offer Fred a drink?

A. I had a little whiskey, about an inch; I had a
little whiskey all the time, you know.

Q. Where did you keep that?

A. I keep that in the same room what I sleep, and 30
I want to give him a drink but he don't want it. He
says he don't want it; "I am temperate," that is
what he said. He says, "I am temperance. I don't
want to drink any more."

Q. You didn't see him drink anything that morn-
ing, did you?

A. No, sir; he didn't drink at all.

Q. Well, you don't know?

A. I know.

Q. You didn't see him?

A. I know, because I know what happened at my house, you know.

Q. You didn't see him drink anything?

A. I know what I keep in my house.

Q. You don't know what he had in his pocket or kept by him, do you?

A. Well, I know he ain't got nothing, because I was with him and he don't brought home nothing.

10 That is the way I know. We go together and we come home together again.

Q. You don't know what he had with him when he came to your house on Wednesday night?

A. Well, I don't know that.

Re-Direct Examination, by the Prosecutor.

Q. Did you hear him go upstairs to bed on Thursday night, the day before this occurrence?

A. Yes, I heard him going upstairs when I was in
20 bed. I don't know what time is it. I don't sleep that time yet.

Q. Had you been upstairs long before that?

A. Well, he—

Q. No, you.

A. No, I don't go upstairs at all.

Q. How long had you been to bed before he went upstairs?

A. Oh, in the bed? Not very long.

Q. Was he sober when he came home with you?

30 A. Yes, he was sober. He was sober with me and with my family.

Q. How was he on Friday morning? When you talked with him after he got up on Friday morning, was he sober or not?

A. No.

Q. Understand me?

A. What.

(Interpreter repeats question to witness.)

A. Well, certainly he was all right. He ain't so drunk at all.

Q. He was sober Friday morning when you saw him all the time you were there?

A. Yes, sir.

Q. Up to the time you saw him go down to the road?

A. Yes, sir.

Q. When he came there did he have anything with him beside his clothing?

A. No, sir; only clothing. That is all.

Q. No trunks?

A. No trunk, no bottle, no nothing at all. 10

Q. No package?

A. No, nothing at all.

Q. You spoke of one—

A. Just a little difference, because he had a white shirt and red necktie and brown hat and he changed them off. That is the difference, not anything else.

Q. You spoke of hearing your daughter squeal and then seeing her run away from him. Which daughter was that?

A. Mary. 20

Q. How old old was she?

A. Fourteen going on fifteen.

Q. How old is Rosie?

A. Sixteen going on seventeen.

Q. How old was Katie?

A. Katie was eighteen going on to nineteen.

Q. Katie your oldest?

A. Yes.

Q. Oldest child?

A. Yes. 30

Re-Cross Examination, by Mr. Strong.

Q. When Fred came to your house on Wednesday night you couldn't tell whether he had a bottle in his clothes or not, could you?

A. Well, I can't see when he has got something in his pocket, a bottle, why, I can't see when he stuck a pistol in or a bottle. I can't see he had or not. Why, he ain't got nothing, bottle, bundle or such a thing.

Q. He had no bundle?

A. No.

Q. But you couldn't tell whether he had a bottle in his pocket?

A. I can't tell. I didn't see.

A. Now, did you say that you saw Mary running away from Fred?

A. Yes, sir.

Q. When did you see her running away from him?

10 A. Well, the same morning.

Q. When was it? Was it after you got down to the gate?

A. No.

Q. Where was it?

A. And I ran about the middle half of the road when she ran down this way towards Brunswick.

Q. Where was Fred then?

A. After her.

Q. She was ahead of him?

20 A. Yes, sir; she was ahead of him, yes.

Q. Where were you then?

A. I was after him again.

Q. I know, but whereabouts were you at that time?

A. Where I was?

Q. Yes.

A. I told you about the middle of the road, middle between the gate and my house, I was that time over there.

30 A. Which side of your daughter's face or neck was it that the shot entered?

A. On the right.

Q. On the right side?

A. Yes, sir.

Q. Sure about that are you?

A. I am very sure. I wasn't drunk that time nor not to-day either.

Rose Gordon, sworn.

Direct Examination, by the Prosecutor.

Q. Where did you live in April of this year, Rosie?

A. Where did I live?

A. Yes.

A. Lived right out there with my father at Piscataway.

Q. At Dunham's Hill, as it is known?

A. Yes, sir.

Q. Along the line of the trolley from New Brunswick to Metuchen?

A. Yes, sir.

Q. Did you know Kate Gordon?

A. Yes, sir.

Q. What relation was she to you?

A. My sister.

Q. And what other sister have you?

A. Mary.

Q. What did you and Mary and Katie do at that time; what work were you at?

A. We were making cigars. Me and my other sister Katie, and she worked down—

Q. Worked in a cigar factory?

A. Yes, sir.

Q. Do you know Fred Lang?

A. Yes, I know him.

Q. What relation was he to you?

A. He is my uncle.

Q. When was he last at your house over at Dunham's Hill?

A. Last fall.

Q. Well, when after that, this year?

A. On the eighteenth he came to our house.

Q. The eighteenth?

A. The eighteenth of April.

Q. Did you see him there?

A. Well, I didn't see him that night, but I heard him talking to my father out in the kitchen,

Q. When did you see him after?

A. I saw him then Wednesday night after work.

Q. Then when next did you see him, or did he stay there right along?

A. He stayed there right along.

Q. Until what time?

A. Until Friday morning. He was leaving my house when we were.

Q. Well, now, what time of the morning were you
10 leaving the house?

A. Well, it was between twenty-five minutes after six or twenty minutes after six; I couldn't tell you that sure.

Q. In the morning?

A. In the morning. That is the time we get our car.

Q. Tell us what took place with you three girls and Fred Lang at that time from the time of leaving the house until the occurrence?

20 A. Well, he has said all up in the house good-bye to everyone, and shook hands to my mother and father, and at that time Kate and Mary they went out front to get the car and I was coming in back of them, and then we all halloed for him; we says to him, "Fred, hurry or you will miss the car," and just then he began to run after us, and when the car was about in sight to stop you know, then he fired the first shot.

Q. Tell us just what took place there. You were
30 all together?

A. His shoulder touched mine. We were standing there, standing between him and my sister Katie and then my other sister she was standing in back of us.

Q. Back of whom?

A. Back of him.

Q. And who else?

A. Rather, back of the whole three of us.

Q. Your shoulder touched his shoulder?

A. Yes, and touched my sister's.

Q. You were between Katie and him?

A. Yes, sir.

Q. And that left Mary back of you?

A. Yes, sir.

Q. How near the trolley tracks?

A. Oh, well, about a feet from the trolley track.

Q. How near your gate was that to the road?

A. I couldn't tell you. About four or five feet.

Q. Now just tell us just what took place then there, will you; what Fred did and what was done? 10

A. Well, now, I says to him,—that was the first thing I said to him when we went out, I said to him, "Well, Uncle Fred, where are you going to go." He said, "I am going to Bound Brook," and I said to him, "Where are you going then," and he said, "Why, then I am going over to South Bethlehem," and we began to cut up with him and he said nothing rough to us or nothing out of the way, and then we had said nothing more because the car was about coming just near to us, near to stop, and then we had 20 no more time to say anything, and he said nothing more, but when the car was about stopping he pulled the revolver from his pocket, or where I couldn't tell you, and raised it right up to her neck and fired the first shot and knocked her right down dead. She died. She didn't live no more than about five minutes, and she died.

Q. You saw her drop?

A. Yes, I saw her drop. I was standing right alongside of her. 30

Q. What did you see him do?

A. Then he turned around and he pointed the revolver at me.

Q. Well.

A. And then I stood still and then after a while his hand was dizzier then all right and he couldn't fire a straight shot and he couldn't shoot me no more, and I don't know where I went to, because I was frightened, and then afterwards he ran after my sister.

Q. Which sister?

A. Mary. I saw him running after her, but I don't know what became of him then or became of her, because I was frightened, and I was running up towards the house halloaing to my father to come down. My father was then coming.

Q. Then what?

A. And then after, when my father come down here, why he ran after him, my father ran after him and he turned and pointed the revolver at my father
10 and I was running after my father.

Q. Where was Mary?

A. Mary was running around. She ran up to the house some place, I don't know where.

Q. You don't know where she was?

A. No, I don't know where she was; I only know she ran up to the house somewheres.

Q. You stated that your Uncle Fred was at the house in October?

A. In October?
20

Mr. Strong: In the fall, she said.

Q. The fall of last year?

A. Yes, sir.

Q. Had you seen him before that?

A. Yes, sir.

Q. Had he been at your father's house?

A. Yes, sir.

Q. Did you have any knowledge from him of any
30 attention he was paying to your sister Katie?

A. I couldn't tell you that.

Q. Did you ever hear whether he was paying any attention?

Objected to.

A. I have heard it from others.

The Court: That is purely hearsay.

Q. From him, anything, or any indication of it?

A. No.

Q. What did you say, you didn't hear?

A. Not off of him; I heard from others.

Mr. Strong: I move to strike out what she heard from others.

The Court: Strike it out.

Q. Did you see him and talk with him before you started for the trolley car early that morning?

A. No, sir.

Q. I mean Fred?

10

A. I saw him, yes.

Q. Were you with him with the rest of them?

A. Yes, I was with the rest of them.

Q. Did he show any signs of having been drinking?

A. No, sir.

Q. How did he appear, sober or otherwise?

A. He was sober.

Q. Did you get close to him?

A. Yes, sir.

20

Q. Heard him talk?

A. Yes, sir.

Q. And when he ran what was his gait, a lively or a slow one?

Q. No, he was running fast.

Q. Did he say anything when he fired a shot at Katie and hit her?

A. Never said a word.

Q. Did he say anything when he fired a shot at you?

30

A. Never said nothing.

Q. Did you know how many shots he fired?

A. I couldn't tell you how many there was, but I am pretty sure there was about three or four shots fired; that is all I know.

Q. The first shot hit Katie?

A. Yes, hit Katie.

Q. Do you know which side of the face?

A. I think on the left side.

Q. You are uncertain?

A. Yes, sir.

Q. You pointed to your right side?

A. Yes, sir.

Q. Well, which do you mean?

A. Well, I ain't sure you know, the left or right.

Q. You are not sure?

A. No.

Q. How close was he to Katie when the pistol was fired and struck her?

10 A. He had the pistol right up to her neck.

Q. Close to the shoulder?

A. Yes, sir. He stepped right in front of me like that (illustrating).

Q. What is that?

A. He stepped right in front of me like that.

Q. Stepped in front of you towards her?

A. Yes; I was standing this way and she was standing alongside of me, he turned right around like that and pointed the revolver right up to her
20 neck.

Q. Did you ever see him with a revolver?

A. I never saw it.

Cross Examination, by Mr. Strong.

Q. Do you mean that the revolver touched her neck as he held it?

A. Yes, sir.

Q. You didn't see him draw the revolver from his
30 pocket or anywhere?

A. No, sir; because I wasn't looking at him.

Q. The first you saw of the revolver, where was it?

A. The first when I saw the revolver he was just then shooting it off right at her neck.

Q. He had it already pointed against her neck when you saw it first?

A. Yes, sir.

Q. You don't know where he got it?

A. No, I don't know. He grabbed it from somewhere, but I couldn't tell you where.

Q. Then the first shot was the one that killed Katie, was it?

A. Yes, sir.

Q. She dropped immediately, did she, where she was?

A. Yes, sir.

Q. What did you do then?

A. Well, I ran away from there then; I don't know where I went to, though. I couldn't tell you that. 10

Q. Did you turn right around and run?

A. No, I turned right face to the car and I ran somewheres around the car.

Q. Where was the car then?

A. The car was standing right in front of the gate where she was lying.

Q. Had the car already stopped when this happened? 20

A. The car already stopped when she was lying there.

Q. I mean when he fired the shot.

A. Oh, it didn't quite stop then.

Q. It was just stopping, was it?

A. Yes, it was just stopping when he fired the shot.

Q. And then where did you run?

A. I ran somewheres around the car.

Q. Behind the car, do you mean? 30

A. Behind the car or beside the car or in front of the car, I couldn't tell you where.

Q. He didn't follow you, did he?

A. No, he didn't follow me. Just as he fired the shot at me; well, I ran away.

Q. You didn't see him fire any shot at you?

A. Yes, I saw him pointing a revolver at me, because that is just when I ran away from him.

Q. How near were you to him when he pointed the revolver at you?

A. I jumped away from him, you know, and I was about as far from him as the door from me here (indicating).

Q. Three or four feet?

A. Yes, sir.

Q. Your back was turned to him, wasn't it?

A. No, my back wasn't turned to him, but I was just turned like this (illustrating).

Q. Well, you said his hand shook and he couldn't fire?

10 *A.* Yes, his hand shook and he couldn't fire a straight shot no more.

Q. Did he fire the pistol off?

A. Yes, sir.

Q. Did the pistol go off?

A. Yes, sir; it went off, but not a straight shot, because he meant to shoot me but he couldn't.

Q. The pistol was aimed towards you, was it?

A. Yes, sir.

Q. It didn't hit you?

20 *A.* No.

Q. Then you turned your back and ran. You don't know what he did after that?

A. Yes. No, I don't know what he done after that.

Q. You don't know anything about this firing at Mary afterwards. You didn't see him chase Mary?

A. I seen him chase her for a while, you know; just turned around to look and saw him running after her, but I don't know what became of her.

30 *Q.* Where were you when you saw him running after her?

A. I was running up towards the road, towards the house.

Q. Your back was turned and you were running?

A. Yes, but I saw him, because they were running right in front of me.

Q. Were they running in the same direction you were?

A. I was running up the road this way and they were running down that way.

Q. Which way were you running, towards New Brunswick?

A. No; right up that kind of hill that goes up toward the house.

Q. Running back towards your father's house?

A. Yes.

Q. Then you had left the public road and you were running up the carriage road toward your father's 10 house?

A. Yes.

Q. Now where was Mary running?

A. Mary, she was running down towards Brunswick.

Q. On the public road?

A. Yes, sir.

Q. How could you see her when you were running?

A. Why, I could see from that hill that goes up to 20 our house, and I looked over that way and I saw her running and him after her?

Q. Whereabouts were you, about how far from the road when you saw it?

A. Well, now, I wasn't no more than about two feet from the gate.

Q. Did anybody scream?

A. My sister Mary.

A. When was it she screamed?

A. When he was running after her. 30

Q. That was after he had fired two shots, was it?

A. Yes, sir.

Q. Did he fire any more shots after those first two?

A. He fired shots, but I don't know whether it was one or two he fired afterwards.

Q. You didn't see him fire them?

A. No, but I heard it.

O. You heard the sound?

A. Yes.

Q. That is all you know about this?

A. Yes, sir.

Q. The first two shots you saw?

A. Yes, I saw them.

Q. Then when your father came out he started down after Fred, did he?

A. Yes, sir.

Q. And did you follow your father?

A. Yes, I followed my father.

Q. And all this time Fred didn't say a word, did
10 he?

A. Not a word.

Q. Not from the time that you got out to the trolley car and it was about to stop he didn't say a word that day at all that you heard after that?

A. No, sir; nothing. He was saying something, but I couldn't quite understand it. All I understood was, he says, "Never mind, your blood will be shed right there."

Q. You said he didn't say a word.

20 A. Well, now, he didn't say not a word while he was shooting, but after my father was running after him and he pointed the revolver at my father, then he said that.

Q. Then he said it?

A. Yes.

Q. What was that? Repeat it again.

A. He said, Your blood will be shed right where your sister's was." I couldn't tell you whether he
30 meant it for my other sister or meant it for me, because he was there, my father.

Q. That was when your father was chasing him?

A. Yes, sir.

Q. And was that when he had turned around and came toward your father?

A. Yes, sir.

Q. How far away from him were you at that time?

A. Why, my father was about middle ways. He was down the hollow, you know, and my father was

over there about fifteen or twenty feet away from him, you know, and I was about in middle ways there, about so far from my father as he was from my father, running after him.

Q. Then you mean your father was about fifteen or twenty feet away from Fred and you were about fifteen or twenty feet behind your father?

A. Yes, something like that. I couldn't tell you.

Q. You stated first that you didn't know what it was that Fred said.

A. No, he was saying something, but I couldn't 10 quite understand it, I said, and that is all I understood, what I have told you.

Q. Now what you have stated just now, are you sure you understood that?

A. Yes, I am sure I understood that.

Q. Did he speak out loud?

A. He spoke out loud.

Q. Who was he talking to?

A. I told you I can't say for sure which one he was talking to, my other sister or I. 20

Q. But your father was nearer to him than either of you girls?

A. Yes, sir.

Q. Wasn't he talking to your father?

A. No, he wasn't talking to my father, because he said, "Your blood will be shed right where your sister's is," and said something after that but I couldn't say what, I ain't sure what he was saying, because I couldn't quite understand it, for then he turned around and started to run again. 30

Q. While he was saying that was that the time that your father was throwing the stone at him?

A. Yes, sir.

Q. Yet you feel very sure he was not talking to your father at all?

A. Yes, sir.

Q. Where was your sister Mary at that time?

A. She was running---she was standing there or

running, I don't know, because I didn't look back to see where she was.

Q. Was she behind you?

A. Yes, somewhere behind me.

Q. Was she near you? You don't know?

A. I don't know that.

Q. You heard your Uncle Fred say he was going on the same car with you and the other girls?

A. Yes, sir.

10 *Q.* Going to Bound Brook?

A. Yes, sir.

Q. That car would come into New Brunswick and then he would change cars at New Brunswick for Bound Brook?

A. Yes, sir.

Q. How long were you standing out by the road before the trolley car came?

A. About a couple of minutes. About two or three minutes.

20 *Q.* When you got out there first was the car in sight? Could you see it yet?

A. No, you couldn't see it quite; you could only hear the sound.

Q. You could hear the noise of it?

A. Yes, sir, you could hear the noise of it.

Q. It is a straight track there for a long distance?

A. Straight track.

Q. So that you could see for a long distance down there where the trolley car was coming from, can

30 you.

A. No, not very long.

Q. What is there to prevent?

A. Why, because the car comes from a hollow, comes on a hill there and then it comes to our house.

Q. Were you all good friends there that morning, you and the girls and Fred?

A. Yes, sir.

Q. You hadn't had a quarrel with him at all?

A. Never.

Q. He was always kind and good to you?

A. Yes, sir.

Q. To you and to both of your sisters?

A. Yes, sir.

Mary Gordon, sworn.

Direct Examination by the Prosecutor.

10

Q. Do you know Katie Gordon?

A. Yes, sir.

Q. Who was she?

A. My sister.

Q. Where did you live on the 18th day of April of this year, Dunham's Hill?

A. Yes, sir.

Q. Is that on the line of the trolley between here and Metuchen?

A. Yes, sir.

20

Q. Speak out so the jury can hear you. What relation are you to John Gordon?

A. My father.

Q. The one that was here this morning?

A. Yes, sir.

Q. Do you know this man (indicating defendant)?

A. Yes, he is my uncle.

Q. Do you remember seeing him at your home?

A. Yes, sir.

30

Q. When was it? In April?

A. April 18th.

Q. What were you doing in the way of earning your living at that time?

A. I was working in the cigar shop.

Q. Cigar shop where, here?

A. At New Brunswick, yes sir.

Q. How would you get back and forth to your work?

A. Why on the car, trolley.

Q. Did you see Fred, Uncle Fred, on the morning of Friday, the 20th of April?

A. Yes, sir.

Q. Will you tell us where it was and what took place from the time you first saw him then?

A. Yes, sir.

Q. Eh?

A. I saw him at our house Thursday night; he was in the kitchen with us and with the children
10 playing. He way playing with money with the little children while we were eating our suppers.

Q. Speak a little louder.

A. On Thursday night he was playing with the children. He had money and he was fooling around then and he said he would give them each a quarter, and so he was fooling with them, and we was inside eating our supper. I think my sister was fixing the supper then, and I says to him, "What are you going to give me?" "O," he said, "I will give you some-
20 thing." And he was fooling around us too, me and my sister Kate and Rose, and then after while we had our supper and we went outside, we went out in front of the kitchen door and there was a big box there, and first we sat on the cellar door, and me and him, we were sitting there, and I says to him, "What did you bring us for a present," and he says, "O, we have brought you something, but I couldn't tell you what it is now. I can't just show you. I will show you tomorrow." He says, "You will have plenty of
30 time to see it," so I said, "No, leave us see it now, and he said, "I couldn't just leave you see it," so I said, "Show me," and he said, "No, he wouldn't show me it, and Kate said, "Come on; we are going to eat," and we went in and he and her sat out there, and he was sitting out there still, and I was saying to him, "show it to me," and he said, "I won't show it to you just now," so I said to him, "when are you going to show me," and he said "I will show it tomorrow," and he wouldn't show us. So he gave Katie a dollar, and then he took it back and gave her

a quarter---I am not sure, but I know it was not quite a dollar.

Q. Did you see it yourself?

A. Yes. And then after a while we went to bed, and my father sent me to bed, and he went out on the front stoop again, and my father said to him, "Go on up stairs to bed," so he went up and the next morning when I got up my father said he was standing in the window.

Mr. Strong: I object to what the father said. 10

The Court: Strike it out.

Q. Tell what you know?

A. Then after we got up we were telling him to come in to eat breakfast with us and he said, "No, he wasn't hungry." He said he would eat his breakfast at Bound Brook. So we were telling him still to come in and he said, "No I don't want none." And then after a while we thought the car was coming and we went out. Me and Katie went out first and then 20 Rosie after us and he came last, and then we got out there to the trolley track there, we stood standing there, and then when the car was in sight, thought it was going to stop, why, he fired a shot, but I was a little ways away from him, and so I didn't see where he got the revolver from or when he shot, and I just heard the shot, and then I run screaming down the road, and there is a little pond in front of our house, and I jumped over the fence somehow and got in there and I don't know what I done after, but I went 30 up to the house and stood there screaming to my father and he ran down and I don't know what he done. He ran after him again and I heard another shot---No, it wasn't a shot either, but my father says that he had another shot.

Objected to.

The Court: Don't tell us what your father said, only what you saw. The jury will disregard that.

A. And I don't think I know anything more, because of course I went to the house and then I don't know what became of them.

Q. Now, when you were in the trolley track, when you heard the shot, did you see your sister Katie?

A. No, sir; I didn't look back, I just kept running on, but he couldn't catch up to me, though.

Q. Did you hear any further shots?

A. Yes, sir; I looked back afterward and I saw
10 two shots coming right after me.

Q. Saw them?

A. Yes, sir.

Q. Do you know who fired the shots?

A. I saw, for I looked back. I saw it was him firing at me.

Q. Did you know who fired the shots when you were at the trolley car?

A. Yes, I kind of thought so, for I heard the sound—

20 *By Mr. Strong.*

Q. You didn't see who fired the shot?

A. No, sir; I heard the shot go off very near.

By the Prosecutor.

Q. Did you see the pistol?

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

Q. See the flash?

A. No, sir.

30 Q. Feel any disturbance of the air?

A. No, sir.

Q. How near was the sound to you?

A. Why, it was not—I couldn't see; it was about two or three feet away from me.

Q. Can you tell how you were standing at the time, you and your sister Katie and Rosie?

A. Yes. Why, Katie stood this way and Rosie the next to her and then Fred stood next to my sister Rose and then I stood about two feet away from him, and then I turned my back to all of them.

Q. You did turn?

A. Yes, and I was then watching down towards Brunswick.

Q. And then it was, when you were standing in that position you heard the shot?

A. Yes, sir

Q. Were you talking with him on Thursday night?

A. Yes, sir

Q. Were you talking with him on Friday morning as he walked down and just before?

A. Yes, sir; just before, and I said to him to 10 hurry; we were halloaing to him.

Q. Before you started were you all talking together?

A. Yes, sir; I was calling him in to breakfast, and so was Kate.

Q. Do you know whether he was sober?

A. Yes, he was sober.

Q. You were close enough to know?

A. Yes, sir

Q. And you were talking with him? 20

A. Yes, sir

Q. Did he talk all right?

A. He talked all right.

Q. The same as usual?

A. Yes, sir

Cross Examination, by Mr. Strong.

Q. You were talking with him down to the time that you started from the house, weren't you; all talking at the house together? 30

A. Yes, sir

Q. And he said good bye to your father and mother?

A. Yes, and I heard him say all right, but he didn't speak to us—he didn't say good by to us there.

Q. You were going on the same car with him?

A. Yes, sir

Q. But he said good bye to your father and mother?

A. Yes, and he shook hands.

Q. And the little children were there?

A. Yes, sir

Q. He was pleasant and kind to them all?

A. Yes; and he went and stood out in the door and said, "Oh, this place is so pleasant, so nice and quiet." He was standing in the door.

Q. You started first from the house with Katie, did you say?

A. Yes, sir

10 Q. And the rest followed you?

A. Yes, sir

Q. How near was she to you?

A. She was about four or five feet behind us.

Q. And when you three girls started ahead your Uncle Fred stayed behind talking to your father?

A. Yes, sir

Q. And then you called back to him, I believe, didn't you?

A. Yes, I hallowed, "Fred, hurry up; you will get
20 late for the car." He said, "Never mind; I won't get late."

Q. Where were you when you called back?

A. I was down the gate.

Q. At the gate?

A. Yes.

Q. Was he still talking with your father at the time?

A. Yes, sir.

Q. Where was Katie then?

30 A. Katie was alongside of me down at the gate.

Q. And Rose?

A. Rose was coming in back of us, but she wasn't quite there. She had a step or two, three or more steps and she would be there.

Q. Did any one else call back to Fred except you?

A. The whole three of us hallowed for him, for he didn't hurry, so the car was in sight already and then he ran. We couldn't see it, but we heard the noise of it. It was near.

Q. You called to him?

A. Yes, sir

Q. To hurry up?

A. Yes, sir

Q. And then he ran down from the house?

A. Yes, sir

Q. When he came down from the house and had got out to where you three girls were standing, the car had not got there yet, had it?

A. Not quite.

10

Q. And you stood there together for a little time until the car got to you?

A. Yes, sir

Q. Now as you stood there—just tell us again how you stood?

A. Katie stood first and then Rosie stood next to her, shoulders close, and then Fred stood next to Rosie.

Q. Which one was nearest to New Brunswick?

A. I was.

20

Q. Of the three first mentioned, was Fred?

A. It was Fred next.

Q. Fred was nearest to New Brunswick?

A. Yes.

Q. And then came Rose in between you and Katie?

A. Yes.

Q. And then Katie was furthest away from New Brunswick?

A. Yes.

Q. Whereabouts did you stand?

30

A. Why I stood about three or four steps away from them.

Q. In which direction were you from them?

A. In the direction of the trolley road there, trolley track.

Q. Were you further from New Brunswick than they were?

A. No, sir; I was nearer.

Q. Nearer to New Brunswick?

A. Yes, sir

Q. So that the trolley car would have passed them before it come to you?

A. Yes, sir

Q. Now you were all standing there together and talking, were you, among yourselves?

A. Why, Katie was talking to him and Rosie, but I wasn't. I didn't say a word to him down at the trolley track there.

Q. You were a little further off?

A. Yes, sir

10 *Q.* And you were looking towards New Brunswick, were you?

A. Yes, sir

Q. And the first thing that attracted your attention at all was the sound of the pistol shot?

A. Yes, sir

Q. That is right?

A. Yes, sir

Q. Then you turned around; I suppose you did turn around and looked to see what it was?

20 *A.* I kind of looked back and then I ran right on, because I saw that—Rosie screamed and I heard her scream and then I ran right on because I got frightened, and I saw him holding his hat with one hand and the pistol with the other as I looked back, but I wasn't quite sure.

Q. Wait a minute. When you heard the pistol shot you looked around?

A. Yes, sir.

30 *Q.* Now just fix your attention on that point for one minute. What did you do when you first looked around?

A. I only saw him running after me, for I was running right on and I kind of looked back.

Q. As you looked around was he running at you then?

A. Yes, sir.

Q. At the very first?

A. Yes, sir.

Q. How many shots had you heard up to that time?

A. I heard two fired right after me.

Q. No; I mean before you looked around, how many shots did you hear?

A. I heard two.

Q. Heard two?

A. Yes, sir.

Q. Were they right close together?

A. Yes, sir.

10

Q. So that there were two shots fired before you looked around?

A. Yes, sir.

Q. I suppose you looked around as quick as you could?

A. I didn't look around much; I just turned my head a little bit and then I heard.

Q. When you heard the pistol go off, of course that was very startling, wasn't it?

A. Yes, sir.

20

Q. And didn't you look quickly to see what it was?

A. I looked around quickly and then I ran right on, because I was afraid of getting hurt.

Q. Do you mean before you were able to look around there had been two shots fired?

A. Yes, sir.

Q. And then you run, and there were how many shots fired after that?

A. Two.

Q. You didn't see those shots all fired?

30

A. I heard one of them. I saw one of them, but I didn't see the other.

Q. You saw one?

A. Yes, sir.

Q. Which one?

A. The first shot that came after—you know, that he fired after me.

Q. You saw him fire a shot at you?

A. Yes, sir.

Q. Then which way did you run?

A. I run towards New Brunswick.

Q. Ran along the road?

A. Yes, sir.

Q. Or did you leave the road and run into your father's property?

A. I didn't leave the road right away, but after I got near the fence where there was a big hill like. and I couldn't get up there, so I ran until I got a little bit lower, the path was there, and then I jumped up
10 and I jumped over the fence and I near fell in the pond right near our house.

Q. You didn't hear Fred say anything at all did you?

A. No, sir.

Q. Katie is the oldest of the children, isn't she?

A. Yes, sir.

Q. How old was she?

A. She was going on nineteen.

Q. And Rose was next to her?

20 *A.* Yes, sir.

Q. How old is Rose?

A. She was sixteen in May, I think.

Q. How old are you?

A. I am fourteen going on fifteen.

Q. You saw him give Kate a dollar the night before?

A. Yes, sir; I saw him.

Q. And then he took it back again?

A. Yes, he took it back.

30 *Q.* They were just playing among themselves, weren't they?

A. I think so.

Q. And all of you were playing and having a good time?

A. Yes, we were having a good time up there.

Q. And he was making believe giving her a dollar and then taking it back again, and gave her how much instead of it?

A. I think it was a quarter.

Q. Did he give you a quarter?

A. No, he didn't give me anything.

Q. He was teasing you and telling you he was going to give you something some other time, to-morrow?

A. Yes.

Q. And you tried to find out what it was?

A. Yes, sir.

Q. But you were all good friends, weren't you, all the time? 10

A. Yes, sir; we were all good friends.

Q. You always were down to the time that he actually fired the pistol shot?

A. Yes, sir.

Q. Hadn't been any quarrel between him and anybody, had there?

A. No, sir.

Re-Direct Examination, by the Prosecutor.

Q. Did he appear to be fond of Katie or not? 20

Objected to.

Question allowed.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

F. J. SWAYZE, J. (L.S.)

Q. Did he appear to be fond of Katie?

A. Yes, sir.

30

By Mr. Strong.

Q. Fond of all of you, wasn't he?

A. Yes, he was fond of all of us.

By the Proecutor.

Q. More so of Katie?

Objected to.

Question overruled.

Q. Who did he appear to think the more of, Katie or the rest of you?

A. Katie.

Objected to.

The Court: I will let that stand. Your objection was taken in a timely way, and you will have the benefit of an exception.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

F. J. SWAYZE, J. (L.S.)

Julius Bors, sworn through interpreter.

By the Prosecutor.

Q. Where do you live?

A. In Bonhamtown.

20 Q. In this county?

A. Yes, sir.

Q. Do you know where John Gordon lives?

A. Yes, sir.

Q. How near does John Gordon live to where you live?

A. About a mile.

Q. Do you know Mike Fader's saloon?

A. Yes.

Q. Where is it?

30 Q. Near to us; near the place where he lives.

Q. Do you know, or did you know Katie Gordon?

A. Yes, he knew her by sight.

Q. Do you know Fred Lang?

A. Yes, sir.

Q. How long have you known Fred Lang?

A. About three years.

Q. Do you recollect being in Mike Fader's saloon on the 19th of April of the present year?

A. Yes; he saw him.

Q. Saw who?

A. Saw Fred Lang in the saloon.

Q. Did you have any conversation with him?

A. They only spoke a few words together.

Q. What time was that of the day?

A. Just half-past seven in the evening.

Q. Where was that?

A. In the saloon.

Q. Who was with Fred Lang or him at the time?

A. He had a friend with him, Steve Carman. 10

Mr. Strong: The interpreter is apparently using the third person in his answers.

The Interpreter: The witness had a friend with him whose name was Steve Carman.

The Court: You had better put the questions in the first person and give the answer as he gives it and not transpose it into the third person.

Q. Whose friend was Steve Carman? 20

A. It was my friend.

Q. Who was with Fred Lang there?

A. John Gordon and Julius Gelleizcsek.

Q. Did Fred Lang talk with you then about Katie Gordon?

A. He only said that if she couldn't be his she shall be nobody else's.

Q. What else?

Mr. Strong: He said that is all.

The Court: You may ask him if he said anything else. 30

A. Didn't say anything else because the car came up and he had to go to New Brunswick.

Q. Who was present when you said that—when Fred Lang said that?

A. John Gordon and Julius Gelleizcsek and Steve Carman.

Q. Will you tell me whether or not—don't tell this until the Court passes upon it. Will you tell me

whether or not Fred Lang spoke as to what would take place to-morrow at that time?

Objected to.

The Court: I will let you ask whether Lang said anything about likely to happen the next day.

(Interpreter repeats.)

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

10

Q. About Katie Gordon?

A. He didn't say anything else. I didn't have no time; the car came up.

Q. What did Fred Lang have with him that night?

A. He didn't see anything of Fred Lang that night.

Q. Did you ever see him have a pistol?

A. No, sir; I didn't see the pistol.

20 *Cross Examination, by Mr. Strong.*

Q. At the time Lang said this were Gordon and the other two men standing close by?

A. About three feet from me.

Q. All standing together?

A. They were standing out apart and they were standing a little behind him.

Q. Did Lang speak so they could all hear?

A. He didn't speak very loud, just low.

30 Q. Speaking low to you and not to the others?

A. Yes, speaking low to him.

Q. Could the others hear it?

A. Well, they had been talking about different things.

A. Could the others hear it?

A. They might have heard it if they listened.

Re-Direct Examination, by the Prosecutor.

Q. Have you ever talked with Fred Lang about Katie Gordon before or since?

Objected to.

Question allowed.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

A. No.

Mr. Strong: The question in that form, it seems to me, is too remote.

10

Charles Rogers, sworn.

Direct Examination, by the Prosecutor.

Q. What is your business?

A. Warden in the jail.

Q. Been that since the first of April?

A. Yes, sir.

Q. Ever see Fred Lang?

20

A. Yes, sir.

Q. Where?

A. At the jail.

Q. Admitted there as a prisoner?

A. Yes, sir.

Q. Do you remember when he was committed to your charge as jailor?

A. On the 6th of May.

Q. Of what?

A. Of May.

30

Q. Or June?

A. Or the 6th of June.

Q. Present year?

A. Yes, sir.

Q. Shortly after he was committed did he make any requests to you, and if so, for what?

A. For writing paper.

Q. What did you do?

A. It is a common request of the jail to get writing paper and envelope.

Objected to.

Q. Did he ask for them?

A. He requested me for writing material and I gave him an envelope and sheet of paper, a billhead or letterhead of the Sheriff, and he spent a good deal of the afternoon in writing a letter.

10 *Q.* Did you see him writing?

A. Yes, sir; and that night he gave it to three young women who, I understood, were his sisters or half sisters.

Objected to.

The Court: Oh, no.

Q. Were you present?

A. Yes, sir.

Q. Did you see him hand it to them?

20 *A.* Yes.

Q. What did you do?

A. I asked them what they were going to do with it and they said mail it.

Objected to.

The Court: Don't give us any conversation with them.

Q. What became of the letter?

A. I took it away from them.

30 *Q.* Where is it?

A. In my pocket. (Produces.)

Q. Is that the letter?

A. Yes, sir.

Q. And envelope, and all just as you took it from these people and as you saw him give it to those people?

A. Yes, sir.

Q. Is that it?

A. Yes, sir.

The Prosecutor: We offer it. Cross-examine if you wish on it.

Cross Examination, by Mr. Strong.

Q. Did you watch him write it?

A. Yes, at different times. He spent the greater part of the afternoon doing it. He laid on his cot.

Q. Did you see what he did with it?

A. With the letter; no, sir.

Q. You didn't see what he did with it?

A. No, sir; after he wrote it.

Q. After he wrote it?

10

A. No, sir.

Q. You saw it in the possession of these girls, did you?

A. Yes; I saw him hand it to these girls.

Q. You saw him hand it to these girls?

A. I saw him hand this letter to these girls through the bars.

Q. In what form was it when he handed it?

A. It was in this cover, sealed.

Q. You produce an envelope. You have here an envelope; you say it was enclosed in that envelope and sealed? 20

A. Yes, sir.

Q. And you saw him deliver it to the girls?

A. Yes, sir.

Q. Who were the girls? Are they here to-day?

A. I think two of them are over there on the front seat.

Q. Have they been sworn as witnesses?

A. I don't know.

30

Q. Which two do you mean?

A. The one in the light dress, I think, were one of them.

The Court: With the white lace?

Q. The one standing up now?

A. Yes; and I think this little girl on this side of her is the other one. My impression is there were three or four girls; at least three.

Q. How long after you saw him give this letter to the girls did you take it from them?

A. Oh, not a minute.

Q. How near were you when you saw him give it to them?

A. Oh, possibly five or six feet.

Q. Who opened this?

A. I did.

By the Prosecutor.

10 Q. I neglected to ask one question. When next did you see Fred Lang respecting this letter?

A. I think last Saturday.

Q. What did you say to him about it and he say to you?

Objected to.

The Court: On what ground?

Mr. Strong: It is offered in the nature of a confession or admission and there should be
20 some preliminary examination.

The Court: Have you finished your examination, Mr. Prosecutor.

The Prosecutor: I simply neglected on my direct examination to go into the second interview and I asked Mr. Strong to permit it and he said yes.

The Court: You asked what was said about this letter at this second interview. Before that question is answered I will allow Mr. Strong to cross-examine as to both the original letter and
30 as to the substance of this last interview.

By Mr. Strong.

Q. Where did the second interview occur, the second conversation?

A. In the corridor of the jail, the outer corridor.

Q. What was he doing there?

A. I brought him out to talk to him.

Q. Talk to him yourself?

A. Yes, sir; I asked him some questions—

Q. One moment. What object had you in talking to him?

A. To find out about this letter.

Q. You asked him questions about it?

A. Yes, sir.

Q. Did you say anything to him before you asked him questions?

A. I told him the letter had never been mailed and asked him if he wished it to be mailed this late 10 day.

Q. Were you intending to mail it?

A. No.

Q. Your object was to get some admission from him?

A. Yes.

Q. And that was the way you went about it?

A. Yes.

Q. That is the way you began your interview?

A. Yes. 20

Q. He knew that you were the jailor, of course?

A. Yes.

Q. You have told us now what you said to him at the beginning of the interview?

A. Yes.

Q. And all that you said to him before he made the statements which you are about to testify to?

A. Yes; I didn't warn him.

Q. You did not warn him?

A. No, sir; I suppose that is what you meant. 30

Mr. Strong: It is very evident that this last interview cannot be received, I think.

The Court: Have you finished your examination with reference to this second interview, Mr. Prosecutor?

The Prosecutor: If the Court will permit me, I might suggest this: I had in view in my examination the McQueen case in 40th Vroom, page 524, where it is pretty well discussed.

The Court: I do not remember that particularly. I have had this question up—

Mr. Strong: There have been a number of cases prior to that in the Court of Errors.

10 The Court: As I understand it, I must be satisfied that the statement is voluntary. I never have had this exact question presented. I think the presumption under such circumstances is against his statement being voluntary and that presumption must be overcome. This man was in a position of authority over the prisoner.

(Prosecutor hands Court list of citations.)

The Court: Is that all there is in the McQueen case to which you wanted to call my attention?

The Prosecutor: Then the Bullock case follows.

The Court: I know the Bullock case.

20 The Prosecutor: There has been no promise, no nothing here, just the negative question.

The Court: I know, but the man is not only a man in authority, but the actual custodian of the prisoner. I will exclude that second interview.

Mr. Strong: I had not finished my examination on the other.

The Court: I will look into it further, Mr. Prosecutor, and if I find I am in error I will give you an opportunity.

30 *By Mr. Strong.*

Q. You know what day it was in June that you furnished some paper to Lang?

A. I think it was the second or third day after he arrived there.

Q. And he arrived on the 6th?

A. Yes.

Q. So that would be the 8th or 9th?

A. I should say it was the 8th or 9th; yes, sir.

Q. Did you suggest to him that may be he would like to write a letter?

A. No, sir.

Q. Who mentioned the subject of writing a letter first, he or you?

A. He asked me for the paper.

Q. Well—

A. I suggested nothing of the kind to him.

Q. Did he tell you what he wanted to do with the letter?

A. No, sir.

10

Q. With the paper?

A. No, sir.

Q. What paper did he ask you for?

A. Writing paper with a cover.

Q. He asked you for the sheet of paper and the envelope, did he?

A. Yes, sir.

Q. Did you tell him that any letter that he might write could not be mailed?

A. No, sir.

20

Q. Did you tell him that if he wrote a letter—

A. I didn't tell him anything.

Q. You knew he would write a letter?

A. I presumed he meant to write, asking for paper; yes, sir.

Q. You understood that to be his purpose?

A. Yes, sir.

Q. And you did not tell him that if he should write a letter that you would break it open and use it?

A. I didn't tell him anything at all. He asked for paper and I gave it to him, as I do a dozen times a day.

30

Q. Is it your custom to break open letters that are delivered by prisoners?

Objected to.

A. Very frequently.

Objected to as to what the custom is.

Question permitted.

Q. You very often do that?

A. Frequently; yes, sir.

Q. What is your object in doing it, to furnish evidence to the Prosecutor?

A. Possibly.

Objected to.

Question permitted.

Q. That is your object, isn't it?

10 *A.* No.

Q. It was your object in this case, wasn't it?

A. My object was to see that there was nothing in it that went out that was detrimental to the office.

Q. What do you mean by that?

A. I showed these letters generally to the Sheriff, and if he considered that the letters may be used in a way they should not be we suppressed them.

Q. Well, you thought this letter might be used in a way that it should not be?

20 *A.* I thought it might be beneficial to the Prosecutor if it would do you any good in this case.

Q. And your object in confiscating this letter and breaking it open was to furnish evidence to the Prosecutor? Haven't you said so?

A. Partly that; yes.

Q. Had you any other object?

A. No, I don't think I did.

Q. You didn't find in the letter anything detrimental to the office, did you?

30 *A.* I haven't read it.

Q. Did you try to read it?

A. Yes, sir.

Q. Weren't able to?

A. I made out parts of it.

Q. But didn't discover anything detrimental to the office. What then did you do after you made an effort to read it?

A. Got somebody that could read it.

Q. And did you inform the Prosecutor of it?

A. No, sir.

Q. What?

A. No, sir.

Q. Never?

A. No, sir.

Q. Did you never inform the Prosecutor that you had this letter until to-day?

A. No, sir.

Q. Has it been out of your possession until to-day?

A. Been in the Sheriff's possession all the time, I believe. 10

Q. You gave it to the Sheriff?

A. Yes, sir.

Q. What he did with it you don't know?

A. No.

Q. When did you get it back again? You brought it here in your pocket just now.

A. I got it from the Sheriff.

Q. When?

A. To-day.

Q. And when did you give it to the Sheriff? 20

A. Shortly after I procured it.

Q. Same day?

A. No, I think not the same day. Within a day, though.

Q. Did you show it to anybody except the Sheriff?

A. Yes; I showed it to a man who was able to read it.

Q. That was before you gave it to the Sheriff, was it?

A. I think the same day. 30

Q. Before you gave it to him.

A. Well, it may have been before he had it in his possession, but not before he knew about it. I told him I had a letter there and I suggested that we get some one to read it, and I did.

Q. So that you heard it read, did you?

A. Yes, I heard the substance of it.

Q. Why didn't you give it back to Lang when you found there was nothing detrimental to the office in it?

A. I thought we might need it.

Q. Thought it was valuable as evidence to the Prosecutor?

A. Yes, sir.

Q. What do you mean by saying we might need it?

A. The Sheriff.

Q. What interest was it to the Sheriff?

A. The Prosecutor.

Q. You meant the Prosecutor, didn't you?

A. Well, practically the Sheriff; yes, sir.

10 *Q.* And you considered yourself one of the authorities and felt justified in resorting to such measures as that to procure evidence against this man in your charge, was that it?

Objected to.

Question permitted.

Q. Is that what you say?

A. Yes, sir.

20 *Q.* Have you told us now all the conversation that occurred between you and Lang with respect to this letter at the time or on the day that it was written?

A. Yes, sir; I had no conversation with him whatever.

Q. He told you he wanted to write a letter, didn't he?

A. He just said "paper and envelope" or "paper and cover," and I handed it to him.

30 *Q.* Why didn't you say to him then, "Fred, you know your letter can't be mailed. It can't go out of this place, and if you write a letter, why, it will be used as evidence against you?"

A. I didn't think that was my province at all.

Q. You hoped that he would write a letter so you would have the chance to get it and use it as evidence for the State?

A. I hoped for nothing, because I had no idea what he was going to write, and I had no idea of taking the letter or using it.

Q. Do you mean to say that on oath?

A. Yes, sir.

Q. Do you mean to say that you had no idea that he was going to write a letter when he asked you for paper and envelope?

Objected to.

Question permitted.

A. Yes; I presumed he was going to write.

Q. You knew he was going to write a letter? 10

A. Yes.

Q. Had you hoped he would write a letter?

A. No; I cared nothing about it.

Q. You intended if he did write a letter to get possession of it as evidence?

A. I had no intention in the matter at all.

Q. What?

A. I had no intention in the matter at all at the time.

Q. When did you get your intention in your mind first? 20

A. After I took it away from the girls. If he had given me that—

Q. You were about to say, "If he had given me."

A. If he had given me that letter with a stamp on I very likely would have mailed it.

Q. That is very likely?

A. Yes.

Q. Although it was your frequent habit to open letters entrusted to you in that way? 30

A. Not with a stamp on.

Q. You felt as long as it didn't have a stamp on you were justified in taking it away from the girls; is that right?

A. Not because it didn't have a stamp on. I didn't make up my mind to it.

Q. What was it that induced you to take this letter and open it?

A. The manner in which he passed it out.

Q. What was the manner?

A. Secretly. He passed it out through the bars.

Q. How secretly? You saw him standing there five or six feet away.

A. There was three or four girls pushed up against the bars. I was not in plain sight. He was down two or three steps below the level of the floor on which I was standing, and two or three girls in front of the door, so I wasn't in plain sight.

10 *Q.* How were you able then to see this letter passed from his hands to theirs?

A. The girls didn't try to conceal it; they held it in their hands.

Q. Oh, they stood between you and him?

A. Yes.

Q. And then there was no secrecy, was there?

A. Merely the manner he held it out.

Q. You didn't see him give that letter to the girls, did you?

A. Yes.

20 *Q.* You saw the girls have it?

A. I saw the girls put their hands and take it.

Q. And you saw him have it in his hand?

A. Yes, I saw him hand it to the girls through the bars.

Q. And yet you say it was done secretly?

A. I didn't say it was done secretly.

Q. What do you mean?

30 *A.* I think the manner in which he passed it out to would indicate secrecy, instead of passing it out to me.

Q. Instead of giving it to you he gave it to the girls?

A. Yes.

Q. And that was the reason you felt justified in taking the letter from them and opening it; is that it?

A. I don't know that I reasoned with myself whether I was justified or not. I took it, right or wrong.

Mr. Strong: I submit, if the Court please, that this letter is within the spirit of the rule against confessions. The defendant was supplied with paper by the witness with the evident expectation and intention on the part of the witness that he would write a letter and that it would be seized and used as evidence. If, instead of putting his thoughts in writing, the defendant had communicated that verbally to this witness, it would be incompetent, for the same reason 10 your Honor has ruled out the second interview.

The Court: I am not sure I was right about that, but I will hear you further on this.

Mr. Strong: I submit the same reason applies to a letter under such circumstances as these, obtained in this manner, that it ought not to be received in evidence.

The Court: I think it is quite clear that the statement contained in that letter comes within the rule of the voluntary statement, and I will 20 overrule your objection. You may have your exception.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

F. J. SWAYZE, J. (L.S.)

The Court: I incline to think I was in error in applying the rule so stringently to the second interview, and, subject to Mr. Strong's right to 30 go into the question as to whether that second statement or whatever it may have been was voluntary or not, I will permit it to be inquired into, if Mr. Strong now desires, before the letter is actually admitted in evidence or before we proceed with the other line, to introduce evidence on his part tending to show that either the letter or the subsequent interview were involuntary I will permit it. Do you desire to introduce any evidence before we go on?

Mr. Strong: No, sir.

The Court: I will admit the letter. I will allow the Prosecutor to go into the question of the interview.

Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

10 The Prosecutor: The essential part is the admission of the letter, and then we will go on to the translation of it.

The Court: Take your own course.

The Prosecutor: The other question was simply to identify the letter.

(Letter offered in evidence and marked Exhibit S6.)

The Prosecutor: I would like to have it interpreted, if you will permit.

20

William Foeder, sworn.

Direct Examination, by the Prosecutor.

Q. I will ask Mr. Foeder to read the letter. You have Exhibit S6?

A. Yes, sir.

Q. In what language is it written?

A. This is written in Hungarian.

30 Q. Do you understand that language?

A. Yes, sir.

Q. Are you competent to translate it into the English language?

A. Yes, sir.

Q. Well, do it.

A. "Praise be the name of the Lord. I send you this letter, my dear mother, as your unfortunate son Fred, with whom you had so many troubles in your life. Now, dear mother, I have to stop with writing the letter, as my tears are running down my face.

Now, my mother, I will write shortly to beg you not to forget me in your prayers. Perhaps I will easier die, for I have avenged myself on the one whom I loved the most on earth—"

The Court: If the gentlemen don't hear it I will have the stenographer read it to you.

A. "And so that we can not be each others now what is life worth without her. And know, my mother, that I am a living dead, because my heart died with the one I killed, and the judge will decide about my body, and I am waiting with patience the will of the Lord. I beg you, my mother, not to worry about me, for this could not be helped. In every family there must be a bad member and now I am going to the grave to take the rest I so much long for. I know that nothing and nobody will hurt me down there no more, and it will be quiet to take a rest down there. And now good bye, mother, and my most beloved brothers and sisters. My address is New Brunswick jail, County jail, and if you will send me a letter send it to this address. Fred Lang, New Brunswick, 246 Neilson street, New Jersey." 10 20

Stenographer repeats translation as made.)

Cross Examination, by Mr. Strong.

Q. The phrase in there which you have translated, "I have avenged myself." You know what I mean?

A. Yes.

Q. What word is that in Hungarian? What word does he use where you say that he writes there that he has avenged himself on the one he loved most on earth? 30

A. "Bosszu."

Q. That word has several meanings in Hungarian, hasn't it?

A. No; it only has one meaning, nothing else but that.

Q. What is the meaning?

A. The meaning of it, "to avenge."

Q. What do you men by avenge?

A. Well, to avenge myself on somebody.

Q. What do you mean by avenging yourself on somebody? You say "revenge" or "avenge," which did you say?

A. Well, it is about the same.

Q. Well, in that letter, translating that letter, which word have you used?

A. I used "avenge."

Q. What do you understand that word means?

10 *A.* That he has avenged himself on the girl he loves the most.

Q. What does the word "avenge" mean, to kill?

A. Not all the time to kill.

Q. What does it mean?

A. It means in this case he meant seeing—

Q. What does the word "avenge" mean generally? I don't care about this case. I move to strike out what he started to say there as not responsive.

20 The Court: Yes.

A. It means to be revenged on some one, to revenge myself.

Q. But you didn't give me your idea of what the word "avenge" means.

A. Well, I can't exactly.

Q. You cannot define it any better than you have done?

A. No; that is the best I can do. We have no other word in the Hungarian for that.

30 *Q.* Have you ever translated this letter before?

The Prosecutor: I object. Are you going to use what I let you see? If you have any doubt about it we can agree upon some competent person to have it translated. Dr. Moth suggests the Hungarian minister here, who is a Princeton man.

Mr. Strong: You can take that back.

Q. I asked you whether you have translated this letter before?

A. Which letter?

Q. This letter you have before you. Have you translated it before?

A. Yes.

Q. When first?

A. I don't exactly know the date; it was about three weeks ago, I think.

Q. You made a written translation?

A. Yes.

10

Q. For the Prosecutor ?

A. Not for the Prosecutor.

Joseph Lengel, sworn.

Direct Examination, by the Prosecutor.

Q. Where do you live?

A. I live 125 Paterson street, New Brunswick.

20

Q. Are you engaged in this case as a detective?

A. Yes, sir.

Q. By whom?

A. Fred Lang.

Q. Did Fred Lang engage you? You evidently don't understand me.

The Court: I think we had better ask through the interpreter.

(Examined through interpreter.)

30

Q. Ask him who engaged him to work on this case?

A. Mr. Andrew Church, the Sheriff.

Q. Do you know Fred Lang?

A. Yes, sir.

Q. How long have you known him?

A. Two years I have known him.

Q. When did you see him first after this 20th of April, 1906?

A. 6th of June I seen him first.

Q. Where did you see him?

A. 20 Somerset street.

Q. Whose place is that, and where?

A. Joe Uhoss is the owner of the saloon.

Q. In this city?

A. Yes, sir.

Q. Whose saloon?

A. Joe Uhoss.

10 *Q.* What time in the day?

A. Half-past nine in the night.

Q. What was Lang doing there?

A. He went in and drank a glass of beer.

Q. Who did?

A. Fred Lang.

Q. Then what happened there?

A. Drank another glass of beer and then I asked him to take another glass of beer.

Q. Go on. What next? Did he take it?

20 *A.* He didn't take the beer; he took a cigar.

Q. Then what took place?

A. Then I stepped up to him and I asked him where he come from.

Q. Then what did he say?

A. He said he come from Coney Island and New York.

Q. Then what took place and what was said?

A. And I slipped a handcuff on him.

Q. You put a handcuff on him?

30 *A.* Yes.

Q. Then what was said and what took place?

Objected to.

A. Then I grabbed his arm.

The Court: You better warn the witness, Mr. Interpreter, that before he gives any statement of the prisoner he had better tell us all that was said.

Q. Tell us all that was said before you touched Fred Lang and put the handcuffs on him?

The Court: Before he made any statement in reference to this case.

A. That is all he told me so far, and I grabbed his arm and stand him up and get him on his feet and take him up on Somerset street; a whole lot of people was half dressed and then he says, "I suppose Katie Gordon is dead—"

Mr. Strong: I object. Before he makes any statement we ought to have all the preliminary conversation that occurred. 10

By the Court.

Q. Now have you told us everything that was said between you and him before he made that statement or asked that question about Katie Gordon?

A. I did not ask him anything else only his name on the road, and he said his name was Fred Lang. 20

The Court: Now, Mr. Strong, you may cross-examine him before I will allow the Prosecutor to go any further.

Cross Examination, by Mr. Strong.

Q. You had a couple of beers with him in the saloon, did you?

A. I didn't drink with him at all.

Q. You saw him drink?

A. Yes, sir. 30

Q. And you asked him to take a drink and he took a cigar?

A. He took a cigar; yes, sir.

Q. Then right away after that you put handcuffs on him?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. And then you were taking him up the sereet?

A. Yes, sir.

Q. With the handcuffs on?

A. Yes, sir.

Q. And the crowd of people followed him?

A. Yes, sir.

Q. At the time that he made the statement which you are going to tell us about; is that true? At the time that he made the statement that you were going
10 to testify to? I said that he told you at the time he was going up the street in your charge and with the handcuffs on him and there was a crowd of people following him; that is right; isn't it?

A. Yes, sir.

Q. He knew that you were a detective at that time, did he?

A. I don't know if he did or not.

Q. Well, when you put the handcuffs on him what did you say to him? Did you tell him he had
20 to go to jail?

A. I didn't tell him that.

Q. What did you tell him?

A. I didn't say a word to him when I put the handcuffs on him. I only asked him where he come from before I put the handcuffs on him.

Q. When you put the handcuffs on him was he trying to get away?

A. No; he didn't try to get away from me.

Q. Then you got him on his feet and started out
30 the door with him?

A. Yes, sir.

Q. Did he ask you what you were doing and why you were doing it?

A. No.

Q. Did he ask you where you were going to take him?

A. No.

Q. Did you tell him you were going to take him to jail?

A. No; I didn't tell him that. I only asked him

what his name was and he said his name was Fred Lang.

Q. Didn't you tell him what you were going to do with him?

A. I didn't say a word to him; no.

Q. Not at all, not a single word?

A. No.

Q. Before he talked to you at all and told you anything about the case did you tell him that whatever he said would be brought against him in evidence? 10

A. No, sir.

Q. Did you ask him any questions?

A. No, sir.

Q. Outside of just what his name was?

A. That is all.

Q. And where he came from?

A. Just where he came from.

Q. Did you ask him why he did it?

A. No, sir; not that night.

Q. Not that night? 20

A. No, sir.

Q. You were employed by the Sheriff, were you?

A. Yes, sir.

Q. And you are claiming a reward by reason of this arrest, aren't you?

A. No; I was not working for the reward; I was working for the Sheriff.

Q. Don't you expect to get the reward that was offered?

A. I expect to get it. 80

A. You do? Certainly.

A. Yes, sir.

Q. How much is that reward?

A. Five hundred dollars.

Q. And you will get it if Lang is convicted and you will not get it if Lang is not convicted; is that the way it is?

A. I don't know how that stands. I expect to get it somehow or other.

Q. Suppose Lang is not convicted but is set free on this trial, then you don't expect to get it, do you?

A. Well, I don't know anything about that.

Q. You understand that that reward is only to be paid in case Lang is convicted, don't you understand so?

A. It is upon conviction, I suppose.

Q. And so when you got Lang in your possession and were taking him up the street with the handcuffs
10 on him and the crowd following you, you were anxious to get a statement out of him that would convict him, weren't you?

A. No, sir.

Q. Not at all, eh?

A. Yes, sir.

Q. You didn't want to get him to tell you he was guilty so that you could get that reward?

A. No, sir.

20 The Prosecutor: I have forgotten my question, but it has reference to what Lang said to you.

The Court: Do you desire to put in evidence on your part, Mr. Strong?

Mr. Strong: No, sir.

The Court: I will permit the statement.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

30 F. J. SWAYZE, J. (L.S.)

Re-Direct Examination, by the Prosecutor.

Q. Now what did Lang say to you respecting the killing of Katie Gordon?

A. He said to me, "I suppose she is dead."

Q. He said that?

A. Yes, sir.

Q. What else was said?

A. Didn't say anything else that he was going up.

Q. Then what did you do with him?

A. Put him right in county jail here.

Q. Say anything further to you on the way to the jail?

A. No, sir.

Q. When next did you see him?

A. About two days afterwards.

Q. Where?

A. In jail.

Objected to.

The Court: Yes; you will have to find out all 10
he said before you go into the statement.

Q. What did you say to him when you went into the jail at the time you are now talking about?

A. I asked him where did he go after he had shot her.

Mr. Strong: I object to any statement of the witness until I have a chance to cross-examine.

The Court: Oh, yes. You have that. You 20
had better find out whether this was the first thing that was said between the witness and Lang on that occasion, Mr. Prosecutor.

Q. When you went to the jail this time and saw him the first time after his arrest—two or three days afterwards?

A. Two or three days afterwards, on the 8th or 9th, something like that.

Q. What was the first thing you said to Fred Lang and what did he first say to you? What did 30
you first say to him?

A. I asked him, I said, "What did you shoot Katie Gordon for?"

Objected to.

The Court: The State must satisfy me first that this is a voluntary statement.

Cross Examination, by Mr. Strong.

Q. What did you go to the jail for that day?

A. I went to see him.

Q. What did you want to see him for?

A. I am going to see him and find out from him which way he went from here.

Q. What did you care about that?

A. Oh, I like to know. I like to find out from him.

Q. Was that all you wanted to find out?

A. Yes.

Q. Was that all that you wanted to find out?

10 *A.* That is all; where he was all that time.

Q. What good was that going to do you, to find out where he was? Any answer to make? Do you understand me?

A. I understand you; yes.

Q. Well, now, have you any answer to make?

A. It won't do much good, but I like to know it anyway.

Q. Well, when you got there to the jail where did you talk to him?

20 *A.* What did I tell him?

Q. Where did you have your talk?

A. Outside in the hallway, in the entry.

Q. He was brought out of the jail into the hallway?

A. Yes, sir.

Q. Who brought him out?

A. Mr. Rogers.

Q. What did Mr. Rogers say to him?

A. Didn't say anything.

30 *Q.* Didn't he say that you want to talk to him?

A. Yes. I asked him if he was willing to talk to me, have a talk with me.

Q. Rogers asked him?

A. Yes, sir.

Q. And did you hear Rogers ask him that?

A. Well, I did; yes, sir; and I asked him too.

Q. What did you ask him?

A. Asked him if he was willing to have a talk with me.

Q. Have a talk about what?

A. About where he went after he shot Katie Gordon.

Q. Why did you ask him? Did you say that you wanted to have a talk with him about where he had been?

A. Yes, sir; that is where he went and where he was.

Q. Did you tell him why you wanted to know where he had been? 10

A. I didn't tell him why.

Q. Did you tell him that you wanted to get some evidence to use on this trial?

A. I did not.

Q. Didn't tell him that?

A. No, sir.

Q. Well, when you went to asking questions who was there beside you?

A. There was Mr. Rogers. He sat right alongside of us for a while and then afterwards he left us 20 and then there was two of us.

Q. Three of you?

A. No; two of us; me and Fred Lang.

Q. Only you two?

A. Yes, sir.

Q. Mr. Rogers was there at first?

A. For a while.

Q. Did Rogers ask questions?

A. No, sir.

Q. Did he say anything? 30

A. No, sir.

Q. Did you say to him that it would be better if he would tell all there was about it?

A. No, sir; not that time.

Q. Not that time?

A. No, sir.

Q. Some other time you told him that, did you?

A. About a week or nine days afterwards when I went in with Mrs. Gordon.

Q. Then what did you say?

A. Then I told him, I says, it would be better for him if he told the whole truth, but he wouldn't talk to me that time; he was talking to Mrs. Gordon.

Q. You were there while he was talking to Mrs. Gordon?

A. Yes, sir.

Q. On this day you are talking about now, two or three days after you brought him there first, did you say to him it would be better for him if he told the
10 whole truth at that time?

A. No, sir.

The Court: I think the statements are admissible.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

F. J. SWAYZE, J. (L.S.)

Q. How did you come to go there that day; did
20 anybody tell you to go?

A. To go to the jail to see him?

Q. Yes.

A. No, sir.

Q. The Prosecutor, the Sheriff, or anybody else?

A. No, sir.

Re-Direct Examination, by the Prosecutor.

Q. What did he say to you about Katie Gordon?

A. That day when I went in, two or three days
30 afterwards, I asked him which way he went and he said he went to South Bethlehem and stayed there over night and the next morning he went to New York and Coney Island, and I asked him, I said, "Why did you shoot Katie Gordon for?" He said, "I want to love her. She won't have me and I wouldn't let anybody else have her." That is what he said.

Q. Was there ever any interview between you and Lang respecting the pistol?

A. Yes, he said.

Q. When was that?

A. That was two or three days afterwards when I left him, the same time.

Q. Tell what was said on that occasion by you to him and his reply?

Objected to.

The Court: You better ask him everything that was said before there was any conversation about this case.

10

Q. When next did you see Fred Lang?

A. Two or three days afterwards when I asked him.

Q. Who was with you then?

A. Nobody but me except Mr. Rogers stayed there and one reporter, but only for a little while.

Q. Where was that interview?

A. That was in the entry there of the jail.

Q. Who opened that conversation? Who spoke first?

20

A. I did.

Q. What did you first say to him?

A. I asked him which way he went after he shot Katie Gordon.

Q. Yes.

A. Then he told me—

Objected to.

By the Court.

Q. That is the very first thing you said, is it?

30

A. Yes, sir.

Q. Did you tell him it would be better for him to tell you about it?

A. No, sir.

Q. Did you tell him that he would suffer if he didn't tell you about it?

A. No, sir.

The Court: Well, proceed, Mr. Strong.

Re-Cross Examination, by Mr. Strong.

Q. What did you want to ask him that question over again for?

A. What question?

Q. Why, he told you all about where he had been the first time you saw him, didn't he?

A. Well, he told me that over there and when I asked him, when I caught him.

10 Q. But you asked him that same thing two or three days before and he told you about how he had been to South Bethlehem and where not, and now then you went there two or three days after that and asked him the same question over again, did you?

A. I only wanted to find out what he done with the pistol.

Q. Oh, that isn't anything about the pistol. Now on this last time, this last conversation that you had with him you simply asked him that question the very first thing?

20 A. Yes, sir.

Q. You didn't tell him that whatever he said would be used against him in evidence, did you?

A. No, sir.

Q. You didn't tell him that at any time, did you? You didn't want him to know it, did you?

A. No, sir.

Q. What?

A. No.

30 Q. Didn't you say to him now that if he told you everything that you wanted to know that it would be better for him in court?

A. No, sir.

Q. What?

A. No, sir; didn't tell him; no.

Q. I mean on this day when you were there the third time with Mrs. Gordon.

A. Yes.

Q. But on this second time now, didn't you say to him that you would try to help him if he told you?

A. No, sir.

Q. What?

A. No, sir.

Q. Didn't you say that if he would tell you where he had been and told you where the pistol was that maybe you could do something for him in court?

A. No, sir.

Q. That you would do all you could to get him off?

A. No, sir.

Q. Nothing like that at all?

A. No, sir; only asked him what he had done with 10
the pistol.

Q. He didn't answer right away when you asked him that, did he?

A. Well, he answered very slowly.

Q. And before he answered it didn't you say to him, "Now you might as well tell me that; there is no use of your not telling?"

A. No; I didn't say anything like that to him.

Q. Didn't you say to him—didn't you give him to understand that you knew where the pistol was any- 20
way?

A. I only asked him where the pistol was.

Q. Didn't you tell him now that you knew where the pistol was?

A. No, sir; not that way.

Q. Not that way? What way did you put it?

A. I only asked him what he done with the pistol and he said he throwed it away.

Mr. Strong: I move to strike out the answer 30
as premature.

The Court: I decline to strike it out.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

Mr. Strong: It is not responsive and your Honor has not yet ruled on the admissibility of the statement.

(Testimony repeated by stenographer.)

The Court: I will strike out the latter part as to his statement. I will admit the statement.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

F. J. SWAYZE, J. (L.S.)

Re-Direct Examination, by the Prosecutor.

Q. What did you say to him and what answer did
10 he make to this last interview you are speaking about?

A. I was not talking to him; the third time Mrs. Gordon was talking to him.

Q. Oh, I mean this interview where you asked him what he did with the pistol.

A. Why, he says when he got to South Plainfield he threw it away.

Q. You ask him the question, "What did you do with the pistol," and what answer did he make?

A. He said he threw it away.

20 Q. When he got to South Plainfield?

A. Yes, sir.

Dr. Charles Theophilus Mas, sworn.

Direct Examination, by the Prosecutor.

Q. Where do you reside?

A. New Brunswick, New Jersey.

30 Q. What is your profession?

A. Doctor of medicine and surgery.

Q. How long have you been such?

A. For about eighteen years.

Q. Where do you practice?

A. I have practiced the last sixteen years in the city here and county.

Q. Do you know John Gordon and his wife and children?

A. I do.

Q. What are your professional relations with them and have been with them?

A. I have been the family physician for about ten or eleven years.

Q. Were you called there on the 20th of April of this year?

A. I have been called early in the morning.

Q. For what purpose?

A. The father came.

Q. Did you respond to the call?

10

A. Yes, sir.

Q. What did you find as to Katie Gordon?

A. I went over quick when the father sent for me, with the father, with the horse and buggy, and then when I came there I found the girl dead.

Q. From what effect?

A. Through hemorrhages, according to my opinion. I found a wound produced by a shot very likely about the size of one-quarter or one-third of an inch in circumference on the right side of the lower part—

20

Q. Give a full description so that we will know what you are talking about.

A. On the lower end of the mastoid.

Q. Turn to the jury and show?

A. Right here (indicating). Penetrating upward. I followed with a probe about two or three inches and it took the course into the wings of the sphenoid bone, in the skull very likely. The wound had caused hemorrhages of the internal carotid and also of the jugular vein, severing. Might have been two or three minutes before the blood was all gone and death came on.

30

Q. In your opinion what was the wound made with?

A. With a bullet.

Q. Would you infer how close the weapon was?

A. Very close. I seen some powder in the skin of the face.

Q. So close powder was in the skin along and about the wound?

A. On the neck, of the right side.

Q. As to the fatality of the wound?

A. Those cases, that condition are undoubtedly always fatal; even if a surgeon should be there at a moment I think there would be no help.

Q. How soon were you there after you were informed? What time of the day were you there?

A. About seven o'clock, early in the morning.

Q. Within less than an hour of the wound?

10 Objected to on the ground that the witness doesn't know.

 Question overruled.

Q. In your opinion, then, how soon must death have occurred?

A. Inside of two to five minutes. One-third of the blood goes through the head, and by having that where the jugular vein and the carotid artery is all in one bunch together and joined to one cheek, when it is opened it doesn't take long for all the life blood to ooze out and flow away.

20

Cross Examination, by Mr. Strong.

Q. Did you find the bullet?

A. No, sir; I couldn't find the bullet, and I only could see the direction going upward toward the base of the skull.

Q. Did you find where the bullet had come out of the head?

30 A. No, sir. The bullet was inside. The autopsy I suppose, has revealed that. I only saw the direction of the wound.

Q. Was the direction immediately upward from that point?

A. Yes, sir.

Q. This was on the right side?

A. On the right side midway between the lower end of the mastoid with the angle of the jaw.

Q. And it was inward as well as upward, I suppose?

A. Yes, certainly. Took that direction. (Indicating.)

Q. What evidence of powder did you see?

A. I seen the black looking dust, looked to me as if it had been powder.

Q. Did it come off when you wiped it?

A. No, sir.

Q. Shot into the skin, was it?

A. Yes, sir.

By the Prosecutor.

Q. Were you present at the autopsy?

10

A. No, sir.

Q. Who performed it?

A. I don't know.

By Mr. Strong.

Q. You don't know whether there was any if you weren't there?

A. I wasn't there. I don't know from my personal observation.

Adjourned till July 17, 1906, 10 A. M.

20

New Brunswick, N. J., July 17, 1906, 10 A. M.

Dr. John L. Suydam, sworn.

Direct Examination, by the Prosecutor.

Q. Doctor, what is your profession?

A. Physician.

30

Q. What is your official position?

A. County Physician.

Q. Were you the county physician on the 20th of April of the present year?

A. Yes, sir.

Q. On that day did you view the body of Katie Gordon?

A. Yes.

Q. Where?

A. At Bonhamtown, below New Brunswick here,

Q. At her father's house?

A. Yes, sir; between two and three o'clock in the afternoon.

Q. Did you ascertain the cause of death?

A. Yes.

Q. What?

A. She died as the result of a bullet wound.

Q. Where?

A. In the neck.

10 Q. Give us whether the right or left side?

A. It was on the right side.

No cross examination.

Dr. Albert L. Kirrally, sworn.

Direct Examination, by the Prosecutor.

20 Q. What is your profession, doctor?

A. Physician.

Q. Where do you practice?

A. New Brunswick.

Q. Where were you born?

A. Hungary.

Q. That your native country?

A. Yes, sir.

Q. What is your native tongue or language?

A. Hungarian.

30 Q. Speak good English as well?

A. I do.

Q. Will you look at Exhibit S6; have you seen that?

A. Yes.

Q. Have you made a translation of it for me?

A. I did.

Q. Will you give us the translation as you made it, read it aloud for the benefit of the court and jury.

A. (Reading from paper): "June, 1906, 19.

"Praise be the Holy Name of Jesus. From a pure

heart, my beloved mother, these words I am sending to you as the unluckily befallen son of yours, Freddy, for whom you have done much fighting as a mother for her son owed to. And dear good mother, here I stop with my lines for my tears are running like a stream on the paper for your bringing me up, and now, mother, shortly I will write you so as to be kind to say an 'Our Father' for me. Maybe I give up my guilty soul easier because I have taken revenge on whom on this earth I loved the most, and I saw that 10 each others we could not be, therefore without one the other life is not worth living for. And know you mother that now I am a living death, because my heart died with the one on whom I have revenged myself, but my body is living yet; with that the Sires are going to dispose, and I am waiting every minute with patience that the Almighty measure out on me. And let me hope that you won't have many sorrows on account of me because this has happened, because in every good family there has to be one bad, and now 20 I am going to the grave to rest, because I know that down there nothing and nobody hurts and it will be quiet to rest. And now with this God be with you, my good parents and very hard beloved brothers. The address in New Brunswick jail, and if you send a letter yet write on this address, Freddy Lang, New Brunswick, 246 Nelson street."

Cross Examination, by Mr. Strong.

Q. Did you read a portion of the letter in which 30 he requested his mother to remember him in her prayers? Do you find that in the letter?

A. Remember him in his prayer, yes.

Q. And then it goes on that perhaps because of that his soul will depart easier from this world; is that the way it goes?

A. No. He says over there—here is the letter.

Q. It doesn't say that, you say?

A. I can't remember.

Q. Well, look and see whether it says that. Don't

read what else it says, but whether it says that. Take the original.

A. This is a literal translation and that is a translation which has not been sifted out.

Q. Answer the question which I put to you, please.

(Question repeated by stenographer.)

A. Yes.

Q. You say it does say that?

10 A. Yes.

Stephen Chonke, sworn.

Direct Examination, by the Prosecutor.

Q. Where have you been living the last two or three years?

A. I live in West Virginia—Woodfield, West Vir-
20 ginia.

Q. Do you know Fred Lang?

A. Yes, sir.

Q. This man?

A. Yes, sir.

Q. Do you remember ever having a conversation with him about Katie Gordon?

A. Well, I hear one time—

Mr. Strong : Wait.

30 Q. Did you ever talk with him about Katie Gordon or he talk with you about Katie?

A. Well, he talk about Katie Gordon.

Q. To you?

A. Yes.

Q. When?

A. That is about two years ago.

Q. What did he say?

Objected to as too remote.

Question permitted.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

F. J. SWAYZE, J. (L.S.)

Q. What did he say?

A. Well, him say nothing, but he says he going to shoot her for fear somebody marry her.

Cross Examination, by Mr. Strong.

Q. Did you ever tell that to anybody before? 10

A. No.

Q. You don't think he meant to shoot her, did you, at that time?

A. No; I don't think that, because he was drunk.

Q. What?

A. He was drunk when he said that.

Q. Do you know Fred pretty well?

A. Yes; I know pretty well about four or five years.

Q. How long has he been in this country? 20

A. I don't know.

Q. How long have you been in this country?

A. Seven years.

Q. How long have you known him?

A. Five years.

Q. Did you know him in the old country?

A. No, sir.

By the Prosecutor.

Q. Can you tell how drunk Fred was then, whether he was— 30

A. He was about half drunk anyhow.

Objected to as immaterial.

The Court: It seems to me it is quite immaterial. I will exclude it.

The Prosecutor: I only want to know he was not drunk enough—

Mr. Strong: I move to strike that testimony

out. I don't think it ought to stand. It is in the first place two years ago.

The Court: I agree with you, Mr. Strong. Two years is a good while. To put in a conversation by a man when he is drunk two years before the occurrence it seems to me is pretty remote. I will strike it out. Gentlemen, disregard all this testimony.

10

The Prosecutor: We rest.

Mr. Strong: Before the State rests I would like to recall Rose.

Rose Gordon, recalled.

Further Cross-Examination, by Mr. Strong.

Q. As you and your sister Katie and Fred were standing by the trolley track, what was the last conversation you heard between them?

20

A. Well, now, my sister says to him, "Why, Uncle Fred, what are you going to send me from Pennsylvania?" and he says to her, "What will I send you," and she says, "There is a lot of fellows down there. Send me a nice fellow."

Q. That was the very last?

A. Yes, sir; that was the very last words she said.

Q. And then the shot was fired instantly at that time?

30

A. Yes.

State rests.

Mr. Strong: If your Honor please, we feel the grave responsibility, but have determined not to offer any evidence.

The Court: The case is closed. Counsel may proceed.

Both sides rest.

(During Mr. Alan Strong's argument.)

Mr. Strong: I desire to read from the New York reports.

The Prosecutor: I object to the offer of reading the New York reports.

The Court: I think I will exclude your offer.

Mr. Strong: I propose to read from the case of Leighton vs. The People, in 88 New York Court of Appeals Reports, at page 120, as to the construction of the words "premeditated" and "deliberate" by the courts of that State. 10

The Court: Yes. I will sustain the objection of the Prosecutor.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

F. J. SWAYZE, J. (L.S.)

Mr. Strong: I wish also to read from the case of the People vs. Koenig in 180 New York, on page 161. 20

The Court: For the same purpose?

Mr. Strong: Yes; for the purpose of quoting what is there taken from the People vs. Majone, 91 New York.

The Prosecutor: I object.

The Court: I sustain the objection.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.) 30

F. J. SWAYZE, J. (L.S.)

Recess till 2 P. M.

Afternoon session, 2 P. M.

(During the Prosecutor's argument Mr. Strong objected to statements made by the Prosecutor.)

The Court: I think the Prosecutor is within the lines of comment. I decline to stop the Prosecutor. The Prosecutor stated that the defendant was licentious in his conduct, beastly in his desires—

10 The Prosecutor: I will state it. "A monster in his passions, licentious in his desires, bestial in his love, brutal when thwarted and cowardly when caught."

Mr. Strong: I submit that the characterization "beastly and licentious" is entirely apart from the evidence and unsupported by the evidence and ought to be stopped.

The Court: I decline to interfere with the Prosecutor.

20 (Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

F. J. SWAYZE, J. (L.S.)

STATE VS. LANG.

COURT'S CHARGE TO JURY.

30 *Gentlemen of the Jury*,—The prisoner at the bar is presumed by the law to be innocent until he is proven guilty, and the State must not only prove him to be guilty, but they must prove his guilt beyond a reasonable doubt. If upon a review of the whole evidence, you entertain a reasonable doubt as to whether he is guilty of any crime at all it will be your duty to acquit him. If you think he is guilty of some crime, but entertain a reasonable doubt as to the degree of the crime, your duty will be to convict of the lesser offence. But while you are bound to give the prisoner the benefit of every reasonable doubt, you

are not bound to give him the benefit of anything but a reasonable doubt. Under the indictment in this case the prisoner may be found guilty either of murder in the first degree, murder in the second degree or manslaughter, and the crimes I now proceed to define.

Murder in the first degree consists in the taking of a human life with intent to kill, and that intent must be executed with deliberation and premeditation. It is not necessary that that deliberation and premeditation should continue for an hour or even for a minute; it is enough that the design to kill be fully formed and purposely executed. 10

Murder in the second degree consists in the taking of the life of a human being either without an intent to kill, but with an intent to do seriously bodily harm, or if there is an intent to kill, an intent executed without the deliberation and premeditation necessary to constitute the crime of murder in the first degree.

You will see, therefore, that the two important 20 elements necessary to constitute the crime of murder in the first degree are an intent to kill and the execution of that intent with deliberation and premeditation. I do not know that I can define those words better than they define themselves. Deliberation and premeditation imply a weighing of the matter and a forthought with regard to the matter; but, as I have stated, that weighing of the matter and that forthought need not be for an hour or even for a minute. The law presumes that an unlawful killing 30 is murder in the second degree, and it is for the State to satisfy you that the elements of deliberation and premeditation and of intent to kill are present which are necessary to raise it to the crime of murder in the first degree. If you entertain a reasonable doubt upon that subject, but are satisfied that the crime of murder has been committed, then find the prisoner guilty of murder in the second degree.

While it is for the State to prove the elements which are necessary to raise a crime which otherwise

would be murder in the second degree to murder in the first degree, the crime may be decreased by proof upon the part of the defendant to the crime of manslaughter.

10 Manslaughter is the taking—so far as we are concerned in this case—is the taking of a human life under such circumstances of sudden passion produced by an adequate provocation that for a time the prisoner may be presumed not to be master of him-
self or of his own understanding; but the impulse must be a sudden one and the provocation must be adequate, that is to say, the provocation must be of such a character as would be likely to lead a reasonable man to a sudden act of passion and the taking of human life when thus bereft of the usual control of his faculties.

20 Do you find in this case proof of provocation such as would lead an ordinary reasonable man to resort to the act of killing under the impulse of sudden passion? If you do, the crime may be reduced to that of manslaughter. If you do not, you would not be justified in finding him guilty of the lesser offence.

30 The first thing necessary to be proven is the killing of Katie Gordon. That, of course, is hardly disputed and I need say nothing more about that. The next element to be proven is the intent to take life or to do serious bodily harm. It can hardly be denied that there was an intent in this case to do serious bodily harm. The discharge of a pistol so close to the person of Katie Gordon requires that inference. Do you think that the proof justifies you in inferring that there was an intent to take life? He shot with a deadly weapon; he shot at close range—so close that marks of powder were found upon the girl's neck; he shot at a vital part—so vital that the bullet pierced the jugular vein and the carotid artery, and the doctor testified would result in death within from two to five minutes. Under those circumstances what inference do you, as reasonable men, draw from the prisoner's act? Did or did he not intend to take life?

The next element necessary to be proven to constitute the crime of murder in the first degree is that he acted with deliberation and premeditation. Upon this subject the circumstances of the case must be your guide and you must decide after considering all those circumstances whether he acted with the deliberation and premeditation which I have said was necessary to constitute the crime of murder in the first degree. One of those circumstances is said to be a statement made in Fader's saloon to a man named Boris, if I have the name right, the night before this occurrence, and that statement, as my notes have it, is that the prisoner said if she could not be his she should not be any one else's. Is it or isn't it a natural inference from that statement that he intended to take her life? It is not, you will see, necessary inference. He may have intended to prevent her marriage to some one else in another way. But it is a natural inference. That is upon the assumption that the statement was made to Mr. Boris, but the defence says that it is altogether improbable that such a statement was made, for Mr. Boris testified that it was made to him when Mr. Gordon and two others were very close at hand; made, I think he said, in a low tone. If the prisoner had planned then to take this girl's life, is it likely that in a public place like Fader's saloon, in the presence of the girl's father and of two other men, he would have made that remark to Boris. If he did make it does it have the meaning which the State seeks to attribute to it? You must remember also that there were other opportunities for this man to take the life of this girl, and that, so far as appears in this case, he had never attempted to avail himself of any other opportunity. Apparently they had been on terms of close friendship; apparently they were on terms of close friendship on the morning of the shooting; apparently they were on terms of close friendship up to the very instant of the shooting. What inference do you draw from those relations between these parties? Again, this occurrence

*Review of the
Proof*

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took place in a public place, by the roadside when a trolley car was close at hand, in the presence of two or more persons, with the girl's father not more, I think, than a hundred yards away. What inference do you draw from those facts as to the deliberation and premeditation on the part of the prisoner? Is it or isn't it likely that a man intending and planning a murder with deliberation and premeditation would have chosen such a spot.

10 Another circumstance which may possibly have some bearing upon the consideration of the question is the fact that the prisoner immediately ran away. I shall speak of that again in a minute in another phase of the case. Then there is evidence of the letter written in the jail to his mother. You will take the translation of the letter and you will see whether from that your minds are led to the inference that he acted with deliberation and premeditation in shooting this girl. That inference is sought to be drawn chiefly
20 or from the use of the word "vengeance" or "avenging" or "revenge" in that letter. I suppose the word "revenge," gentlemen, implies the idea of paying back or getting even with a person for some wrong. Did the prisoner use it in that sense? Is there any evidence in this case of any quarrel between him and this girl or of any wrong previously done by her to him? If he did not use it in that sense you will see that the inference sought to be drawn by the State from it is an exceedingly difficult one to draw.

30 In considering these circumstances you have the right to consider the failure of the prisoner to testify. When the State proves a distinct fact which it is within the power of the prisoner to contradict and he fails to take the stand in his own behalf to contradict it, the inference is, of course, a strong one that he is unable to contradict it. For instance, in this case it is testified to as a fact by Rose and Mary that the prisoner shot Katie Gordon. His failure to take the stand to deny the shooting is almost a confession that he shot her. But when an inference is sought to be

drawn merely from the circumstances of the case, when the testimony on the part of the State is only of certain circumstances, and they ask you to reason upon those circumstances and draw an inference therefrom, the failure of the prisoner to take the stand in his own behalf is of a very different character. There he may properly say that, admitting all of those circumstances to be true, the inference which the State seeks to draw can not properly be drawn.

Considering those circumstances, ask yourselves 10 these questions: Did he intend to take life? Did he act with deliberation and premeditation, short though the time for deliberation and premeditation may have been? If he did, if you answer both of those questions in the affirmative, he is guilty of murder in the first degree. If you answer either one of them in the negative, he is not guilty of murder in the first degree; and then ask yourselves these questions: Did he intend to take life? If he did, then, unless he has shown some defense or unless he has shown such 20 passion produced by adequate provocation as would reduce the crime to manslaughter, he is guilty of murder in the second degree. I say unless he has shown a defence, for it was argued before you this morning that the evidence on the part of the State compels the inference that the prisoner was insane. The law is settled in this State upon that subject. We know nothing of emotional insanity in New Jersey. In order that the prisoner may be acquitted upon the ground of insanity he must show that at the time 30 of committing the act he was incapable of distinguishing between right and wrong and was not conscious that the act was one which he ought not to have done. In considering whether or not he was incapable of distinguishing between right and wrong, in considering whether or not he was unconscious that the act was one which he ought not to have done, the fact that he immediately ran away, and the tone of this letter written to his mother from the jail are of the greatest importance. What do those facts indi-

cate to your mind as to his consciousness as to whether he was doing right or wrong. If he was capable of distinguishing between right and wrong, if he was conscious that the act was wrong, he can not be acquitted on the ground of insanity. Let the officers be sworn.

Gentlemen, the translation of that letter apparently was not put in evidence. You will have to therefore remember it as well as you can. I cannot let it go to you.

10 Mr. Strong: The original being in a foreign language, I am doubtful whether it ought to go to the jury.

The Court: It is in evidence. I will let it go.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

F. J. SWAYZE, J. (L.S.)

20

DEFENDANT'S EXCEPTIONS.

Mr. Strong : I would like to have a general exception to the charge.

(Which exception is hereby allowed and sealed accordingly.)

F. J. SWAYZE, J. (L.S.)

30 Defendant also excepts to the Court's refusal to charge the first request of the defendant except as it did charge.

(Which exception is hereby allowed and sealed accordingly.)

F. J. SWAYZE, J. (L.S.)

Defendant also excepts to the Court's refusal to charge the second request of the defendant except as it did charge.

(Which exception is hereby allowed and sealed accordingly.)

F. J. SWAYZE, J. (L.S.)

Defendant also excepts to the Court's refusal to charge the third request of the defendant except as it did charge.

(Which exception is hereby allowed and sealed accordingly.)

F. J. SWAYZE, J. (L.S.)

Defendant also excepts to the Court's refusal to charge the fourth request of the defendant except as it did charge. 10

(Which exception is hereby allowed and sealed accordingly.)

F. J. SWAYZE, J. (L.S.)

Defendant also excepts to the Court's refusal to charge the fifth request of the defendant except as it did charge.

(Which exception is hereby allowed and sealed accordingly.)

F. J. SWAYZE, J. (L.S.) 20

DEFENDANT'S REQUESTS TO CHARGE.

1. The crime is not murder in the first degree unless there was not only intention to kill but also premeditation and a deliberate killing.

2. Although the intent to kill may have existed in the mind of the defendant, still if the intent was formed at the instant of firing the fatal shot as the result of impulse and not of deliberation, the defendant is not guilty of murder in the first degree. 30

3. The word "deliberate" implies some degree of consideration. A deliberate act is one that is weighed, the opposite of one performed without reflection.

4. The defendant acted in the heat of passion under great provocation and without intent to kill, he is guilty of manslaughter only.

5. The State is obliged to prove every element in

the crime, beyond a reasonable doubt, and if the jury have any reasonable doubt as to the premeditation or deliberation of the act, the defendant cannot be convicted of murder in the first degree.

The jury having been charged as hereinbefore set forth, retired to consider their verdict and having afterward returned their verdict that the defendant;
10 Frederick Lang, is guilty of murder in the first degree as charged in said indictment, the said defendant, by his counsel, thereupon and before sentence pronounced, moved that said verdict be set aside and that a new trial be granted upon the ground that the evidence was not sufficient to support said verdict; which motion the Court, after hearing argument thereon by the counsl for the State and for the defendant respectively, denied.

I hereby certify that the above is the entire record
20 of proceedings had upon the trial of the above entitled cause.

F. J. SWAYZE,
Judge.

New Jersey Supreme Court.

THE STATE OF NEW JERSEY, <i>Defendant in Error.</i> v. FREDERICK LANG, <i>Plaintiff in Error.</i>	}	On Error to Middlesex Oyer. Assignment of Errors.
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[Filed December 6, 1906.]

And now on this sixth day of November, in the year nineteen hundred and six, before the Supreme Court of Judicature of the State of New Jersey, at Trenton, comes the said Frederick Lang, plaintiff in error, by Alan H. and Theodore Strong, his attorneys, and says that in the record and proceedings and also in the giving of judgment upon the said indictment against 20 him in the Court of Oyer and Terminer of Middlesex County, and in the bills of exception taken upon the said trial, there is manifest error in this:

1. That the said Court overruled and refused the motion on behalf of the said defendant to quash the said indictment (*pro ut* the bills of exception).

2. And in this, that the said Court sustained the demurrer of the State of New Jersey to the plea in abatement filed by the said defendant to the said indictment. 30

3. And in this, that the said defendant, notwithstanding his objections in that behalf made by motion to quash the said indictment and by his plea in abatement thereof, was forced and compelled by the said Court to answer unto the said indictment and to be tried, convicted and sentenced thereupon, notwithstanding that two of the members of the grand jury by which the said indictment was found and who took part in the finding thereof by said grand jury, to wit: Hezekiah Warne and Isaac S. Bennett, were at the time of being

empanelled and sworn upon the said grand jury, over the age of sixty-five years; and notwithstanding that the matter on account of which the said indictment was found occurred subsequent to the empanelling of the said grand jury and to the swearing of the two persons as members thereof; and notwithstanding that no matter had occurred or was charged to have been done or committed by the said defendant, for which he was liable to be indicted, prior to the empanelling of the

10 said grand jury or to the swearing of the said two persons as members thereof; and notwithstanding that the said defendant had no opportunity to object to the said two persons on account of their being as aforesaid over the age of sixty-five years, prior to their being sworn as members of the said grand jury. And the said plaintiff in error says that by the said action of the said Court in the premises he has been deprived of his liberty and has been sentenced and adjudged to be deprived of his life without due process of law, and has

20 therein and thereby been denied the equal protection of the laws, all contrary to and in violation of the first section of the fourteenth amendment to the Constitution of the United States, upon which the said plaintiff in error relies in that behalf.

4. That there is manifest error in this, that the said Court in empanelling the jury for the said trial, refused to call upon the State to declare whether it would challenge peremptorily, before requiring the defendant so to do (*pro ut* the said bills of exception).

30 5. And in this, that the Court excused one Charles Jackson from serving upon the said jury (*pro ut* the said bills of exception).

6. And in this, that the Court permitted one Mary Gordon, a witness, to be asked and to answer the question on the part of the State, "Did he appear to be fond of Katie or not?" against the objection of the said defendant (*pro ut* the said bills of exception).

7. And in this, that the Court permitted the said witness Mary Gordon to be asked and to answer the question on the part of the State, "Who did he appear

to think the more of Katie or the rest of you?" against the objection of the said defendant (*pro ut* the said bills of exception).

8. And in this, that the Court admitted in evidence a letter (Exhibit S. 6) alleged to have been written by the defendant to his mother, against the objection of the said defendant (*pro ut* the said bills of exception).

9. And in this, that the Court permitted one Joseph Lengel, a witness on the part of the State, to testify to a statement made by the said defendant just after he 10 had been arrested by the said Lengel and while the defendant was in his custody, against the objection of said defendant (*pro ut* the said bills of exception).

10. And in this, that the Court permitted the said witness Lengel to testify to a statement made by said defendant about two days after his arrest in answer to a question asked him by said Lengel, why he shot Katie Gordon, against the objection of said defendant (*pro ut* the said bills of exception).

11. And in this, that the Court permitted the said 20 witness Lengel to testify that in answer to a question by said Lengel what he did with the pistol, the defendant said he had thrown it away, against the objection of said defendant (*pro ut* the said bills of exception).

12. And in this, that the Court refused to permit the counsel for said defendant in his argument to the jury to read from the opinion of the New York Court of Appeals in the case of Leighton against The People, 88 New York Court of Appeals Reports, page 120 (*pro ut* the said bills of exception). 30

13. And in this, that the Court refused to permit the counsel for the defendant in his argument to the jury to read from the New York Court of Appeals in the case of The People against Koenig, 180 New York Court of Appeals Reports, page 161 (*pro ut* the said bills of exception).

14. And in this, that the Court declined to stop or interfere with the Prosecutor when he stated in his argument to the jury that the defendant was "a monster in his passions, bestial in his love, brutal when thwarted

and cowardly when caught" (*pro ut* the said bills of exception).

15. And in this, that the Court refused to charge in accordance with the first request of the said defendant as follows: "The crime is not murder in the first degree unless there was not only an intention to kill but also premeditation and a deliberate killing" (*pro ut* the said bills of exception).

16. And in this, that the Court refused to charge in
10 accordance with the second request of the said defendant as follows: "Although the intent to kill may have existed in the mind of the defendant, still if the intent was formed at the instant of firing the fatal shot as the result of impulse and not of deliberation, the defendant is not guilty of murder in the first degree" (*pro ut* the said bills of exception).

17. And in this, that the Court refused to charge in accordance with the third request of the said defendant as follows: "The word deliberate implies some degree
20 of consideration. A deliberate act is one that is weighed, the opposite of one performed without reflection" (*pro ut* the said bills of exception).

18. And in this, that the Court refused to charge in accordance with the fourth request of the said defendant as follows: "If the defendant acted in the heat of passion under great provocation and without intent to kill, he is guilty of manslaughter only" (*pro ut* the said bills of exception).

19. And in this, that the Court refused to charge in
30 accordance with the fifth request of the said defendant as follows: "The State is obliged to prove every element in the crime beyond a reasonable doubt, and if the jury have any reasonable doubt as to the premeditation or deliberation the defendant cannot be convicted of murder in the first degree" (*pro ut* the said bills of exception).

20. And in this, that the Court charged the jury that in order to constitute murder in the first degree it is enough that the design to kill be fully formed and purposely executed (*pro ut* the said bills of exception).

21. And in this, that the Court charged the jury that the law presumes that an unlawful killing is murder in the second degree (*pro ut* the said bills of exception).

22. And in this, that the Court charged the jury that in order to decrease the crime to manslaughter the provocation must be of such a character as would be likely to lead a reasonable man to a sudden act of passion and the taking of human life when thus bereft of the usual control of his faculties (*pro ut* the said bills of exception). 10

23. And in this, that the Court permitted the letter of the defendant to his mother, written in a foreign language, to go to the jury and be taken by them when retiring to consider of their verdict (*pro ut* the said bill of exceptions).

24. And in this, that the said indictment is insufficient.

25. And in this, that judgment was given for the State of New Jersey and against said defendant, whereas judgment should have been given in favor of said defendant and against the State of New Jersey. 20

Wherefore, because of the said errors and of other errors appearing in the said record and proceedings, the said plaintiff in error prays that the judgment of the said Court of Oyer and Terminer of the County of Middlesex may be reversed, annulled and for nothing holden, and that he may be restored to all things that he hath lost on occasion of said judgment.

ALAN H. & THEO. STRONG,

Attorneys for Plaintiff in Error. 30

GEORGE BERDINE,

Prosecutor.

Service acknowledged December 6, 1906.

[Joinder in error in common form, filed January 2, 1907.]

New Jersey Supreme Court.

THE STATE OF NEW JERSEY, <i>Defendant in Error.</i> v. FREDERICK LANG, <i>Plaintiff in Error.</i>	}	On Error to Middlesex Oyer and Terminer. Causes for Reversal.
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[Filed February , 1907.]

The said Plaintiff in Error having caused the entire record of the proceedings at the trial to be certified and returned with his Writ of Error, hereby specifies the following causes upon which he relies for a reversal of said judgment, that is to say:

- 20 1. Because, notwithstanding his objections in that behalf made by motion to quash the said indictment and by his plea in abatement thereof, he was forced and compelled by said Court of Oyer and Terminer to answer unto the said indictment and was tried, convicted and sentenced thereon, although two members of the grand jury by which the said indictment was found and who took part in the finding thereof by said grand jury, to wit: Hezekiah Warne and Isaac Scudder Bennett, were at the time of being empanelled and
- 30 sworn upon said grand jury over the age of sixty-five years; and notwithstanding that the matter on account of which the said indictment was found occurred subsequent to the empanelling of the said grand jury and to the swearing of the said two persons as members thereof; and notwithstanding that said defendant had no opportunity to object to the said two persons on account of their being as aforesaid over the age of sixty-five years, prior to their being sworn as members of the said grand jury. And the said plaintiff in error

says that by the said action of the said Court in the premises he has been deprived of his liberty and has been adjudged to be deprived of his life, without due process of law, and has therein and thereby been denied the equal protection of the laws, all contrary to and in violation of the first section of the fourteenth amendment to the Constitution of the United States upon which the said plaintiff in error relies in that behalf.

2. Because the said Court refused the motion made on the part of the said plaintiff in error for a new trial. 10

3. Because the evidence was not sufficient to support the verdict.

4. Because the said Judge upon the trial of said indictment in charging the jury, after referring to the testimony of one Boris, that the defendant said in a saloon on the evening previous to the shooting of Katie Gordon, that if she could not be his, she should not be any one else's, charged the jury that it is a natural inference from that statement (if made by the defendant 20 as testified by Boris) that the defendant intended to take her life.

5. Because the said Judge charged the jury that they had the right to consider the failure of the defendant to testify in determining the question of deliberation and premeditation on the part of the defendant in shooting the said Katie Gordon.

6. Because the said Judge charged the said jury that in considering whether or not the defendant was unconscious that the act was one which he ought not to have done the fact that he immediately ran away and the tone of the letter to his mother are of the greatest importance. 30

7. Because the said Judge declined to stop or interfere with the Prosecutor when in his argument to the jury he stated that the defendant was "a monster in his passions, licentious in his desires, bestial in his love, brutal when thwarted and cowardly when caught," but

on the contrary, declared that in so stating the Prosecutor was within the lines of comment.

ALAN H. & THEO. STRONG,
Attorneys for Plaintiff in Error.

Service acknowledged February 2, 1907.

GEORGE BERDINE,
Prosecutor.

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