

## New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY,  
*Defendant in Error,*

*vs.*

DAVID PETERS,  
*Plaintiff in Error.*

*Sur Indictment for  
Assault and  
Battery.*

*On Writ of  
Error.*

### Brief for Plaintiff in Error.

The writ of error in this case brings up for review, the conviction of the plaintiff in error in Essex County Quarter Sessions Court, had before the Hon. William P. Martin, Judge of the said Court, on December 16, 1914, on an indictment, charging the plaintiff in error with having committed an assault and battery in and upon one Alvin Abrams.

Having been found guilty, the plaintiff in error thereupon sued out a writ of error from the Supreme Court directed to the said Court of Quarter Sessions. Upon this writ of error the judgment of the Court of Quarter Sessions was affirmed, and the present writ brings up for review the entire record and proceedings had in the trial court and in the Supreme Court, and comes within purview of section 136 of the Criminal Procedure Act of 1898 (P. L. 1898, page 915).

## I.

The plaintiff in error is the owner of a farm fronting on Morris avenue in Millburn, New Jersey. On the 22d day of August, 1914, one Alvin Abrams in company with his mother and others, was riding in an automobile, which came to a stop on said Morris avenue, when the said Alvin Abrams got out of the automobile, together with two other persons, and entered the defendant's premises. That the defendant upon seeing them on his premises and attempting to steal his apples, and were shaking the branch of the tree, he shot off a gun pointed in the air, in order to scare them away. The said Alvin Abrams was about 400 feet away from where the defendant stood. The defendant testified that he had no intention of shooting at Abrams or any one else. There is no evidence that the defendant pointed his gun directly at Abrams. On page 24 of the printed book, the testimony on the part of Mary Brown, a witness for the State, on cross examination, is as follows:

“Q Mrs. Brown did you see Mr. Peters when he fired the second shot?

A After he fired it?

Q Did you see him when he fired the first shot?

A No, sir.

Q You turned around after he fired these shots?

A Yes, sir.”

On her direct examination the witness testified that she saw the defendant pointing the gun at the children, which is in direct contradiction to what she testifies on cross examination, as she did not see the defendant until after the shot was fired.

The evidence also shows that the said Alvin Abrams was not struck at all.

Felix McGee, Recorder of the Township of Millburn, a witness for the State, testified, that on the same day Alvin Abrams and his mother called to see him for the purpose of making a complaint against the defendant, on being questioned he testified, on page 21 of printed book:

“Q At that time did you make any examination of the boy?

A Yes, the boy bared his hip here (indicating) or some body did for him.

Q What did you see, if anything, on the hip?

A Well, there was no mark there that I could see at that time.

Q What time was this?

A Between three and four o'clock some time. It was nearer to four than it was to three.”

The next witness on the part of the State was Albert Nagel, a police officer of the Town of Millburn, his testimony on this point follows on page 22 of printed book:

“Q Did you examine the boy at all?

A Yes, sir.

Q What did you find, if anything?

A I found a little pimple on his left hip.

Q Can you explain the pimple in any way?

A It looked to me something like a mosquito bite.

Q Was the recorder there at the time, or did he come later?

A No, he was not.

Q Do you know when the recorder came?

A I should judge it was near four o'clock.

Q What time was it when you saw the boy?

A About quarter after three.”

Now, then, was this pimple that was seen on the hip of Abrams caused by a shot or was it a mosquito bite? On page 18 of the printed book, Alvin Abrams testified as follows:

“Q And what did you get out of the automobile for?

A To go to the toilet.

Q When you got out of the automobile what did you do? Where did you go?

A By the bush.”

Now is it not possible that Abrams received a mosquito bite at this place? A day or two afterwards the defendant sent Doctor Watson B. Morris to examine Alvin Abrams, and he testifies as follows, page 51 of printed book:

“Q This boy you examined, doctor, what did you find?

A I could find nothing.

Q Did you find any marks on his thigh or hips?

A I did not.

Q Did Mrs. Abrams tell you that he was the boy that was struck the day before by Mr. Peters?

A She did.

Q Did you find any black and blue marks on his body?

A I did not.”

Now is it possible that if a person is shot, nothing will appear or show on his body by way of marks or bruises, and that if there does, they disappear within ten or fifteen minutes or a day?

Abrams was never shot at; the gun could not carry the distance of 400 feet. The whole case resolves itself in favor of the defendant, on the theory, as he testified, that he shot off the gun in the air, in order to scare away Abrams and his companions from his premises, as he, Abrams and his

companions were attempting to steal apples and were shaking the branches of the tree.

Defendant had no intention of shooting at Abrams or any one of his party. There was no assault and battery committed in this case.

I take it to be the law that a person may use any necessary force in resisting a forcible trespass, or to prevent a trespass on his property.

If a person seeks to take or injure another's property not by robbery, or to trespass on his premises, otherwise than by forcibly attempting to enter his habitation, the latter may use all necessary force, short of endangering life, to prevent the trespass or to eject the trespasser.

*Comm. v. Kennard*, 8 Pick. (Mass.), 133, resisting an attempt to take a chattle.

*Comm. v. Clark*, 2 Metc. (Mass.), 23, ejecting a trespasser.

*Filkins v. People*, 69 N. Y., 101.

*Com. v. Ribert*, 144 Pa., 413.

*People v. Dann*, 53 Mich., 490.

*State v. McDuffie*, 34 N. H., 523, defense of one's dog justifiable.

*Jardin v. Cornell*, 50 N. J. L., 485.

It cannot be disputed that a man may justify an assault and battery in defense of his lands or goods, and whether he resist with greater force than is proportioned to the violence of the trespasser will be for the jury under proper instructions from the court.

Hawk., P. & C. B. 1 C. 60. sec. 23; 1 Russ, on Cr. 609 (n).

Was not the defendant in this case exercising a right to eject trespassers from his property, who were not only unlawfully on his premises but attempting to steal his apples and shaking the branch of the tree?

The defendant testified that he had been annoyed by trespassers and that he saw Alvin Abrams followed by another going to the apple tree and started to shake a branch, in fact, shook the branch and that the defendant called out to him to go away, and Abrams did not go, and that thereupon the defendant shot the gun, not at the boy, but in the air, so as to frighten away Abrams and his companions then upon his premises.

Defendant further testified that he was about 400 feet away from where Alvin Abrams was. Did the gun carry that distance?

There was no assault and battery committed in this case. Alvin Abrams was not struck at all.

Firing a gun, loaded, so that it cannot injure, not an assault.

*State v. Swails*, 8 Ind., 524, 65 Am. Dec., 772.

There must be at least an apparent present intention and ability to inflict the injury; thus to raise one's cane or fist in a threatening manner or aim a gun at another, when by reason of the distance between the parties it is evident that injury cannot possibly be inflicted, as in the case at bar, would not be an assault.

*Tarner v. State*, 43 Ala., 354.

*Smith v. State*, 32 Tex., 593.

*McKay v. State*, 44 Tex., 43.

Some courts hold that there must be not only an apparent present ability and intention to inflict the injury, but that such intention and ability must be actual.

1 Russ. Crimes, 1019.

2 Green Cr. Rep. and note page 271.

*Reg v. James*, 1 Car. & P., 530.

*Klien v. State*, 9 Ind. Appl., 365.

*People v. Dodel*, 77 Cal., 293.

In the case in question, there was no apparent present ability and intention to inflict injury; actual or otherwise.

If it is contended that there was an assault in this case, then I contend that it is not one that can be punished criminally, though it may possibly sustain a civil action for damages.

*Chapman v. State*, 78 Ala., 463.

*State v. Godfrey*, 17 Oregon, 300.

An assault may not result in a battery, as where a person strikes at another and misses him, there is an assault, but not a battery.

4 Black Comm., 120.

*State v. Morgan*, 25 N. C., 186.

*State v. Baker*, 63 N. C., 332.

*U. S. v. Hand*, 2 Wash. C. C., 435, Fed. Cases No. 15,297.

*U. S. v. Ortega*, 4 Wash. C. C., 535, Fed. Cases No. 15,971.

I respectfully submit that no crime was committed, and that the verdict is against the weight of evidence.

## II.

The trial judge charged: "The jury has a right to consider the interest of Mrs. Abrams; the interest of the little children; the interest of the aunt or neighbor, and whether or not that interest is sufficient, or has any effect, and if so to what degree, upon the truthfulness of the story told upon the witness stand. That test may be applied in the jury's discussion of Mr. Howard's testimony, and that of all the witnesses in the case, *including the defendant himself, because he has been upon the witness stand.* AND IN THAT CONNECTION THE JURY HAS A RIGHT TO CONSIDER

THE VERY GRAVE INTEREST WHICH THIS DEFENDANT HAS IN ANY VERDICT THE JURY MAY RENDER" (Assg. No. 2, and Cause No. 4).

The court must bear in mind that the State put in evidence as witnesses, the mother, Mrs. Abrams, the aunt, Mrs. Mary Ida Brown, relatives of the complainant, Alvin Abrams, and Mrs. Elizabeth T. Prange, a neighbor, who has had trouble with the defendant and showed animosity against the defendant, and only but two disinterested witnesses were introduced on the part of the State, who were, Mr. Felix McGee, recorder of the Town of Millburn, and Albert Nagel, a police officer of the same town. All of the other witnesses testified along the same line of testimony with the exception of the recorder and the police officer who testified direct and positively as to whether or not the said Alvin Abrams had any marks on his body, as heretofore discussed in our brief.

The trial judge made the fact pointed, that "the jury has a right to consider the very grave interest which this defendant has in any verdict the jury may render." After the trial judge had charged the jury that they had a right to consider the interest of the defendant because he had been on the witness stand. By the court in so charging the jury, made them understand that they could at their pleasure and without regard to the element of credibility which the evidence of the defendant may possess, reject it, because of his interest which is a grave one, or because they are not satisfied that it has not been corroborated.

It is tantamount to saying that because of the very grave interest of the defendant, his testimony is unworthy of belief, as he is the person most likely to commit perjury.

I have always understood it to be the law, that it is the duty of the jury to always consider the evidence of the accused with all the evidence in the case. The charge as given by the court to the jury, takes away the right of the defendant's presumption of innocence. The presumption of innocence is itself a piece of evidence to be weighed with the other evidence favorable to the accused in determining the question of his guilt.

*State v. Marston*, 72 Atl. (Vt.), 1075.

It is not up to the accused to prove his innocence, the State must prove the guilt of the defendant beyond a reasonable doubt; but the trial court makes the jury understand that the defendant by taking the stand shows an interest in the case which is a very grave one, and most likely to commit perjury in order to establish his innocence, so as to escape punishment.

### III.

The trial judge charged and instructed the jury in answer to a written communication sent by them to him, if whether or not it was possible to convict and recommend to the leniency of the court, in the following manner:

“Strictly speaking, as a matter of the division of power and authority, and responsibility, the duty of the jury is simply to determine the guilt or the innocence of the defendant upon the facts in evidence, and if the defendant is convicted the duty of determining whether any sentence, and if so, what shall be imposed, whether the prisoner shall be put on probation and fined, or imprisonment, or what shall be done with him, is left to the discretion of the court, within certain limitations. But while it is not the province of the

jury to recommend in reference to the matter, it has been the custom for juries to make recommendations and for them to receive careful consideration. Strictly speaking it is not a part of the duty of the jury; but when verdicts are brought in with recommendations they are received and given some consideration" (Assig. No. 3 and Cause No. 5).

By the court in so instructing the jury is error. There is no law in our State which gives the jury power to assess punishment for crime. Recommendations to leniency by juries are of no value and are mere surplusage, and our courts do not recognize such recommendations nor are they bound by them.

*State v. Overton*, 88 Atl., 689.

Where the statutes give the jury power to assess punishment for a crime, it is necessary for the judge to instruct the jury as to the possible punishment which the law prescribes.

*People v. Sainz* (1912), 162 Cal., 242.

But where the court imposes the penalty, which is the usual situation no such necessity appears.

*People v. Ryan* (N. Y. 1898) 55 Hun., 214.

*Caudill v. Comm.* (1913), 155 Ky., 578.

It may be intimated in the case at bar, that such instructions may be desirable in order to induce the jury in considering the evidence, to exercise care commensurate with the severity of the consequences of conviction. If this is done, however, the jury may use its knowledge of the penalty to adapt its verdict to what it deems adequate punishment for the defendant, thereby perverting its duty to determine merely the fact of guilt or innocence, and to that extent making the penalty for

crime dependent upon the will of the jury instead of the legislature.

*Bliss v. State*, 117 Wis., 596.

*State v. Garrison*, 59 Ore., 440.

The jury should not convict or acquit on the basis of the lightness or severity of the authorized punishment.

*State v. Peffers*, 80 Ia., 580.

*Ford v. State*, 46 Neb., 390.

And the possibility of compromise verdicts have led courts to declare instructions as to punishment reversible error.

*Comm. v. Switzer*, 134 Pa., 383.

*Ellerbe v. State*, 79 Miss., 10.

The court in the present case gave the jury to understand that the sentence would be a light one if the jury added a recommendation to leniency with their verdict of guilt, and upon that basis the jury brought in their verdict; it was in effect inducing the jury to bring in a verdict of guilty against the defendant.

If the court had told the jury that a recommendation to leniency in no way impairs the verdict, and that it is mere surplusage, the jury would have probably brought in a different verdict.

The law regarding recommendations to leniency was declared by our Court of Errors and Appeals in the case of the *State v. Overton*, 88 Atl., 689, where the defendant who was charged with murder, was found guilty of murder in the first degree, and the jury added the words "with a recommendation to the leniency of the court," it was held that such words are mere surplusage, and in no way impaired the verdict of guilty of murder in the first degree. In the present case the recommendation can be nothing else than mere surplusage, and the court erred in telling the jury that

it could consider such recommendation thereby inducing the jury to labor under the belief that the defendant would receive light punishment for the crime if the jury brought in such a verdict.

I respectfully submit that a *veniri de nuovo* should issue.

FRANK M. McDERMIT,  
*Of Counsel with Plaintiff in Error.*

## New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY, <i>Defendant in Error,</i>  <i>vs.</i> DAVID PETERS,  <i>Plaintiff in Error.</i>	}	<i>On Writ of Error to Supreme Court.</i>
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### **Brief for Defendant in Error.**

The defendant, David Peters, was tried in the Essex Quarter Sessions and convicted of assault (page 9).

The entire record of the proceedings had at the trial are returned with the writ of error.

### **Specifications Nos. 1 and 2.**

The testimony of Mrs. Sadie Abrams, of 52 Walnut street, East Orange (page 10), shows that on the twenty-second day of last August she was taking a ride in her automobile, accompanied by her two children, Carol, a girl eight years of age, and Alvin, a boy seven years of age, Richard Davies, a lad of eight years old, the son of a neighbor, and her two aunts, Mrs. Brown and Mrs. Tucker. Between three and four o'clock in the afternoon they were on Morris avenue in Millburn. The automobile was stopped, and the children got out because Alvin said "he'd have to go to the toilet" (page 12).

Shortly after this, while the children were alongside of the road, Mrs. Abrams says (page 12, line 19), "I heard a gun go off. I thought it was a tire. I turned around and I saw a man with a gun, back quite a little way up on the top of a hill. Alvin began to cry, saying 'I am hit.'"

"I told him to come and get in with me. I didn't know what to do, so I took him in, and he was crying and said he was hit. So I turned around and asked him, if he was shooting at him, and he said, 'Yes, you thief, I am.' I said I was going to have him arrested, and he laughed at me." Thereupon she pointed at the defendant as the man.

Mary Ida Brown, one of the aunts who was in the automobile, testifies at the bottom of page 23, that after she heard the shot, "I turned around and looked for who was shooting when the boy cried, and I saw a man up on the hill near the house pointing a gun at the children," and thereupon she identified the defendant as the man.

Elizabeth T. Prange testifies (page 26) that she was the next door neighbor of the defendant, and says: "I heard the report of a gun. I went out on the porch to see what it was. I saw Mr. Peters going with his gun, and getting the two dogs on the lead and strike for the road. Then I saw Mrs. Abrams—I didn't know who she was, but I saw this woman (indicating) draw up in the automobile, and I heard her holler at him, and I heard her say, 'Are you shooting at us?' He said, 'Yes, you thief.'"

The defendant testified (pages 43 and 44) that he fired the shot holding the gun "straight from the shoulder" parallel with the ground where he stood (page 43, line 35).

The testimony of Mr. Jaydell (page 57), Mr. Howard (page 59) and David Peters, the defendant (page 60), conclusively shows that the carrying power of the gun used by the defendant was sufficient for one of the shot to have struck the boy Alvin.

We respectfully insist that this testimony not only supports the conviction, but amply sustains it.

*State vs. Herron*, 48 Vr., page 524.

*State vs. Lang*, 46 Vr., page 1, at page 8.

**Assignment No. 1.**

This assignment is directed at that portion of the charge found on page 65, beginning at line 15, to wit:

“Gentlemen of the jury, it is for you to consider very carefully the question of intent with which this shot was fired. That is the principal question, it seems to the court, about which there is a sharp issue. The State claims that it was a shot with intent to injure, or such reckless disregard as to indicate a mind which showed the necessary intent to fulfill that essential element of the crime of assault and battery. The defendant says he had no such intent whatever.”

The defendant testified, page 38, line 3, as follows:

“I had been annoyed by thieves, and two children entered—an automobile stopped and children entered the orchard, a boy and a girl; and the boy took hold of the low hanging branches of the tree and started to shake. I thought there were other people coming from the automobile, and I hollered, ‘Don’t go there. Don’t you see the sign?’ No one paid any attention and I took up the gun and fired in the air.”

On page 42, line 25, the defendant said he fired the gun in the air to “attract attention.”

Inasmuch as the defendant admitted that he fired the gun, the only question in the case was, with what intent did he do this.

We respectfully submit that this portion of the charge is entirely proper and was perfectly fair to the defendant.

### Assignment No. 2.

This assignment is directed at that portion of the charge found on page 65, beginning at line 37, to wit:

"The jury has a right to consider the interest of Mrs. Abrams; the interest of these little children; the interest of the aunt or neighbor, and whether or not that interest is sufficient, or has any effect, and if so, to what degree, upon the truthfulness of the story told upon the witness stand. That test may be applied in the jury's discussion of Mr. Howard's testimony, and that of all the witnesses in the case, including the defendant himself, because he has been upon the witness stand. And in that connection the jury has a right to consider the very grave interest which this defendant has in any verdict the jury may render."

The Court, immediately preceding the portion here objected to, says, page 65, line 15:

"Gentlemen of the jury, it is for you to search the minds and consciences of these witnesses and ascertain where the truth lies. The jury has a right to consider the manner and the appearance of a witness on the stand; his accuracy of observation; his means of observation; the accuracy of recollection, memory, and all such other matters as experience shows are helpful in determining the truthfulness of the statement. In other words, the matter is left to the judgment of the jury. And among other things the jury may consider the interest of a witness in testifying."

And then follows the portion of the charge objected to.

It is certainly settled law in this State that the jury may consider the interest of a witness in testifying.

We respectfully submit that the charge of the Court in this respect correctly states the law.

**Assignment No. 3.**

This assignment is based upon instructions given the jury in response to the following request in writing:

“Is it possible in this case to convict and recommend to leniency of the court?” What occurred is set out on pages 66 and 67 of the record.

To this written request the Court replied:

“Strictly speaking, as a matter of the division of power and authority, and responsibility, the duty of the jury is simply to determine the guilt or the innocence of the defendant upon the facts in evidence, and if the defendant is convicted, the duty of determining whether any sentence, and if so, what, shall be imposed, whether the prisoner shall be put on probation and fined, or imprisonment, or what shall be done with him, is left to the discretion of the Court, within certain limitations. But while it is not the province of the jury to recommend in reference to the matter, it has been the custom for juries to make recommendations and for them to receive careful consideration. Strictly speaking, it is not a part of the duty of the jury; but when verdicts are brought in with recommendations, they are received and given some consideration.”

A recommendation to mercy accompanying a verdict of guilty is surplusage.

*State vs. Overton*, 56 Vr., at p. 295.

We respectfully submit that the instructions of the court given in reply to this request were in all respects proper, and beneficial to the defendant.

The verdict in this case, however, was “guilty of assault,” without any recommendation to mercy (page 9).

We respectfully submit that there is no error in the record, and that the judgment below should be affirmed.

Respectfully submitted,

FREDERICK F. GUILD,  
*Prosecutor.*

WILBUR A. MOTT,  
*Assistant Prosecutor.*

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**Writ of Error.**

Filed July 9, 1915.

**New Jersey Court of Errors and Appeals**

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The State of New Jersey to our Justices  
[L. s.] of our Supreme Court, GREETING:

Because in the record and proceedings  
and also in the giving of the Judgment upon a cer-  
tain indictment, which was in our said Supreme  
Court, before you between the State, defendant in  
error and David Peters, plaintiff in error, on a writ  
of error issued out of our Supreme Court to the  
Judges constituting the Court of General Quarter  
Sessions in and for the County of Essex, as is said,  
manifest error hath intervened to the great damage  
of the said David Peters as from his complaint we  
have received information, we being willing in this  
behalf to correct the error in due manner, if any  
there shall be, and that speedy justice be done to  
him, the said David Peters do command you, that if  
judgment be thereupon given, then you send dis-  
tinctly and openly under your seal the entire record,  
proceedings and indictment aforesaid, with all  
things touching and concerning the same to our  
Court of Errors and Appeals, before the Judges  
thereof, on the seventh day of July next, and this  
writ and that the records and proceedings aforesaid,  
being inspected, we may cause to be further done  
thereupon what of right and according to law ought  
to be done.

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*Return.*

Witness, Edwin Robert Walker, our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the eighteenth day of June, A. D. nineteen hundred and fifteen.

THOMAS F. MARTIN,  
*Clerk.*

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McDERMIT & McDERMIT,  
*Attorneys for David Peters.*

FRANK M. McDERMIT,  
*Of Counsel.*

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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.

[L. s.] WM. S. GUMMERE,  
*C. J.*

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*Writ of Error.*

**Writ of Error.**

Filed.

# New Jersey Supreme Court.

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NEW JERSEY, ss.

The State of New Jersey, to our  
Judges of our Court of Oyer and Ter-  
(SEAL) miner of the County of Essex, consti-  
tuting the Court of General Quarter  
Sessions, in and for the County of Es-  
sex, of the term of December, in the year of our  
Lord, nineteen hundred and fourteen, GREETING:

Because in the record and process, and also the  
giving a judgment upon certain indictment against  
David Peters, late of the Township of Millburn, in  
the County of Essex, for assault, *pro ut* the said  
indictment and the several counts therein, whereof  
before you he hath been indicted, and is therefore  
convicted by a certain jury of the county taken be-  
tween the State of New Jersey and the said David  
Peters, as it is said, manifest error hath intervened  
to the great damage of the said David Peters, as  
from his complaint we have received information,  
we being willing, in his behalf, to correct the error  
in due manner, if any there shall be, and that  
speedy justice be done to him, the said David  
Peters, command you that if judgment thereon be  
given then that you distinctly and openly send  
under your seal, the record and proceedings afore-  
said, with all things touching the same, to our Su-  
preme Court, to be held at Trenton on the twelfth  
day of January next, that the record and proceed-  
ings aforesaid being inspected, we may further  
cause to be done thereupon for correcting that error

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*Writ of Error.*

what of right and according to the laws and customs ought to be done.

Witness, William S. Gummere, Esquire, Chief Justice of our Supreme Court, at Trenton, this twenty-second day of December, nineteen hundred and fourteen.

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WM. C. GEBHARDT,  
OSBORNE & ASTLEY, *Clerk.*  
*Attorneys.*

Endorsed:

NEW JERSEY SUPREME COURT.

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THE STATE OF NEW JERSEY,  
*Defendant in Error.*

*vs.*

DAVID PETERS,  
*Plaintiff in Error.*

WRIT OF ERROR.

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OSBORNE & ASTLEY,  
*Attorneys for Plaintiff in Error.*

800 Broad Street,  
Newark, N. J.

FRANK M. McDERMID,  
*Of Counsel.*

Writ presented in open court this 23rd day of December, 1914.

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WM. P. MARTIN,  
*P. J.*

*Return.*

**Return.**

STATE OF NEW JERSEY,  
COUNTY OF ESSEX.

I, William P. Martin, Judge of the Court of  
Quarter Sessions, Essex County, New Jersey, do  
hereby certify and return to the Supreme Court of 10  
Judicature of the State of New Jersey the judg-  
ment, record and proceedings, together with all  
things touching and concerning the same and the  
entire record as by the within writ to me directed,  
I am commanded.

Witness my hand and the seal of said court and  
county at Newark, N. J., this 11 day of February  
A. D., 1914.

(SEAL)

*W. P. Martin.*  
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*Return.*

**Indictment.**

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

10 Be it remembered, that a Court of Oyer and Ter-  
miner, holden at Newark, in and for the County of  
Essex on the third Tuesday of September, in the  
year of our Lord, one thousand nine hundred and  
fourteen, by the Honorable William S. Gummere,  
Chief Justice of the Supreme Court of Judicature,  
of the State of New Jersey, and holding the said  
Court of Oyer and Terminer, in and for the Coun-  
ty of Essex, New Jersey, by the oath of Fred L.  
Baldwin, Robert Patrick, Hubert F. Hahn, Fred-  
erick Bigelow, Anthony Koelhoeffer, Francis Me-  
20 Cue, Fred W. Canfield, August Soffel, John F.  
Dey, Frank R. Kelly, John M. Delaney, David T.  
Abererombie, Adolph F. Hensler, Michael J. Me-  
Gowan, Jr., Hugh Gallagher, Wilson L. Jenkins,  
Albert J. Hahne, Louis O. Faulhauber, Merritt G.  
Perkins and Matthias Ludlow, good and lawful  
men of the said County of Essex, duly commis-  
sioned and then and there duly sworn and charged  
to enquire in behalf of the State of New Jersey, in  
and for the said County of Essex, it is presented  
30 in manner and form following, to wit:

ESSEX COUNTY, to wit:

The Grand inquest for the State of New Jersey,  
and for the body of the County of Essex, upon  
their oath present, that David Peters, late of the  
Township of Millburn, in the said County of Es-  
sex, on the twenty-fifth day of August, in the year  
of our Lord, one thousand, nine hundred and four-  
teen, with force and arms at the Township afore-  
said, in the county aforesaid, and within the juris-  
40 diction of this court, in and upon one Alvin Abrams,

*Return.*

in the peace of God and of this state then and there being, an assault did make, and him, the said Alvin then and there did beat, wound, and ill treat, and other wrongs to said Alvin then and there did, to the great damage of the said Alvin, contrary to the form of the statute in such case made and provided and against the peace of this state, the government and dignity of the same. 10

FREDERICK F. GUILD,  
*Prosecutor of Pleas.*

On the tenth day of November, A. D., nineteen hundred and fourteen, on which day the said indictment was presented by the grand jury aforesaid, to the said Court of Oyer and Terminer, and the said justice did then and there order the said indictment to be handed down to the Court of General Quarter Sessions, and to be delivered to the clerk of the Court of General Quarter Sessions, in and for said County of Essex, and then and there the said indictment was duly delivered and duly filed by the clerk of said court and an entry of such order and delivery and filing was there and then made in the minutes of said court at the same time pursuant to the statute in such case made and provided. 20  
30

*Return.*

**Plea.**

10 And afterwards, that is to say, on the nineteenth day of November, A. D., nineteen hundred and fourteen, at a Court of General Quarter Sessions, holden at Newark, in and for the County of Essex, before the Honorable William P. Martin, Presiding Judge of the Court of Common Pleas, David Peters, in the custody of John F. Monahan, Sheriff of the County of Essex aforesaid, and the said David Peters, being brought before the bar in his own proper person and forthwith being demanded of and concerning the premises in the above indictment specified and charged upon him, how he would acquit himself thereof, say that he is not  
20 guilty thereof, and therefore for good and evil he puts himself upon the country, etc., and Frederick F. Guild, prosecutor of the pleas of this state, for said County of Essex in this behalf doth the like.

Therefore, let a jury thereupon come before the Court of General Quarter Sessions, to be holden at Newark, in and for the County of Essex, on the first day of December, A. D., nineteen hundred and fourteen, then next ensuing twelve free and lawful  
30 men, each of whom shall be a citizen of this state and resident within the County of Essex aforesaid, above the age of twenty-one years and under the age of sixty-five years, by whom the truth of the matter may be better known and who are not of kin to the said David Peters, to recognize upon their oath whether the said David Peters is guilty of the premises in the said indictment specified or not guilty because the said Frederick F. Guild, Esq., prosecutor, etc., as the said David Peters puts himself upon the jury and the same time is  
40 given to the parties aforesaid at the same place.

*Return.*

And afterwards, that is to say, the sixteenth day of December, nineteen hundred and thirteen, to which day the trial of aforesaid indictment was postponed, at the same Court of General Quarter Sessions, holden before the Honorable William P. Martin, Judge of the Court of Common Pleas, comes the said Frederick F. Guild, who prosecutes as aforesaid, and the said David Peters, and the jury of whom mention is before made, and by John F. Monahan, Sheriff of the County of Essex, for this purpose empanelled and returned, to wit: Thomas Duffy, Charles F. Chase, Edward T. Conroy, Herbert A. Basset, Frank W. Dishaw, John C. Miller, Percy L. Grammer, Wallace F. Baldwin, Charles H. Bennett, William P. Gee, John McGinn, Philip Livingston being called were sworn upon that jury who to speak the truth of and concerning the premises and thereupon the trial of said issue was commenced and continued until December seventeenth, A. D., nineteen hundred and fourteen, when the jury returned into court in charge of the officer sworn to attend them, and then and there in the presence of the prosecutor, defendant and court do say upon their oath, they find the said defendant, David Peters guilty of assault, and so they say all.

Whereupon, all and singular, the premises being seen and by the court now here fully understood, it is, on this twenty-first day of December, A. D., nineteen hundred and fourteen, ordered and adjudged that the said David Peters be committed to the county jail for a term of one month, and to pay a fine of one thousand dollars (1,000) and stand committed until the fine and costs are paid, which said costs are taxed by the clerk of the sum of fifty-one dollars and one cent.

Wm P. Martin 40  
J

*Sadie Abrams, direct.*

ESSEX COUNTY COURT OF QUARTER  
SESSIONS.

Thursday, December 16, 1914.

10	STATE, <i>vs.</i> DAVID PETERS.	}	<i>Indictment for Assault and Battery.</i>
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Before Hon. William P. Martin, judge and a jury.

For the State appears Wilbur A. Mott, Esq., assistant prosecutor of the pleas.

20 For the defendant appear Messrs. Osborne & Astley.

Mr. Mott opened for the State.

SADIE ABRAMS, sworn in behalf of State.

*Direct examination* by Mr. Mott.

Q Mrs. Abrams, where do you reside? A 52 S. Walnut street, East Orange.

30 Q Are you married? A Yes.

Q What is your husband's name? A James Dexter Abrams.

Q Have you children? A Three.

Q Who is Alvin Abrams? A Who is he?

Q Yes. A The little one.

Q Well, is he your son? A Oh, yes.

Q How old is Alvin? A Seven.

*The Court.* Alvin, come here.

40 (Alvin Abrams steps in front of the witness stand.)

*Sadie Abrams, direct.*

Q Is this lad standing up here, Alvin? A Yes, sir.

Q On the 22d of August last, were you out in an automobile? A Yes.

Q Who was in the machine with you? A Two of my children and a little neighbor's boy, and my two aunts. 10

Q Your two children were Alvin— A And Carol.

Q Carol is a girl? A Yes, sir.

Q How old is Carol? A She is eight.

Q And your two aunts? A Yes.

Q What were your aunt's names? A One was Mrs. Brown and the other was Mrs. Tucker.

Q Where does Mrs. Tucker live? A She has gone on to Seattle. 20

Q Where is she now? A In Seattle.

Q When did she go back home? How soon after that? A Well, November.

Q Who was operating the machine, driving it? A I was.

Q Did anything happen there that day while you were out in the machine? Did you do anything? A No, I didn't do anything.

Q Well, did anything happen? A Well, yes. A man shot Alvin. 30

Q Did Alvin leave the machine? A Yes, the three children did.

Q Where were you when they left the machine? A On Morris avenue.

Q You were on Morris avenue in Millburn? A Yes.

Q What time of day was it, Mrs. Abrams? A Between three and four o'clock.

Q In the afternoon? A Yes.

Q What was the occasion for the children leaving the machine? A Why, they said— 40

*Sadie Abrams, direct.*

Q What was the occasion? A Why, he said he had to get out, he had to go to the toilet.

Q Where did Alvin go when he got out of the machine? A He just went down to the side of the road.

10 Q Do you know whether there was a fence along the road? A I don't think there was then. He didn't get over any fence; he didn't climb any fence.

Q What did the other children do? A Well, the two little boys—they all went; then I called the little girl back and told the two boys to stay there, and I told her to go on the other side of the road.

20 Q Then what was the first thing you saw or heard of this trouble? A Well, I heard a gun go off. I thought it was a tire. I turned around and saw a man with a gun.

Q Where was he with the gun? A Back quite a little way up on top of a hill.

Q What was he doing with the gun when you saw him? A Just finished shooting it off. He had it up in his hand.

Q Where was it pointed? How was he holding it? A He had it up in his hand.

30 Q Did you observe where it was pointed or anything? A It was pointed toward the east.

Q Do you know how many times the gun was fired off? A I know once, anyway; I couldn't say any more.

Q What happened when the gun was fired off? A Why, he began to cry. He said, "I am hit."

40 Q Who? A Alvin. I told him to come and get in with me. I didn't know what to do so I took him in, and he was crying, and said he was hit. So I turned around and asked him if he was shooting at him and he said, "Yes, you thief, I am."

*Sadie Abrams, direct.*

Q Did you see the man there? A Yes, right there. He had two dogs on a leash.

*The Court.* Indicating the defendant.

Q Was anything else said besides, "Yes, you thief, I am"? A I think that is all he said. I said I was going to have him arrested and he laughed at me. 10

Q What did you do then? A Then I went up to Millburn, and I went and told a policeman.

Q What? A I asked him to look at it with me; I was afraid to look at it; I thought maybe there was a bullet in him.

Q In the boy, Alvin? A Yes.

Q Did you look at it? A Yes, we looked at it. On his hip there was a blister. 20

Q On his hip? A On his left hip.

Q Can you tell us any more definitely what you mean than a blister? A It was raised up, sort of a white lump. Looked red, like a sting.

Q The skin was not broken? A No.

Q You examined his clothes, did you, or did you not? A No, I didn't.

Q And then where did you go with Alvin? A I went home.

Q Did anybody else see Alvin? A Not then; just the policeman and I. 30

Q Subsequently did somebody else see him? A. Oh, yes.

Q Who? A I took him home to my mother.

Q And did the doctor come to your house? A Not my doctor, no.

Q Did a doctor? A Yes, sir.

Q Who was it, do you know? A No; I don't know the name.

Q What did the doctor do when he came to your house? A He came and looked at it. I told 40

*Sadie Abrams, cross.*

him about it and he said undoubtedly he had been hit; he could see that he was black and blue.

*Mr. Astley.* I object to that, if the Court please.

10 *The Court.* That is not competent. It ought to go out. (Addressing witness). You are asked what the doctor did, and that you can tell us, but not what he said.

*Witness.* He did not do anything but look at it.

*Cross examination by Mr. Astley.*

Q Mrs. Abrams, what is the name of the child that was in the auto at the time with your two children? A Richard Davies.

20 Q Did Richard Davies and your girl get out of the car first? A They all seemed to get out together. He had gotten out ahead of my boy.

Q I mean, were they out for any length of time before Alvin got out? A No.

Q Are you sure Alvin got out before this gun was fired? A Positive.

Q Did your girl and this boy—not your own boy—go over to the apple tree? A No.

Q Did they take any apples? A No.

30 Q Did this boy that you had with you—not Alvin—did he stay at the apple tree and continue to pick apples after the gun had gone off? A He didn't go near the apple tree.

Q None of the children were near the apple tree at any time? A No.

Q That is what you wish to say? A Yes.

Q When you saw Mr. Peters was he standing by his house on the hill? A Not by his house.

Q Or near the house? A No, away from it.

40 Q How many feet? A I don't know.

Q About how many? A I haven't any idea.

*Sadie Abrams, cross.*

Q As far as from you to me? A Possibly further I should imagine.

Q About how much further? A I don't know; I can't tell.

Q Mrs. Abrams, when you turned around, after hearing the gun fired, or at the time you turned around, how was your automobile facing, towards the house or away from the house? A Why towards Morristown. 10

Q Was there a top to the automobile? A Yes, sir.

Q You didn't see Mr. Peters when he fired the gun, did you? A I didn't see him fire the gun, no. I turned around after I heard it.

Q Do you say there was a blister on the boy's thigh when he was examined in Millburn shortly after the gun was fired, and he claimed he was hit, or knew it? Was there any evidence of the blister? A No; it was just bruised, like. 20

Q Was there any evidence at all of his being hit? A Black and blue.

Q Was there more than one spot? A No.

Q Just one spot. Did you call a doctor? A No.

Q Did you consider it serious enough to call a doctor? A Well, I saw that it was not, so I didn't get a doctor. 30

Q What was he wearing the day that this occurred? A Why, he had his sweater on.

Q Did he have a coat on? A No.

Q Why didn't you call a doctor? A I don't know.

*Mr. Mott.* She has given you the reason.

*Mr. Astley.* No, she has not.

*Witness.* I saw the bullet had not gone in the child and I did not think it was necessary. 40

*Sadie Abrams, cross.*

Q You didn't think it was serious enough, is that it? A No, I didn't expect it had gone in his eye.

Q Well, it didn't hit his eye, did it? A No; but it might have.

10 Q I say, you didn't consider this injury serious enough to call a doctor? A No.

Q Can you give us any idea of the distance from the house to the automobile at the time you heard the shot fired. A I don't know how to measure by feet.

Q At the time the shot was fired was Alvin standing beside the automobile? A He was down off the roadway in the bushes.

Q And the automobile was on the road? A Yes, sir.

20 Q Was it right beside of it, in the side of the road? A Very near to it.

Q Was he ahead of it, beside it, or behind it? A Alongside.

Q Did any of the other children complain of being hit? A No.

Q Did you ever notice a mark on Alvin of the same character as the mark you saw this day or this time? A No.

Q In any other part of his body? A No.

30 Q When you heard the gun fired, and Alvin contended or claimed that he was struck, you say he was on the side of the automobile, at the side of the road in some bushes. Now, where was the girl and the other boy at that time? A The boy was there too. I had called the girl back and told her to go on the other side of the road.

Q The boy was beside Alvin? A Yes, he was with him.

40 Q And the girl was— A I think she was right alongside the road on the side of the car with me, and I called her back.

*Sadie Abrams, re-direct.*

Q Were you out of the machine? A No.

Q How near were the bushes to the automobile, the bushes on the side of the road where they were standing? A About ten feet away, I guess.

Q They were on the side toward the house, were they, or on the other side? That is, Mr. Peters' house? A On the side of his house. 10

Q And Alvin, standing in the bushes—could he be seen from where Mr. Peters stood? You saw Mr. Peters after the gun was fired? A Yes, sir.

Q He couldn't have been seen by anybody in the house, I presume? A Possibly.

Q The other children could be seen also? A Yes, sir.

Q They were altogether, practically? A Yes.

Q Did your husband make any complaint about the matter? A No. 20

*Mr. Mott.* What do you mean by complaint?

*Mr. Astley.* Any objection. It is a peculiar thing that the mother is here and not the father.

*Re-direct examination by Mr. Mott.*

Q Whose is the automobile? A It is my mother's.

Q Where does your mother live? A I live with my mother at 52 South Walnut Street, East Orange. 30

Q Have you a license to run the car? A Certainly.

ALVIN ABRAMS, called to the stand.

*By the Court.*

Q How old are you, Alvin? A Seven.

Q You are seven years old now? A Yes, sir. 40

*Alvin Abrams, direct.*

Q When was your birthday, do you know? (No response.)

Q You don't remember that? A No, sir.

Q Do you go to Sunday School? A Yes, sir.

Q Do you know what will happen to you if you don't tell the truth? Do you know what telling  
10 the truth is—to tell a story? A Yes.

Q What will happen to you if you do not tell us the truth? (No response.)

Q Do you know you will be punished if you don't tell the truth? A Yes.

*By Mr. Mott.*

Q Do you go to church? A No.

Q Go to Sunday School? A Yes.

Q What Sunday School do you go to? A  
20 Christ Church.

*The Court.* He may be sworn.

ALVIN ABRAMS, sworn in behalf of State.

*Direct examination by Mr. Mott.*

Q Alvin, did you go out in the automobile one day last summer with your mother? A Yes.

Q And did you get out of the automobile? A  
Yes.

Q And what did you get out of the automobile  
30 for? A To go to the toilet.

Q When you got out of the automobile what did you do? Where did you go? A By the bush.

Q And did anything happen to you while you were there? A Yes, sir.

Q What happened? (No response.)

Q Well, let me ask you this, Alvin. Did you hear anything? A Yes.

Q What did you hear? A A noise.

Q And did anything happen to you at the time  
40 you heard the noise? A Yes, sir.

*Alvin Abrams, cross.*

Q What happened? A I got hit.

Q Whereabouts did you get hit? A The left hip.

Q Point out the place, will you? A Whereabouts? Put you hand on the place where you got hit?

(Witness indicates.)

10

*Mr. Mott.* He is putting his hand on his left hip on the side.

*The Court.* Stand him up on the chair there.

(The witness stood up on the witness chair.)

*The Court.* Where is that, Alvin?

(Witness indicates.) Around on the left hip about the waist line.

Q After you got hit what did you do, Alvin? 20  
A I cried.

Q Then what did you do? A I went to my mother.

*Cross examination by Mr. Astley.*

Q Alvin, what other children were in the car at the time you were hit? That is, who were out riding that day, your brother or your sister?

A My sister.

Q And another boy? A Yes.

30

Q What is his name? A Richard Davies.

Q Did Richard and your sister get out of the car? A Yes.

Q Where did they go when they got out of the car? A Richard went with me.

Q Did Richard get any apples? A No.

Q Did you or your sister get any? A No, sir.

Q Didn't get any at all? (No response.)

Q And did you have any bruise on you? Did you see any marks on you, afterwards? A I saw it on the sweater. 40

*Felix McGee, direct.*

*By Mr. Mott.*

Q What was it you said? A I thought I saw a hole in the sweater.

*By Mr. Astley.*

10 Q Did you see any mark on you at all besides the hole in the sweater? A Yes.

Q Did you ever have a mark on you like that before, Alvin, or since? (No response.)

Q Did the doctor come to see you the next day? A Yes, sir.

Q Did he find anything on you, do you know?

*Mr. Mott.* I object.

Q Was there any mark on when the doctor saw you? A Black and blue.

20 *By the Court.*

Q How big was the black and blue place? Hold up your two fingers and show us. About half an inch, was it, or less? A Yes.

*By Mr. Astley.*

Q How many marks were there, Alvin; just one or two? A Just one.

30 FELIX MCGEE, sworn in behalf of State.

*Direct examination by Mr. Mott.*

Q Do you hold any official position, Mr. McGee? A Yes, sir.

Q What is it, please? A One of them is Recorder of Millburn Township.

Q Do you remember seeing Mrs. Abrams on the 22d of August last? A Yes, sir.

40 Q Did you see the little boy, Alvin, who was on the stand? A Yes, sir; I did.

*Felix McGee, direct.*

Q Where did you see Mrs. Abrams? A In the Town Hall, the police court part of the Town Hall.

Q That is where you saw the boy? A Yes, sir.

Q At that time did you make any examination of the boy? A Yes, the boy bared his hip here (indicating) or somebody did for him. 10

Q What did you see, if anything, on the hip? A Well, there was no mark that I could see at that time.

Q What time was this? A Between three and four o'clock sometime. It was nearer to four than it was to three.

Q Did Mrs. Abrams make a complaint to you? A She made a complaint, yes.

Q You took the complaint? A I took the complaint. 20

Q You say you saw no mark at all? A No mark at that time.

Q Haven't you said that there was? A Who, me?

Q Yes?

*Mr. Astley.* I object on the ground that they are impeaching their own witness.

*The Court.* Under the case of *State vs. D'Adame*, 87 Atl., decided by the Court of Errors and Appeals you are permitted to ask the question, not for the purpose of impeaching your witness but for the purpose of neutralizing the effect of the witness put on the stand in good faith to testify as expected. However, the objection is that it obviously does not call his attention to the time, circumstances and persons present when he is suppose to have made the statement. I will sustain the objection for the latter reason. 30 40

*Albert Nagel, direct.*

*Mr. Mott.* I ought to say that I am mistaken. I had no reason to suppose that the Recorder had said anything different.

ALBERT NAGEL, sworn in behalf of State.

*Direct examination by Mr. Mott.*

10

Q You are a police officer of Millburn? A Yes, sir.

Q A constable or police officer? A Police officer.

Q On the 22d of August last, did you see Mrs. Abrams and her little boy, Alvin, at the police station? A Yes, sir.

Q Did you examine the boy at all? A Yes, sir.

20

Q What did you find, if anything? A I found a little pimple on his left hip.

Q Can you explain the pimple in any way? A It looked to me something like a mosquito bite.

Q Was the Recorder there at that time or did he come later? A No, he was not.

Q Do you know when the Recorder came? A I should judge it was near four o'clock.

Q What time was it when you saw the boy?

A About a quarter after three, I think.

30

Q Do you know what time the Recorder saw the boy? A At four o'clock or around four o'clock.

*Juror No. 2.* Your honor is the jury permitted to propound a question to the witness.

*The Court.* You may propound the question. The court will decide whether it is a proper question or not.

40

*Juror No. 2.* I would like to ask the witness whether he has ever seen human flesh

*Mary Ida Brown, direct.*

immediately or shortly after it had been struck by a bullet of some sort.

*The Court.* That call for the investigation of a number of different things. I think the question ought to be withdrawn.

MARY IDA BROWN, sworn in behalf of State. 10

*Direct examination* by Mr. Mott.

Q Mrs. Brown, you are an aunt of Mrs. Abrams, I believe. A Yes, sir.

Q You were in the automobile on this day, were you? A Yes, sir.

Q Do you remember the automobile stopping and the children getting out? A Yes, sir.

Q Where did the children go after they got out? A They jumped right out and danced around in this lot; as we thought it was a vacant lot. There was no fence up, not where we were. 20

Q You say danced around? A Yes, and the little boy went to the bushes, these sumac bushes; and the other little boy went to the other side.

Q The girl got out, too? A She got out and her mother called her back and told her to go to the other side.

Q While the children were out there, did anything happen? A We heard a shot. They weren't out five minutes when the shot was heard. We thought it was a tire. 30

Q Just what you saw? A There was another shot, and the little boy cried that he was hurt, that he was hit.

Q How many shots were there? A Two.

Q Did you see anybody with a gun? A I turned around and looked for who was shooting when the boy cried and I saw a man up on the hill near the house pointing a gun at the children. 40

*Mary Ida Brown, cross.*

Q Would you recognize the man? A Yes, man there. (Indicating defendant.)

Q Did you turn before or after the second shot was fired? A I turned after the second shot. When the child cried I turned to see who was shot.

10 *Cross examination by Mr. Astley.*

Q Mrs. Brown, did you see Mr. Peters when he fired the second shot? A After he fired it.

Q Did you see him when he fired it? A No; I heard the shot.

Q Did you see him when he fired the first shot? A No, sir.

Q You turned around after he fired these shots? A Yes, sir.

20 Q And the children when he got out of the machine—you said that Alvin went up near some bushes and the other boy went to the lot? A No, on the other side. I say that one went that way (indicating) and the other went that way (indicating).

Q On the other side of the road? A No, in the same lot.

30 Q Did the other boy get near the apple tree? A No, the apple tree was about twenty-five or thirty feet away from him.

Q From the road? A From the children.

Q The children were how far from the road? A About seven feet, just inside the line.

Q Then in your idea the apple tree was forty feet from the road?

*Mr. Mott.* I object. She did not say that.

40 Q Seven feet from the road to the bushes, thirty feet to the tree, forty altogether? A No, twenty-five or thirty feet, I said, to the road from where the children were.

*Mary Ida Brown, cross.*

Q How far to the apple tree? A Twenty-five feet, I said.

Q That would make it about fifty feet? A Oh, no.

Q How far were the bushes where the children were from the road? A Not very far. Five to seven feet. 10

Q How far in your judgment was it from the bushes up to the apple tree? A From twenty-five to thirty feet from the children.

Q That would make it about fifty feet from the apple tree to the road? A I don't know.

*The Court.* Well, we can do that.

Q Are you positive that the gun was fired twice? A Yes.

Q You say Mr. Peters was standing near the house when you saw him? A Yes. 20

Q Did the automobile you were in have a top? A Yes.

Q Which way was it stationed, toward the house or away from the house? A Toward Morristown.

Q Was it away from the house? A Yes.

Q And the children standing by the bush were practically by the side of the automobile? A Not far away from it.

Q Were they ahead of it, behind it or alongside of it? A Just alongside of it. 30

Q Alongside of it, by the side of the road? A Yes.

Q Did you ever see Mr. Peters on any other occasion except to-day and the day that the gun was fired? A No.

Q You wear glasses, Mrs. Brown? A Yes.

Q Can you see 400 feet and recognize a man? A Well, not very good, I don't think. He had a slouch brown hat on. 40

*Elizabeth T. Prange, direct.*

Q The man who fired the gun? A Yes.

Q You say you cannot see very well 400 feet away? A I don't know whether I could or not. I never tried it.

10 ELIZABETH T. PRANGE, sworn in behalf of State.

*Direct examination by Mr. Mott.*

Q You are married, Mrs. Prange? A Yes.

Q Where do you reside, Mrs. Prange? A In Millburn.

Q With reference to the home of the defendant where is your home? A Why, in the country, next door; but a little distance.

20 Q You have adjoining places? A Yes, the property adjoins.

Q Do you know the defendant? A Yes.

Q How long have you known him? A He has lived in the neighborhood, I guess, eight or nine years.

Q During that time you have known him, you have known him by sight? A Oh, yes, I know who he is.

Q Do you remember the 25th of August last? A Yes.

30 Q Was your attention directed to anything? A Yes.

Q To what? A I heard the report of a gun. I went out on the porch to see what it was.

40 Q What did you see? A I saw Mr. Peters going with his gun and getting the two dogs on the lead and strike for the road. Then I saw Mrs. Abrams—I didn't know who she was, but I saw this woman (indicating) draw up on the automobile and I heard her holler at him and I heard her say, "Are you shooting at us"? He said, "Yes, you thief."

*Elizabeth T. Prange, cross.*

Q Did you go down to the automobile? A No; it is a distance.

Q I say, did you go down to the automobile?

A At the time?

Q Yes. A No.

Q You had never seen Mrs. Abrams at that time? A No; didn't know who she was at all. 10

Q Did you see the little boy? A After it had occurred, yes.

Q Where was he? A In the machine with his mother and the other children.

Q Did you observe what the little boy was doing at the time? A I couldn't say.

Q You were in the house when the first shot was fired?

*Mr. Astley.* I object. She did not say that he fired more than one shot. 20

Q Where were you when these shots were fired?

A I was in the house.

Q Did you hear one or two shots? A Only, to my knowledge, one.

Q Then you went out? A I stepped out on the porch to see where the noise was.

Q Where was Mr. Peters? A When I stepped on the porch he was stepping toward the place where he had his dogs fastened. He loosened the two dogs and started toward the road with his gun in his hand. 30

*Cross examination by Mr. Astley.*

Q When you heard the gun, Mrs. Prange, you were in the house? A Yes.

Q You did not see Mr. Peters at the time it was fired? A No.

Q You say your house is about 500 feet from Mr. Peters? A I didn't say. You didn't ask me. 40

*Richard Davies, direct.*

Q How far was it from your house to Mr. Peters's house? A Between 400 and 500 feet, as near as I can judge.

Q When Mr. Peters went back to get the dogs did he lay the gun down? A Not that I saw.

Q Are you sure whether he laid the gun down  
10 or not? A I am not sure; I didn't see him.

Q When he got the dogs did he turn them loose or hold them on a string? A He had them on a lead.

Q When the automobile drove up to Mr. Peters' house Mrs. Abrams said, "Are you shooting at us," and he said, "Yes, you thief"? A Yes.

Q You heard that 500 feet away? A Yes, I heard it, because it was in loud tones.

Q Have you ever had any trouble with Mr.  
20 Peters? A What do you mean by "any trouble"?

Q Have you had any trouble at all? A No, I have never had any trouble. He has annoyed us, and endangered our property and things.

RICHARD DAVIES, called to the stand.

*By the Court.*

Q How old are you? A Eight to-day.

30 Q Do you go to Sunday School? A Yes.

Q Do you know what it is to tell the truth or tell a wrong story? A Yes, sir.

Q Do you know what will happen to you if you take an oath and then do not tell us the truth?

A Yes, sir.

*The Court.* Swear him.

*Richard Davies, cross.*

RICHARD DAVIES, sworn in behalf of State.

*Direct examination by Mr. Mott.*

Q Richard, where do you live? A 74 Lenox Avenue.

Q Do you live next to Mrs. Abrams? A Yes, sir. 10

Q Did you go out riding with her in the automobile one time last summer? A Yes, sir.

Q Do you recall whether the automobile stopped and you children got out? A Yes, sir.

Q When the automobile stopped who got out of the machine? A Alvin, me and Carol.

Q Where did you go when you got out of the machine? A We went out on the side lot.

Q What for? A To go to the toilet.

Q And did you do anything else besides that? 20  
Did you get anything or do anything? A No.

Q Did you hear anything? A Yes, I heard a shot. I was in the auto, though, when the shot went.

Q You were in the auto when the shot— A I got ahead of Alvin, I got in the auto ahead of Alvin.

Q You were in the machine when you heard the shot? A Yes.

Q After the shot what did Alvin do? A He 30  
started to cry.

Q Then did he get in the machine? A He went to his mother and got in the machine.

*Cross examination by Mr. Astley.*

Q Where was Carrie? A She was over on the other side.

Q She had not gotten in yet? A No, she was on the other side of the auto.

Q When you were in the automobile you heard the gun go off? A Yes. 40

*Carol Abrams, direct.*

Q Did you get any apples that day, Richard?

A No.

Q You didn't try to get any? A No.

Q Has anybody been talking to you about this case? A No.

Q In the last day or two? A No.

10 Q Did anybody talk to you about the case since it happened? A No.

CAROL ABRAMS, called to the stand.

*By the Court.*

Q Are you Carol? A Yes, sir.

Q How old are you, Carol? A Eight.

Q Eight years old now? A Yes.

20 Q Do you go to Sunday School with your brother? A Yes, sir.

Q Do you know what will happen to you if you do not tell us the truth? A Yes, sir.

*The Court.* Swear her.

CAROL ABRAMS, sworn in behalf of State.

*Direct examination by Mr. Mott.*

Q Carol, is this your mother sitting over here (indicating) A Yes.

30 Q Alvin is your brother A Yes.

Q Did you go auto riding with your mother and Alvin, and Richard, one day last summer? A Yes, sir.

Q Did the auto stop? A Yes.

Q Did anybody get out of the automobile? A Yes.

Q Who got out? A Alvin, Richard and me.

40 Q And when you got out of the automobile where did you go, Carol? A I didn't go down, I went to the other side.

*Motion for Direction of Verdict.*

Q Did you hear anything? A Yes.

Q What? A I heard like a shot.

Q Where were you when you heard the shot?

A Over on the other side of the road.

Q You had not got in the automobile then? A  
No.

Q After the shot what did Alvin do? A He 10  
was crying.

Q Where did he go? A He ran back on the  
automobile.

*Cross examination by Mr. Astley.*

Q Carol, did you get any apples that day?

A No.

Q None at all? Did you hear the gun go off?

A Yes.

Q How many times did it go off? A I only 20  
heard it once.

Q Has anybody been talking to you about this  
case? A No.

Q Did anybody talk to you since it happened?

A No.

## STATE RESTS.

*Mr. Astley.* If I would not jeopardize my  
rights any I might make a motion.

*The Court.* The court will permit you to go 30  
into your testimony if it is denied. You may  
make the motion.

*Mr. Astley.* I would like to make a motion  
to have a judgment in this case, at this time,  
on the ground that the State has put in evi-  
dence here the mother, the aunt, the children,  
a neighbor who has had trouble with the de-  
fendant and two disinterested witnesses, the  
police judge, the recorder and an officer, and 40  
the testimony of all of the relatives, with the

*Motion for Direction of Verdict.*

exception of Mrs. Brown, the aunt, has been practically the same. You can see that they are all interested.

*The Court.* I do not want to hear any discussion I simply want to hear the grounds of the motion.

10 *Mr. Ashley.* My motion is for a judgment for the defendant.

*The Court.* You mean that you move for the direction of a verdict to acquit the defendant.

20 *Mr. Astley.* Yes, sir. The ground is that the two disinterested witnesses, police judge and the officer claimed that they saw no marks on the child, and I contend that the testimony of the other parties, without going into it—that there is a mistake here about the child ever having been struck at all.

*The Court.* What difference does it make whether he was struck or not?

*Mr. Astley.* Or shot at—no testimony that he was shot at.

30 *The Court.* The testimony is that the defendant said he did shoot at them. You cannot make a motion for the direction of a verdict on the ground of the weight of the testimony. Your motion assumes that the parties are interested. It may be that they are not. That is all a matter for the jury. Motion denied.

Defendant's counsel prays an exception to this ruling of the court, and the same is allowed, and it is sealed accordingly.

(L. S.)

*J. P. Martin* Judge.

*John J. Kentz, direct.*

JOHN J. KENTZ, sworn in behalf of defendant.

*Direct examination by Mr. Astley.*

Q Mr. Kentz, what is your business? A Civil engineer and surveyor.

Q How long have you been in that business? A Eight years. 10

Q At the request of the defendant, Mr. Peters, did you make a survey of his property lately? A I did.

Q I draw your attention to an outline or sketch on the exhibit board and ask you if you made that? A I did.

Q I ask you when you made that? A It was made November 30, 1914.

*By the Court.*

Q Did you make it from actual measurements that you made on the ground? A I did. 20

Q When did you make your measurements? A November 30, 1914.

Q What is the scale of this map? A There are two scales. I have got a profile, your honor, and a plan. The plan scale is twenty feet to the inch.

Q Turn around and tell the jury? A This plan is drawn to a scale twenty feet to the inch. Up here (indicating) is a profile showing the surface of the ground. The ground is not level. From the point here, point A, from the point where the defendant was supposed to be standing when the gun— 30

Q Never mind that. Just describe the physical characteristics of the land? A The ground does not run level. From this here point (indicating) to the tree it is quite a hollow. This here line (indicating) indicates the surface of the ground. 40

*John J. Kentz, direct.*

Q The red line at the top? A Yes. That scale is a horizontal scale, one inch equals twenty feet to the inch. The vertical scale is four feet to the inch. This (indicating) is a dwelling house.

*Mr. Astley.* I want a mark at the place where he said "this is a dwelling house."

10

*The Court.* You cannot mark the map, but ask him question which will bring out the point which you want to get at.

*By Mr. Astley.*

Q This point on the map marked "dwelling"—do you know whether or not that is Mr. Peter's dwelling or house, where he lives? A That is Mr. Peters' dwelling.

20

Q This point marked "B," what is that? A Apple tree.

Q What is this black line I am pointing to? A That is the side line of the road.

Q What is the distance from the point "B," the apple trees, to the road? A Forty feet.

Q What is this black mark? A Another apple tree.

Q What is the distance from that to the road? A Forty-seven feet.

30

Q What is the black mark north of the dwelling marked "A"? A That was the place pointed out, supposed to be where Mr. Peters was standing when he fired the shot.

Q Pointed out by whom? A By Mrs. Peters.

Q From the point "A" on this map which you have described as an apple tree to the point "B," how many feet is that? A 374 feet.

Q That is a straight line? A That is a straight line, yes.

40

*John J. Kentz, cross.*

*By the Court.*

Q What point is that, from the point "A"?

A North of the house to the apple tree "B," 374 feet.

*By Mr. Astley.*

Q At a point on the road parallel to the apple tree "B" what would be the distance from such a point to the point "A" in a straight line? A 400 feet.

10

*By the Court.*

Q Parallel to or opposite to? A No.

*Mr. Astley.* It runs at an angle from the other line, starting from an angle at point "A."

20

*By Mr. Astley.*

Q From the dwelling house to point "A" it is how many feet? A Forty-one feet.

Q Is there any mark on this map between this (indicating) apple tree and the mark on the road parallel to the apple tree that would indicate bushes? A No bushes. There are two trees that stand there, a sassafras tree and another tree by the side of the road, a small tree.

30

Q Is there any sumac there? A I didn't see any.

Q You were there on November 30th? A Yes.

*Cross examination by Mr. Mott.*

Q I see on this sign the words "Sign on tree 'No trespassing under penalty. Beware of dogs.'" Where did you get that from? A There is a sign on a tree there that reads thus.

Q There are two "No trespassing" signs, are there? A Yes, sir.

40

*Felix McGee, direct.*

Q But "Beware of the dog" is only on one of them? A Only on one, yes.

Q This sign "Beware of the dog"—did that whole sign "No trespassing, beware of the dog"—in what colored letters is that? A I am not quite sure. I think it was black.

10 Q It was not red? A No, I am quite sure it was not red.

*Mr. Astley.* I offer the map in evidence. Said map marked Exhibit D. 1.

*Mr. Mott.* May I ask the privilege of putting on one witness that I did not know of before? I would like to reopen my case to do it.

*The Court.* Motion granted.

20 *Mr. Astley.* I would like to enter an objection to his putting on a witness again.

*The Court.* On what ground?

*Mr. Astley.* On the ground that the case has been closed on the part of the State.

*The Court.* It is purely a matter of discretion on the part of the court. It will not do you any harm. Objection overruled.

30 FELIX MCGEE, recalled in behalf of State.

*Direct examination* by Mr. Mott.

Q Mr. McGee, you were sworn? A Yes.

Q After seeing these marks did you see the defendant and have a talk with him? A I issued a warrant about four o'clock.

Q (*By the Court.*) Just answer yes or no. A Yes.

40 Q (*By Mr. Mott.*) About what time did you see him? A About half-past seven.

*David Peters, direct.*

Q That is when he was brought in on the warrant? A Yes.

Q At that time did you have any conversation with him in relation to this shooting? A I read the complaint to him, that is all.

Q What did he say? A He said that he fired the shot. He had been annoyed and he fired the shot but didn't think the gun would carry so far. He was very sorry if he hit the boy. 10

*By Mr. Astley.*

Q He said what? A He said he was very sorry if he hit the boy. He didn't imagine the gun would carry so far.

DAVID PETERS, defendant, sworn in his own behalf. 20

*Direct examination by Mr. Astley.*

Q Mr. Peters, where do you live? A On the Morris Turnpike, Millburn, New Jersey.

Q You are the defendant in this case? A I am, sir.

Q I wish that you would tell us just what happened on this 25th day of August, 1914, right from the start to the finish. Go ahead and tell the story to the jury. A Can I tell the existence—about the locality? 30

*Mr. Astley.* No. You go ahead and tell your story, first.

*The Court.* You had better proceed by question and answer.

Q On the 25th day of August, 1914, did you see Mrs. Abrams that was on the stand this morning, around your house? A Never sir. I never saw Mrs. Abrams until I saw her in court. 40

*David Peters, direct.*

Q On that day did you fire a gun? A I did, sir.

Q For what reason? A I had been annoyed by thieves, and two children entered—an automobile stopped and children entered the orchard, a boy and a girl, and the boy took hold of the low hanging branches of the tree and started to shake. I thought there was other people coming from the automobile, and I hollered, “Don’t go there. Don’t you see the sign?” No one paid any attention and I took up the gun and fired in the air.

Q Well, did you see him take any apples? A I from the shoulder in the air. On account of the low hanging, low ground the top of the tree is on a level with where I stood, about.

Q Did you point in the direction of the automobile? A No, sir.

Q What make of gun was that, Mr. Peters? A A Victor Plane manufactured by the American Gun Company.

Q (*By the Court.*) A rifle or a shot-gun? A A single-barreled shot-gun.

Q (*By Mr. Astley.*) What bore was it? A 12 bore, I believe.

Q When you fired that gun did you fire it with the intention of striking anyone? A No, sir. I fired it with the intention of attracting attention or warning.

Q Did the people go away? A I didn’t see them go away. First they paid no attention. I went back to get the dogs on the leash. I had considerable difficulty. In the meantime I had laid down the gun against the door and went back to get the dogs. By the time I got back with the dogs, which was about ten minutes, the automobile was in the bank by the house, alongside of the road. The house is on a terrace on a hill.

*David Peters, direct.*

Q Did you loosen the dogs? That is, loosen them off the leash? A One of them, yes; the other one was loose.

Q Are the dogs ferocious? A Not at all.

Q What was your object in getting the dogs? A I thought the barking would scare the children; scare anybody, in fact.

10

Q The child that was picking apples from the tree when you fired the gun, did he leave the tree then and go to the machine? A I didn't see. The child must have left the tree while I was going for the dogs.

Q After you fired the gun and went for the dogs did the child leave the tree? A No.

Q I show you a 12 bore shell manufactured by the Union Metallic Cartridge Company, Remington, and ask you whether that is the shell such as you fired that day? A The only 24 shells I ever had in my possession, sir.

20

Q And this is one of the twenty-four? A Yes.

Q Another one of the twenty-four you fired at that time? A Yes.

Q Did you ever have any other gun in your possession except the shot gun you speak of? A Never in my life, sir.

Q Refer to the map. I point to this building marked "Dwelling" and ask you if this is your house? A It is sir.

30

Q When you fired the gun how far were you from your house toward the tree from which you say the child was picking apples? A About four hundred feet, I think.

Q Now, how far were you toward the apple tree when you fired the gun, from your house? About how many feet? A About four hundred feet.

Q (*By the Court.*) The question is how far were you standing from your house at that time?

40

A Where I stood is forty feet.

*David Peters, direct.*

Q Forty feet from the house toward the tree?

A Yes.

Q I call your attention to two trees here marked "Apple Trees." Do you recognize those trees? A Yes, sir.

Q From which one of those two trees was the  
10 boy picking apples? A The one nearest to the house.

Q Marked "B" here? A Marked "B," yes, sir.

Q Did the automobile from which the children came, where was that on the road with relation to the tree marked "B?" A Standing parallel with the road.

Q When you stood at "A," before you fired your gun, could you see how many children came  
20 out of that automobile? A Yes, sir.

Q How many? A Two.

Q Did you see the little boy on the stand this morning called Alvin? A Yes, sir.

Q Was he out at the time you fired the gun? A I didn't see him.

Q You saw the other two children, Carol and Richard? A I did.

Q Did you recognize them as being out of the machine at the time? A Well, really, I couldn't  
30 see the size. I supposed at the time they were a girl about eleven and a boy about twelve. I couldn't recognize the children today as them.

Q How many children were there? A Just two, a boy and a girl. I could only tell by the dress, the girl had a skirt on and the boy had trousers—it was too far.

Q On those trees which the surveyor states that the sign was on, one of them which said, "Beware of the dogs," and the other which said,  
40 simply, "No trespassing"—were those signs on those trees at the time? A One was.

*David Peters, cross.*

Q Which one? A "Beware of the dogs."  
The other sign was put up later.

Q After this incident occurred what happened?  
Were you summoned anywhere? A The police  
officer came after me about six or seven o'clock  
in the evening and read a summons and I went  
to the court of Recorder McGee. 10

Q Did you see this boy Alvin and examine him  
as to the accident? A Never. The boy wasn't  
in court.

Q Did you ever send anyone to examine the  
boy? A I did.

Q Who? A Dr. Morris, the family physician.

Q Where did you send him? A I sent him—

*The Court.* How is this relevant? 20

*Mr. Astley.* I am going to put the doctor  
on the stand. I want to show how he came  
to examine the boy.

*The Court.* He sent him there. That is  
enough to identify him.

Q Mrs. Prange who was a witness this morn-  
ing is a neighbor of yours? A Yes.

Q That is, she lives next door to you? A Next  
door, five hundred feet away.

Q And the shell that you shot that day, did it  
contain one bullet or several bullets? A Why,  
it is an ordinary No. 6 shot. I think it is a fine  
bore shot. I put some there. 30

*Cross examination by Mr. Mott.*

Q You had been annoyed by thieves, you say?  
A Yes, sir.

Q What kind of apple trees are these that  
you have referred to, the two trees shown on the  
map? A One is a very fine apple tree. 40

*David Peters, cross.*

Q What kind, I asked you? A I think they call it a Mayflower; the other is a wine sap, I believe.

Q You say these children picked apples? A No, sir; I did not.

10 Q Well, your counsel has several times asked you— A I said—

Q Wait a minute. Which one of the children do you say picked apples—and you said the boy. Did you see him picking apples? A He shook the tree.

Q Did you see him picking any apples? A No.

Q What did he do, take hold of the trunk of the tree and shake it? A Took hold of the low hanging branches, sir.

20 Q You didn't like that, did you? A Why, the thought didn't occur to me of liking it, sir.

Q Well, did you like it? A Why, it is just a case of entering and trespassing a dwelling that I resented. No, I didn't like it.

Q Did you see him steal anything? A No; but it is attempting to steal, isn't it, to shake an apple tree that doesn't belong to you?

Q I don't know. A Technically.

30 Q Was he trying to get the tree? A He was trying to get the apples, evidently.

Q Well, did you see him take any apple? A I didn't wait to see him take.

Q What did you do? A "Don't go there!" Then I fired the gun in the air to attract the attention.

Q Is it your idea that death is the penalty for stealing an apple? A No, sir.

40 Q What were you doing with that gun out there? A Why, I was outside with the gun in the morning. My little girl of thirteen saw a big snake in the pasture lot; and I used the gun as a warning

*David Peters, cross.*

to any trespasser in case they did not—on such a long distance, by the time I got down to the pasture to drive them off—the people around the vicinity trespassed on the place and I used it in this instance as a warning, that is, to keep off.

Q You are in the habit then, as I understand of carrying this gun around with you as a warning to trespassers? A No, sir. 10

Q What were you doing with the gun, then? A In the morning—

Q I don't care about the morning. The time this thing occurred? A I let it stay there, that is all, instead of taking it in the house; I let it stay in the door.

Q When did you pick it up, before or after you say this automobile stopped? A After I warned them not to go there. 20

Q How did you warn them not to go there? A Hollered loudly.

Q What did you say? A "Don't go there; don't you see the sign?"

Q And they didn't pay any attention to that? A No, sir.

Q Then what did you do? Pick up your gun? A I took up the gun and shot in the air. 30

Q Well, when you stood on the hill here (indicating on map) by your house, how did you hold the gun? Will you take this pointer, please, and hold it at the level that you held this gun? A Right like that, sir (illustrating). Straight from the shoulder.

*The Court.* You are indicating a position parallel with the ground.

Q Then you mean straight from the shoulder. Well, the ground wasn't exactly level there, was it? 40

*David Peters, cross.*

*The Court.* Well, it is on a level. He held the gun, as indicated by the witness, on a level.

Q Parallel with the ground where you stood?

A Yes, sir; parallel with the top of the trees.

10 Q (*By the Court.*) Well, did you shoot the gun straight up in the air or away from you horizontally? A Why, away from me horizontally. That was in the air, sir, because it was parallel with the top of the trees. There was no one standing between me and the tree; it was air; I couldn't—

Q The first question is whether you shot up or out from you. A Out from me in the air.

20 Q (*By Mr. Mott.*) Did you see this girl stealing apples? A No, sir. She was going in, following the boy.

Q Which boy? A The boy that shook the lower branches.

Q What were the children doing at the time you fired the gun? A The boy was shaking the branches and the girl was going in towards him.

Q Going towards him from the automobile? A Yes, sir, she was in the lot, of course, about twenty feet in, and the boy was about forty feet in at the tree.

30 Q What was your idea in going to get the dogs? A To have them bark and scare the children. They evidently didn't hear the gun. I didn't recognize the children, only I thought the other people were getting out of the automobile.

40 Q Why did you have this sign "No trespassing under penalty"—why did you have the words "Beware of the dog" there, to remind the people that you had some vicious dogs that might get after them if they trespassed? A I don't remember what were the intentions when the sign

*David Peters, cross.*

was printed, but I kept the sign there for other people around the neighborhood.

Q Why did you have these words, "Beware of the dogs" put on your sign? Was it to notify people there that you had a couple of good dogs that they had better look out for? A No, sir.

Q What did you have it there for, then? A 10  
As I told you, that sign was put on a great many years ago and I kept the sign there. A great many people around the neighborhood—I never had the dogs until long afterwards.

Q What effect were the dogs going to have there? A By barking.

Q What effect did you think a dog's barking 400 feet away would have on a couple of children? A They would be frightened.

Q Did you expect the dogs to run down to the tree, then? A Not if I had them on the leash; they couldn't run. 20

Q I ask you if you expected to have them go down there? A No, sir.

Q Then the only duty you expected the dog to perform was upon his mouth by barking? A Yes, sir.

Q Did he do it? A Yes, sir, he did; he always barks when he is loose on the leash. 30

Q Did he do it this time? A Yes, sir.

Q Did it have the effect you anticipated of frightening the children? A I don't know. The children had left the tree before I returned.

Q Did you fire the shot before you got the dog? A Why, yes.

Q Then you resorted to the shot gun before you leashed the dog? A I did unleash the dog.

Q Well, did you unleash him? Did you let him go on the leash, I mean? A No. I didn't 40  
quite understand when you said leash the dog.

*David Peters, re-direct.*

Q Well, you loosened one of the dogs from the leash? A He was always loose practically.

Q What did he do? A He followed the other dog.

Q Where? A To the front of the hill where the house stands.

10 Q Then did you let the other dogs go? Were they both free? A No, sir; one was free and the other was on the leash.

Q Well, you said one followed the other dog. Where did the other dog go? A They just stood on the bank with me, that is all. The dogs are perfectly harmless.

Q Has he got a good loud bark? A Very.

Q (*By the Court.*) What kind of a dog is he? A Sort of a collie, a cross breed.

20 Q A cross between a collie and what? A A setter, I believe. There is a law—

Q Never mind that. You are asked to describe the dog. A Yes, sir.

Q (*By Mr. Mott.*) Well, is his bark such a bark as would be likely to frighten a person 400 feet away? A Well, if the children saw me with the dog, the dog was barking and they read the sign; I should think they would be scared.

30 *Re-direct examination by Mr. Astley.*

Q Mr. Peters, you say that you stood on the bank at a point marked "A" with a gun in your hand raised against your shoulder, as indicated, and at the time the gun being parallel with the ground on which you were standing? A Yes.

Q Did you aim that at the point where the children were? A No, sir.

40 Q (*By the Court.*) Was it headed or pointed in this direction? A It was pointed—I couldn't say in what direction it was pointed; it was just straight from where I stood.

*Margaret E. Peters, direct.*

Q In what direction? A No, it was the other side of the trees.

Q About where? A That (indicating on map) is where I stood. That would be about there (indicating) straight.

Q Then you pointed out a little bit to the north of the first apple tree? A Yes. 10

Q A few feet to the north? A Well, that scale is what? Twenty feet to the inch? That would be about thirty feet, I should judge.

MARGARET E. PETERS, sworn in behalf of defendant.

*Direct examination by Mr. Astley.*

Q Mrs. Peters, you are the wife of David Peters, the defendant? A Yes, sir. 20

Q You reside in the house marked "Dwelling" on the map, on the board? A Yes.

Q And do you remember on the 25th day of August, 1914, your husband shooting off a gun in the afternoon? A Yes, about four o'clock.

Q Did you see him shoot the gun? A I did.

Q Where were you? A I was in the dining room window.

Q Looking out of the dining room window? A Yes, I was sitting there. 30

Q When your husband fired the gun what position did he hold it in? A Well, he had it on his shoulder and shot for, I should think, for the trees—between the other apple tree and this way (indicating on map); right about here. He stood off here (indicating).

Q He stood at the point marked "A"? A He stood about two or three feet from the crab apple tree; that is, I should judge it would come to about here. We have another apple tree up 40 further.

*Margaret E. Peters, direct.*

Q (*By the Court.*) Do you mean to indicate north of the apple tree? A I don't know whether it is.

Q (*By Mr. Astley.*) Did you see any people down at the road there by the apple trees? A I did.

10 Q Did you see any children? A Yes, there was a girl about eight or ten and a boy that looked, from the window, about twelve or thirteen.

Q Were they the only children? A The only ones that were around there.

Q Was there an automobile there? A Yes.

Q Did you see the little boy on the stand this morning called Alvin? A Yes.

Q Was Alvin out there? A He was not.

20 Q Where was he? A I don't know; I didn't see him at all.

Q When your husband fired this shot did he point the gun toward the children? A No.

Q After he fired the shot the children that were by the apple trees, or were at the automobile, rather, what did they do? A The older boy that was in it, he was shaking the tree, and Mr. Peters called to him as a warning and he turned around, he looked and went on.

30 Q On doing what? A Shaking the tree. Whether he said anything to the girl that was there I couldn't say; I couldn't hear, but he paid no attention whatever.

Q What tree was he shaking the limbs of? A This first tree here (indicating).

*The Court.* What does she indicate?

*Mr. Astley.* "B."

*Witness.* It was right here in the center where the red line is that he was standing.

40 Q And the automobile from which the children came, where was that in relation to the trade mark

*Watson B. Morris, direct.*

“B”? A That was standing right here (indicating).

Q About parallel with the road? A No, it wasn't; it was right between this—it was facing this one sign.

Q Was the automobile facing away from that house or away towards your house? A Away. 10

Q Was there a top on the automobile? A Yes.

Q How many shots did your husband fire? A One.

Q Did you see the boy Alvin after they contended that they were shot? A No.

*By the Court.*

Q Was Carol the girl? A I don't know what her name was. 20

Q The girl that you say followed the boy, who you say was not Alvin? A It may be. On account of the color of her hair, I couldn't say; I didn't see the child's face.

Q Did you see the children that were under the apple tree get out of the automobile? A Yes

Q (*By Mr. Astley.*) Was either of the children that were under the tree, that got out of the automobile, the boy Alvin, that was on the stand this morning? A Not that boy; I didn't see him at all. 30

WATSON B. MORRIS, sworn in behalf of defendant.

*Direct examination by Mr. Astley.*

Q Doctor, what is your business? A Physician and surgeon.

Q Where? A Springfield, New Jersey.

Q How long have you been practicing? A Twelve years. 40

*Watson B. Morris, direct.*

Q Do you know the defendant, Mr. Peters?

A I do.

Q On or about the 25th day of August, 1914, did Mr. Peters ask you to go and examine anybody? A He did.

10 Q When was it he asked you? A On the evening of the 25th.

Q Where did he ask you to go, if you remember? A I think the number is 26 South Walnut street, East Orange.

Q Do you know the name of the people? A Abrams.

Q When did you go to the house to examine?

A I went the following day, I think, between one and two.

20 Q Who did you see there? A I saw Mrs. Abrams, an elderly lady.

Q Did you examine anybody? A I asked Mrs. Abrams—

*Mr. Mott.* I object to what he asked Mrs. Abrams. There was a very plain question asked.

Q (*By the Court.*) Did you examine anybody?

A I examined this small boy.

30 Q The boy sitting on his mother's lap here (indicating). Is that the boy you examined? A I don't think so.

*The Court.* He refers to Alvin. (Address the boy just indicated.) Just come up here, Alvin.

(Alvin Abrams approaches the stand.)

40 Q This boy? A Well, I really couldn't say. I went in there and just saw the boy in a casual way. I really didn't take a good look at the youngster.

*Watson B. Morris, cross—re-direct.*

Q Did you examine the boy this morning? A I examined the boy.

Q Was it a child of Mrs. Abrams? A I expect it was.

Q Did she say it was? A She did say it was.

Q Do you know how many children she had?  
A I do not. 10

*Mr. Mott.* You say that morning. He was not there in the morning.

*Mr. Astley.* That day, I mean.

Q This boy you examined, doctor, what did you find? A I could find nothing.

Q Did you find any marks on his thigh or hips?  
A I did not.

Q Did Mrs. Abrams tell you that he was the boy that was struck the day before by Mr. Peters?  
A She did. 20

Q Did you find any black and blue marks on his body? A I did not.

*Cross examination by Mr. Mott.*

Q Where did you look, doctor? A Mr. Peters asked me to go down and examine him.

Q No, where did you look? A Over the back and down over the hips.

Q You don't know who it was you examined?  
A I couldn't be positive, no. 30

*Re-direct examination by Mr. Astley.*

Q How old was the child you examined? A I should say the youngster was seven or eight years old.

*Mr. Mott.* I have not any doubt that this was the boy. She said the doctor examined him.

*Frederick W. Jaydell, direct.*

FREDERICK W. JAYDELL, sworn in behalf of defendant.

*Direct examination by Mr. Astley.*

Q Mr. Jaydell, where are you employed? A E. G. Koenig's Sons.

10 Q In Newark? A In Newark.

Q For how long? A Seventeen years.

Q Have you had any experience with shot guns and shells, and their effect? A Yes, sir.

Q Do you know the defendant, Mr. Peters here? A I met him about a month ago.

Q Did he come to you and ask you to go and examine a gun of his? A Yes.

Q Did you see the gun? A Yes, sir.

20 Q What was it? A A single-barreled shot-gun.

Q Do you know the name of it? A American Arms Company.

Q Is it known as a Victor Plane? A That was the name on the gun.

Q Have you ever had any experience with guns of that make? A Not that particular make—but guns of—with similar guns. That happened to be a cheap mail order gun that we don't handle in the store.

30 Q Do you know what bore that gun was? A It was a 12-gauge gun.

Q I show you a cartridge, a 12-gauge Union metallic cartridge, and ask you if that was the size cartridge that was used in that bore gun? A Yes, sir.

Q Since the 25th day of August, 1914, to the present time, have you ever tested this gun as to its carrying qualities? A This particular gun?

40 Q Yes. A No, sir.

*Frederick W. Jaydell, direct.*

Q From your experience in this business, and taking a gun such as this Victor Plane, or a gun of that variety, and with a cartridge of this character, with a number 6 shot, how far would it carry?

*Mr. Mott.* I object.

*The Court.* You have not qualified him. 10

*Mr. Mott.* The witness expressly says, "I don't know anything about this gun; it is a cheap gun that they don't carry." He does not know anything about it.

Q Mr. Jaydell, take this cartridge in any gun—12 gauge—

*The Court.* What cartridge, the one that is identified by Mr. Peters as being one of the 24 cartridges that he bought? 20

*Mr. Astley.* Yes.

*The Court.* Mark that D. 2.

(Said cartridge marked D.2.)

Q Take a cartridge manufactured by the Union Metallic Cartridge Company, 12 gauge, No. 6 shell, fired in any gun. In your experience how far would each shot carry?

*Mr. Mott.* I object. We haven't anything to do with any gun; we are dealing with this particular gun about which this witness says he knows something. 30

*The Court.* He has not fired that cartridge. He is not qualified.

*Mr. Ashley.* I understand that these are standard cartridges. Here is one of twenty-four in a box.

*The Court.* Did you mean, fires a cartridge of a certain charge of powder, a certain weight of bullet, and that goes a particular distance? 40

*Frederick W. Jaydell, direct.*

You have not shown that there is any relevancy between that and his firing another cartridge with another load of powder. You have not, I say, laid a sufficient foundation to permit the witness to answer the question.

10 Q Have you ever fired, or used, a No. 12 gauge Union metallic cartridge with No. 6 shot? A Yes, sir.

Q When have you fired that? A The last attempt I made was about a year ago.

Q Have you fired them very frequently? A Fired them about fifty times.

*By the Court.*

Q Where? A At the gun club.

20 Q Where? A The Smith Gun Club.

Q Where is it? A At Wiedemayer's Park.

Q Does it make any difference about the distance which a particular shot would be carried by a charge such as is in this cartridge, D. 2, what kind of a gun it is fired from? A Yes, sir.

Q One gun will carry it further than another? A Yes, sir..

30 Q What gun was it that you used when you made the test? A I used a double-barreled Fox gun.

*The Court.* Now, proceed.

Q Do you know from your experience how far a No. 6 shell in this cartridge marked D. 2 would carry in a gun such as you inspected at Mr. Peter's?

*Mr. Mott.* Yes, or no.

40 Q (*By the Court.*) Do you know? A Yes, sir.

*Frederick W. Jaydell, direct.*

Q (*By Mr. Astley.*) Then I will ask you how far would a cartridge with a No. 6 shell such as is marked D. 2 carry in this gun of Mr. Peters's?

*Mr. Mott.* May I cross examine the witness?

*The Court.* Yes.

*By Mr. Mott.*

10

Q Mr. Jaydell, you say you have had no experience with the gun in question? A Not that particular gun.

Q I mean of this make of gun? A Not that make.

Q But you say that different guns will carry different shells further than others? A Yes.

Q You mean bird shot? A Yes.

Q (*By the Court.*) This is bird shot, isn't it, in this cartridge, D. 2? A Yes, sir. 20

Q (*By Mr. Mott.*) How do you know how far this particular gun will carry? A I don't know how far that particular gun will carry.

Q Well, that is the only one we are inquiring about here. A I can only tell you from experience with guns very much like it.

*Mr. Mott.* That is all I have got to say.

*By Mr. Astley.*

30

Q Well, the make of a gun has nothing to do with its carrying quality, has it? A No.

Q What has? A The choke, the way the gun is bored.

Q A gun bored with the same choke will have the same carrying quality? A Yes.

Q Have you ever fired a gun bored with the same choke as this Victor Plane? A Yes.

Q What gun was it? A An Iver Johnson. 40

*Frederick W. Jaydell, direct.*

Q The same choke? A The same choke as that.

Q (*By Mr. Mott.*) You just told us you didn't know how far this particular gun would carry. That is right, isn't it? A I said that.

10 Q Then how can you tell how far it would carry? A I spoke only of the gun which I fired, which was an Iver Johnson.

Q But you are being asked about this gun here, the Victor Plane. Do you say you can't tell how far a Victor Plane would carry? A I didn't say that.

Q (*By the Court.*) You thought he was asking about an Iver Johnson? A An Iver Johnson that I was making the test with.

20 Q (*By Mr. Astley.*) You say the carrying quality of a gun is not in the main but in the choke? A In the choke.

Q You said what the choke of this Victor Plane was? A Yes.

Q Take that same choke in any make of gun. Have you had experience in firing it? A Yes.

Q From your experience would the same choke in another make of gun have the same quality as the same choke in a Victor Plane? A That is not very clear.

30 *The Court.* Why do you not let this witness take this gun and go far out somewhere, under conditions that are satisfactory and where it is not against the law, during the recess, and find out whether it will do it, and come back here and tell us the result? That would seem to be the only way of getting at it quickly.

RECESS.

*Frederick W. Jaydell, cross.*

AFTER RECESS.

*Mr. Astley.* I will not put Mr. Jaydell back.  
I will close the case.

DEFENDANT RESTS.

FREDERICK W. JAYDELL, re-called in behalf 10  
of State in rebuttal.

*Direct examination* by Mr. Mott.

Q Mr. Jaydell, since the court adjourned have  
you made any tests of the carrying power of the  
shot gun in question? A Yes, sir.

Q Who was with you? A Mr. Peters, the  
chauffeur, the man who did the surveying, and  
Mr. Howard. 20

Q Mr. Howard of the prosecutor's office,  
George Howard? A Yes, sir.

Q How did you make the test? A We put  
up a target at forty yards and shot at it and  
found that it was about—

Q Well, all right, go on. A The first target  
was made at forty yards. I penetrated about  
twelve pellets. Then we put up a board and the  
surveyor stood a distance, say, about 374 feet.  
We found it carried that distance. 30

*Cross examination* by Mr. Astley.

Q Did you make any test further than 375  
feet, Mr. Jaydell? A Nothing further than that.

Q In your opinion, would the gun carry further  
than that? A That is about the extreme limit.

Q 375 feet? A Yes, sir.

Q In your opinion would the gun carry 400  
feet? A I doubt it. 40

*Frederick W. Jaydell, cross.*

*By the Court.*

Q Would it carry 400 feet if it was shot from a terrace and in the direction of a place somewhat lower than the terrace? (No response.) You are speaking now and saying that in your opinion you doubt whether it would carry 400 feet up on a level, are you? A On a level.

Q (*By Mr. Astley.*) In making your test did you stand at the spot that Mr. Peter said he stood when he fired the gun? (No response.)

Q (*By Mr. Mott.*) Who fired the gun? A I fired it.

Q (*By Mr. Astley.*) Did you stand on the ridge when you fired the gun, making this test, in front of the house? A Yes, I should judge about forty feet from the house.

Q This is the character or lay of the land there? A Yes.

Q Here (indicating) is the house and here is the point marked "A" corresponding with the point marked "A" on this map? A Yes.

Q And you stood, assuming "A" is forty feet from the house—you stood at that (indicating) point and fired toward the apple tree, in your test? A Yes, sir.

Q Considering that the lay of the land can you say it would go 375 feet? A Yes, with the measurements the surveyor gave me.

*By Mr. Mott.*

Q Did Mr. Peters show you how to hold the gun in the same manner that he held it when he fired? A Yes.

Q Did you fire the gun off in the same manner that he said he did? A In the same manner, yes, sir.

*George W. Howard, direct.*

GEORGE W. HOWARD, sworn in behalf of State  
in rebuttal.

*Direct examination by Mr. Mott.*

Q Mr. Howard, you are a detective connected  
with the prosecutor's office, are you? A Yes, sir.

Q Were you present with these gentlemen when  
this gun was tested up on the ground, since recess? 10

A Yes, sir.

Q Who fired the gun? A I don't know what  
his name is.

Q That gentleman who was just on the stand?

A The gentleman just on the stand.

Q Mr. Jaydell. Where were you standing, or  
where were you? A Well, can I tell just how  
that was? 20

Q Yes. A I said to the expert—I said to Mr.  
Peters—"Mr. Peters, just show him how you held  
the gun when you shot that day, the elevation, and  
so on." I said, "Mr. Peters, have you a door?"  
We will take a door and go down behind this tree  
where you saw these children. We did. He  
showed us where the children were and where he  
shot. He said he shot over on a level with these  
trees—

*Mr. Astley.* I object. He says, "where he  
shot." 30

*Witness.* I said where he shot. He shot on  
a level with these trees. That is what he said.

*By the Court.*

Q You mean what he said. You and the rest,  
or are you telling us what you think he said in  
his testimony? A I said, "Show these men just  
how you held the gun when you shot it." We  
took the door down there, and I said, "Mr. Peters, 40

*David Peters, direct.*

which tree was it?" He showed me. I stood the door up and we said, "We will get behind it."

Q Who is "we?" A Mr. Peters and I. I hollered over to the man and I said, "Ready!" We stepped behind the door, and he shot the gun. Now, the shots scattered all around us. There were  
 10 not any that struck the door but we heard them scatter all around the door; we heard the shots strike. I said, "Mr. Peters, are you satisfied the gun will shoot that far?" And he said, "Yes, sir."

Cross examination waived.

DAVID PETERS, defendant, recalled in his own behalf in surrebuttal.

20 *Direct examination by Mr. Astley.*

Q You have heard Mr. Howard a moment ago tell about the test given, you being behind the man with the door, and about Mr. Jaydell aiming the gun at the door. Mr. Howard says further that that was the way you aimed the gun on the day in question. Is that the way which you aimed the gun at the trees on that day? A No.

Q Show us on the map the direction in which  
 30 you aimed the gun.

*The Court.* He has already told us that he held it in the general direction of that place, somewhat northerly. My impression is that he said about thirty feet north from the apple tree.

*By the Court.*

Q That would be northeasterly, wouldn't it, Mr. Peters? A This is west.

40 Q That is west down in the lefthand corner of the map? A Oh, yes, northeasterly.

*Charge to Jury.**By Mr. Astley.*

Q At the tree "B?" In what direction did you shoot that gun that day? Was it at the tree or otherwise? A Thirty feet the other side in a direct line from here (indicating).

Q When you fired that gun did you fire it with the intention of hitting anybody? A No, sir. 10

*Cross examination by Mr. Mott.*

Q You did stand behind the door with Mr. Howard this morning? A I did, sir.

Q And as you were standing behind the door there the shots did fall around you? A Yes, sir.

DEFENDANT RESTS.

Mr. Astley sums up for defendant. 20

Mr. Mott sums up for the State.

**Charge to Jury.**

The Court charges the Jury as follows:

MARTIN, J.

Gentlemen of the jury. The function of the Court is to instruct the jury in reference to the principles of law governing the case. The principles of law as charged should be accepted as a correct statement of law. The jury, however, are the sole judges of the facts, the weight of testimony, credibility of witnesses, the inferences to be drawn from the evidence and ultimate conclusions to be reached upon all the facts. The Court, in referring to the evidence, is not to be understood as deciding any facts, but merely as attempting to illustrate or explain the application of principles of law. If the Court errs in the statement 30 40

*Charge to Jury.*

of any evidence, or assumes the existence of evidence that is not before the jury, the jury is to rely upon its recollection and not upon the recollection of the Court. If any part of the evidence is referred to, seemingly giving it particular emphasis the jury is not to disregard other evidence which  
 10 it may deem of equal or greater importance. It is the duty of the jury to consider and weigh all the evidence and pertinent proof bearing upon the question of the guilt of the defendant, not only the evidence mentioned by the Court but all of the facts which may appear by the testimony. The law presumes that the defendant is innocent. This presumption can be overcome only by evidence showing beyond a reasonable doubt the guilt of the defendant. The burden of proof is upon the  
 20 State to show the guilt of the defendant and to show all of the elements of the offense, and it does not shift from the State throughout the whole case.

“Reasonable doubt is a term often used, probably pretty well understood, but not easily defined. It is not a mere possible doubt because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that  
 30 state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is on the prosecution. If upon such proof there be reasonable doubt remaining, the defendant is entitled to the benefit of it by an acquittal. The evidence must establish the truth of the fact to a reasonable and moral certainty, a certainty  
 40 that convinces and directs the understand-

*Charge to Jury.*

ing, and satisfies the reason and judgment of those who are bound to act conscienciously upon it. This is taken to be proof beyond a reasonable doubt; because if the law should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether."

10

This defendant is presented here upon an indictment found by the Grand Jury, charging, substantially, that David Peters did, on the 25th day of August, 1914, in the Township of Millburn, beat, wound and illtreat Alvin Abrams. This is a charge of the commission of the offense of assault, and assault and battery. The count in the indictment is that of assault and battery, and under it the defendant may be found guilty of assault and battery or assault.

20

Assault is an attempt or offer with unlawful force or violence to do a corporal hurt to another. A battery is the actual doing of any unlawful, corporal hurt, however slight, to another. To constitute an assault there must be an attempt or offer, with force and violence, to inflict an unlawful corporal injury. Therefore, (1) there must be an act and not a mere menace which, if not interrupted or diverted, will apparently result in injury; (2) there must be an actual or apparent intention to inflict injury; (3) there must be an intent to inflict a corporal injury and there must be present ability to inflict an injury.

30

The elements of the crime of assault and battery are two. One is that there must be some corporal hurt; and as to that element it is not necessary that there be a severe injury, because the mere touching of the person without physical pain is enough of a corporal hurt to constitute this particular element of the crime. In addition to the

40

*Charge to Jury.*

corporal hurt or physical injury there must be the other very essential element, and that is that it must be accompanied with an intent to inflict a corporal injury. If one accidentally brushes a person in an elevator that of course is not an assault and battery; but if it is done intentionally it would be a different situation.

10

In support of this indictment the State has presented the testimony of quite a number of witnesses. It is the contention of the State that these witnesses have shown by their testimony that Alvin got out of the automobile and went to some bushes near the side of the road; that they heard a shot and that Alvin immediately began to cry, and that there was a little mark, some of them say, as the Court remembers it, on his left hip and just below the waist line. Then Mrs. Abrams turned around and saw this defendant, and called out to him at that time or shortly after it and asked if he was shooting at them, and he said, "Yes, you thief!"

20

The testimony on the part of the defendant is that he had been annoyed by trespassers and that he saw a young boy whom he thought to be ten, eleven or twelve years of age—I have forgotten which—followed by a girl, and that this boy went to the apple tree and started to shake a branch, in fact he shook the branch, and that the defendant called out to him to go away and he did not go, and that thereupon the defendant shot the shotgun, not at the boy but in the air, so as simply to scare the trespasser then upon his premises.

30

The owner of premises has a right to use reasonable force to remove from them persons trespassing; using, however, no more force than is, or reasonably appears to be, necessary to remove trespassers.

40

*Charge to Jury.*

The State, in answer to the defendant's position, as the Court understands it, contends that the defendant did not remain within the protection of this principle of law, that to remove a child or two, six or seven years of age, or whatever they were, Harold and Richard Davies, and the other boy, Alvin, that he not only did not need any gun or dog, but that he could probably very readily have put all three of them off without resorting (as the State contends, I am stating now) to the use of dangerous firearms. 10

Gentlemen of the jury, it is for you to consider very carefully the question of intent with which this shot was fired. That is the principal question, it seems to the Court, about which there is a sharp issue. The State claims that it was a shot with intent to injure, or such reckless disregard as to indicate a mind which showed the necessary intent to fulfill that essential element of the crime of assault and battery. The defendant says he had no such intent whatever. 20

Gentlemen of the jury, it is for you to search the minds and consciences of these witnesses and ascertain where the truth lies. The jury has a right to consider the manner and the appearance of a witness upon the stand; his accuracy of observation; his means of observation; his accuracy of recollection, memory, and all such other matters as experience shows are helpful in determining the truthfulness of the statement. In other words, the matter is left to the judgment of the jury. And among other things the jury may consider the interest of a witness in testifying. The jury has a right to consider the interest of Mrs. Abrams; the interest of these little children; the interest of the aunt or neighbor, and whether or not that interest is sufficient, or has any effect, and if so to what 30 40

*Charge to Jury.*

degree, upon the truthfulness of the story told upon the witness stand. That test may be applied in the jury's discussion of Mr. Howard's testimony, and that of all the witnesses in the case, including the defendant himself, because he has been upon the witness stand. And in that connection  
 10 the jury has a right to consider the very grave interest which this defendant has in any verdict the jury may render.

Gentlemen of the jury, if you arrive at the conclusion, under the principles of law as stated by the Court, and upon the testimony, that this defendant is guilty of an assault and battery, the verdict should be guilty of assault and battery. If the testimony falls short of this the jury may consider the question of whether or not this defendant is  
 20 guilty under the principles of law as stated by the Court and upon the testimony, of the crime of assault, in which case the verdict should be guilty of assault. Of course, otherwise, the verdict must be not guilty.

## THE JURY RETIRE.

*Mr. Ashley.* I desire to take a general exception to the court's charge.

Defendant's counsel prays an exception to this  
 30 charge of the court, the same is allowed and it is sealed accordingly.

(L. S.)

*J. P. Martin* Judge.

After deliberation the jury return, by order of the court.

*The Court.* Gentlemen of the jury, the court has received the communication signed by Thomas Duffy. That is your foreman, is it?

*The Foreman.* Yes, sir.

40 *The Court.* (Reading): "Is it possible in this case to convict and recommend to leniency of the

*Charge to Jury.*

court." Strictly speaking, as a matter of the division of power and authority, and responsibility, the duty of the jury is simply to determine the guilt or the innocence of the defendant upon the facts in evidence, and if the defendant is convicted the duty of determining whether any sentence, and if so, what shall be imposed, whether the prisoner shall be put on probation and fined, or imprisonment, or what shall be done with him, is left to the discretion of the Court, within certain limitations. But while it is not the province of the jury to recommend in reference to the matter, it has been the custom for juries to make recommendations and for them to receive careful consideration. Strictly speaking it is not a part of the duty of the jury; but when verdicts are brought in with recommendations they are received and given some consideration.

10

20

I think that answers the question of the jury.

*The Juror.* Are we privileged to ask another question while we are down here?

*The Court.* I think you had better put it in writing.

The jury again retire.

30

40



*Specification of Causes.*

## NEW JERSEY SUPREME COURT.

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 THE STATE OF NEW JERSEY,

*Defendant in Error,*
*vs.*

DAVID PETERS,

*Plaintiff in Error.*


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*In Error.*
*Specification  
of cause for  
Reversal.*

10

The plaintiff in error specifies the following cause for reversal of the conviction against him in the above entitled case, to wit: that there is no evidence whatever in the case to support the said conviction and that the verdict is against the weight of evidence.

20

McDERMIT & McDERMIT,  
*Attorneys for Plaintiff in Error.*

30

40

*Assignment of Errors.***Assignment of Errors.**

## NEW JERSEY SUPREME COURT.

10	THE STATE OF NEW JERSEY, <i>Defendant in Error,</i> <i>vs.</i> DAVID PETERS, <i>Plaintiff in Error.</i>	}	<i>On Writ of Error.</i>  <i>Assignment of Errors.</i>
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20 Afterwards to wit, etc., in the Supreme Court of Judicature of the State of New Jersey, comes the said David Peters, by McDermit & McDermit, his attorneys, and says, that in the record and proceedings aforesaid and also in the giving of the verdict and judgment aforesaid, there is manifest error in this, to wit:

1. In that upon the trial of said cause, the court before whom it was tried, after the evidence was closed, charged and instructed the jury among other things as follows:

30 "Gentlemen of the jury, it is for you to consider very carefully the question of intent with which this shot was fired. That is the principal question, it seems to the Court, about which there is a sharp issue. The State claims that it was a shot with intent to injure, or such reckless disregard as to indicate a mind which showed the necessary intent to fulfill that essential element of the crime of assault and battery. The defendant says he had no such intent whatever."

40 2. In that upon the trial of said cause, the court before whom it was tried, after the evidence was

*Assignment of Errors.*

closed, charged and instructed the jury among other things as follows:

“The jury has a right to consider the interest of Mrs. Abrams; the interest of these little children; the interest of the aunt or neighbor, and whether or not that interest is sufficient, or has any effect, and if so to what degree, upon the truthfulness of the story told upon the witness stand. That test may be applied in the jury’s discussion of Mr. Howard’s testimony, and that of all the witnesses in the case, including the defendant himself, because he has been upon the witness stand. And in that connection the jury has a right to consider the very grave interest which this defendant has in any verdict the jury may render.”

3. In that upon the trial of said cause, the court before whom it was tried, after the evidence was closed, and the jury charged and instructed, and after deliberation, the jury returned, by order of the court, it charged and instructed in answer to a written communication sent by the jury to the court, as follows:

“Strictly speaking, as a matter of the division of power and authority, and responsibility, the duty of the jury is simply to determine the guilt or the innocence of the defendant upon the facts in evidence, and if the defendant is convicted the duty of determining whether any sentence, and if so, what shall be imposed, whether the prisoner shall be put on probation and fined, or imprisonment, or what shall be done with him, is left to the discretion of the Court, within certain limitations. But while it is not the province of the jury to recommend in reference to the matter, it has been the custom for juries to make recommendations and for them to receive careful consideration. Strictly speaking it is not a part of the duty of

*Assignment of Errors.*

the jury; but when verdicts are brought in with recommendations they are received and given some consideration.”

Wherefore, the plaintiff in error, David Peters, prays that the judgment aforesaid be reversed and altogether held for nothing, and that he may be  
10 restored to all things which he has lost by reason of the said judgment.

McDERMIT & McDERMIT,  
*Attorneys for Plaintiff in Error.*

FRANK M. McDERMIT,  
*Of Counsel with Plaintiff in Error.*

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*Opinion of Supreme Court.*

**Opinion of Supreme Court.**

Filed June 14, 1915.

NEW JERSEY SUPREME COURT.

February Term, 1915.

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THE STATE,

*vs.*

DAVID PETERS.

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*Error to Essex Sessions.*

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Argued February term, 1915; decided June term, 1915.

Frederick F. Guild, for the State.

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McDermitt & McDermitt, for defendant.

Argued before the Chief Justice and Justices Garrison and Minturn.

*Per Curiam.*

The defendant was indicted for and convicted of assault in shooting at children who invaded his yard; and the case is here on the entire record.

It is urged that the testimony adduced by the State does not support the verdict. We think there was testimony pro and con upon the facts, and the jury were entitled to draw such inferences as they thought were justifiable from the testimony, the circumstances and the conduct of the parties. There was enough in the testimony to warrant the conviction if the jury believed the testimony upon the part of the State.

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We think the comments of the learned trial Court upon the testimony were not improper, and were entirely within the sphere of judicial comment, and in no wise prejudicial to defendant. The reference

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*Opinion of Supreme Court.*

made by the Court to the interest of the witnesses was in accordance with the recognized rules of evidence, and was not improper.

The reply made by the learned Trial Court to the inquiry in writing submitted by the jury, viz.: whether it was possible to convict and recommend  
10 to the leniency of the Court, was not an improper response and was in accord with the usage and settled practice of the Courts in such a situation.

We are unable to perceive, however, in what aspect the reply of the learned trial Court could have injured the defendant.

The conviction will be affirmed.

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*Remittitur.***Remittitur.**

Entered June 15, 1915.

## NEW JERSEY SUPREME COURT.

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 THE STATE OF NEW JERSEY,
*Defendant in Error,**vs.*

DAVID PETERS,

*Plaintiff in Error.*


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 On Writ of  
 Error. Re-  
 mittitur.

The above stated cause having been duly submitted on brief at the February Term nineteen hundred and fifteen of the New Jersey Supreme Court by Frederick F. Guild, and Wilbur A. Mott, of counsel for the defendant in error, and Frank M. McDermit, of counsel for the plaintiff in error, and the Court having considered the matter and finding no error in the record and proceedings in the Essex County Quarter Sessions Court;

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It is thereupon ordered and adjudged that the judgment of the Essex Quarter Sessions Court, removed by the writ of error in this cause, be affirmed in all things with costs, and that the record be remitted to the Essex County Quarter Sessions Court to be proceeded with according to law and the practice of said Court.

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Entered June 15, 1915.

On motion of FREDERICK F. GUILD,

Prosecutor of the Pleas of Essex County,

*Attorney of Defendant in Error.*

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*Remittitur.*

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

In testimony whereof I have set my hand and the seal of said Court at Trenton, this twenty-  
10 second day of June, A. D. nineteen hundred and fifteen.

WM. C. GEBHARDT, [L. S.]

*Clerk.*

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*Assignment of Errors.***Assignment of Errors.**

Filed.

**New Jersey Court of Errors and Appeals**

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STATE OF NEW JERSEY,

*Defendant in Error,**vs.*

DAVID PETERS,

*Plaintiff in Error.**On Writ of  
Error.*

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Afterwards, to wit, etc., in the Court of Errors and Appeals in the last resort in all causes of the State of New Jersey, comes the said David Peters by McDermitt & McDermitt, his attorneys, and says that in the record and proceedings aforesaid and also in the matters recited and contained in the said bill of exceptions and also in the giving of the verdict and judgment there is manifest error in this to wit:

1. Because the Supreme Court upheld the charge of the trial court that: 30

“it is for you to consider very carefully the question of intent with which this shot was fired. That is the principal question, it seems to the Court, about which there is a sharp issue. The State claims that it was a shot with intent to injure, or such reckless disregard as to indicate a mind which showed the necessary intent to fulfill that essential element of the crime of assault and battery. The defendant says he had no such intent whatsoever.” 40

*Assignment of Errors.*

2. Because the Supreme Court upheld the charge of the trial court that:

10        “The jury has a right to consider the interest of Mrs. Abrams; the interest of these little children; the interest of the aunt or neighbor, and whether or not that interest is sufficient, or has any effect, and if so to what degree, upon the truthfulness of the story told upon the witness stand. That test may be applied in the jury’s discussion of Mr. Howard’s testimony, and that of all the witnesses in the case, including the defendant himself, because he has been upon the witness stand. And in that connection the jury has a right to consider the very grave interest which this defendant has in any verdict the jury may render.”

20        3. Because the Supreme Court upheld the charge of the trial court that:

30        “Strictly speaking as a matter of the division of power and authority, and responsibility, the duty of the jury is simply to determine the guilt or the innocence of the defendant upon the facts in evidence, and if the defendant is convicted the duty of determining whether any sentence, and if so what, shall be imposed, whether the prisoner shall be put on probation and fined, or imprisonment, or what shall be done with him, is left to the discretion of the court, within certain limitations. But while it is not the province of the jury to recommend in reference to the matter, it has been the custom for juries to make recommendations and for them to receive careful consideration. Strictly speaking, it is not a part of the duty of the jury; but when verdicts are brought in with recommendations they are received and given some consideration.”

*Assignment of Errors.*

Wherefore, the plaintiff in error, David Peters, prays that the judgment aforesaid be reversed and altogether held for nothing, and that he may be restored to all things which he has lost by reason of the said judgment.

McDERMIT & McDERMIT, 10  
*Attorneys for Plaintiff in Error.*

FRANK M. McDERMIT,  
*Of Counsel with Plaintiff in Error.*

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*Specification of Causes.***Specification of Causes.**

Filed.

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

10	STATE OF NEW JERSEY, <i>Defendant in Error,</i> <i>vs.</i> DAVID PETERS, <i>Plaintiff in Error.</i>	}	<i>On Writ of Error.</i>
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David Peters, plaintiff in error, by McDermit & McDermit, his attorneys, hereby specifies the causes in the record relied upon for relief or reversal in the aforesaid cause as follows:

1. Because there was no evidence whatever to sustain a verdict of guilty.
2. Because there was no evidence whatever to sustain the crime charged in the indictment.
3. Because the court erroneously charged the jury as follows:

“it is for you to consider very carefully the question of intent with which this shot was fired. That is the principal question, it seems to the Court, about which there is a sharp issue. The State claims that it was a shot with intent to injure, or such reckless disregard as to indicate a mind which showed the necessary intent to fulfill that essential element of the crime of assault and battery. The defendant says he had no such intent whatever.”

4. Because the Court erroneously charged the jury as follows:

“The jury has a right to consider the interest of Mrs. Abrams; the interest of these little chil-

*Specification of Causes.*

dren; the interest of the aunt or neighbor, and whether or not that interest is sufficient, or has any effect, and if so to what degree, upon the truthfulness of the story told upon the witness stand. That test may be applied in the jury's discussion of Mr. Howard's testimony, and that of all the witnesses in the case, including the defendant himself, because he has been upon the witness stand. And in that connection the jury has a right to consider the very grave interest which this defendant has in any verdict the jury may render." 10

5. Because the court erroneously charged the jury as follows:

"Strictly speaking, as a matter of the division of power and authority, and responsibility, the duty of the jury is simply to determine the guilt or the innocence of the defendant upon the facts in evidence, and if the defendant is convicted the duty of determining whether any sentence, and if so what, shall be imposed, whether the prisoner shall be put on probation and fined, or imprisonment, or what shall be done with him, is left to the discretion of the court, within certain limitations. But while it is not the province of the jury to recommend in reference to the matter, it has been the custom for juries to make recommendations and for them to receive careful consideration. Strictly speaking, it is not a part of the duty of the jury; but when verdicts are brought in with recommendations they are received and given some consideration." 20 30

McDERMIT & McDERMIT,  
*Attorneys for Plaintiff in Error.*

FRANK M. McDERMIT,  
*Of Counsel with Plaintiff in Error.* 40

*Joinder in Error.*

**Joinder in Error.**

Filed July 22, 1915.

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

10

THE STATE,

*vs.*

DAVID PETERS.

*In Error.*

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And hereupon, the said The State, by Frederick F. Guild, Prosecutor of the Pleas, its attorney, comes into Court and says that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid, and he prays here, that the Court here, may proceed and examine as well the record and proceedings aforesaid as the matters aforesaid assigned for error, and that the judgment aforesaid, in manner aforesaid given, may in all things be affirmed, etc.

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FREDERICK F. GUILD,  
Prosecutor of the Pleas of Essex County,  
*Attorney for Defendant.*

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