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New Jersey Court of Errors and Appeals

State of New Jersey, *Defendant-in-Error,* *vs.* Joseph Juliano, *and others, Plaintiffs-in-Error.*	*On Error.*

BRIEF FOR THE STATE.

I.

The Weight of the Evidence.

Mr. McGeehan's Brief, Point 44.

Big Joe Juliano, Christopher Barone, Louis Capozzi and Nick Joe Juliano (hereinafter called the defendants), were convicted of the murder of George Condit. Sentence of death was pronounced upon them.

One Robert W. Boudreau was named in the indictment with these men as a co-defendant. He was not, however, tried with them but on the contrary, appeared at their trial as a witness for the State.

Mr. Condit was murdered in Newark, July 19, 1926, in the course of a robbery. This fact was not controverted at the trial. In dealing with the weight of the evidence in this brief, we will therefore pay but little attention to the proof of *corpus delicti.*

The State offered a number of witnesses to prove that the defendants, together with Boudreau, were the robbers and therefore the persons guilty of the murder.

To rebut this proof, each of the four defendants presented evidence of an alibi, and further to rebut it, they called five witnesses who were at or near the scene of the holdup, in the attempt to prove that the defendants were not the robbers that these witnesses saw.

Mr. Condit was an employee of the Reid Ice Cream Corporation. That company had a plant and office in Newark on the east side of Mt. Pleasant avenue, about 175 feet north of Clay street.

Clay street begins at Broad street a few hundred yards north of the Lackawanna Railroad, and at the same point where the trolley tracks leave Broad street and turn diagonally northwest into Belleville avenue. Clay street runs east from Broad street, while Mt. Pleasant avenue lies parallel with Broad street one block east thereof, beginning at Clay street and reaching north to the Mt. Pleasant Cemetery. East of Mt. Pleasant avenue, Clay street widens out and has a small triangular park in the center, and the roadway north of the park is known as Carlyle Place. Carlyle Place crosses Ogden street one block from Mt. Pleasant avenue, and then crosses the Passaic River on what is known as the Clay Street bridge.

Edward T. Schanck, cashier for the Ice Cream Company, at about 8:45 or 9 A. M., on Monday, July 19, 1926, got together, to deposit in the bank, cash amounting to $7,944.13 and checks totaling $6,582.53. The money and checks he put into two bags and gave to Mr. Condit at, or a little before 10 o'clock. (Cas. pp. 384 to 386.) This happened in the cashier's cage at the east side of the office on the second floor of the company's building.

Joseph P. Duff, another employee of the company, usually worked in another building of the company on the opposite or west side of Mt. Pleasant avenue. He was in the habit of going to the bank with Mr. Condit. At about 9:55 A. M., the day of the murder, he crossed the street and went upstairs to the office where he met Mr. Condit. (Cas. pp. 346 and 347.)

Mr. Condit and Mr. Duff each took one money bag and came downstairs (Cas. pp. 348 and 386), Duff leading the way. In front of the building was standing a small Chevrolet automobile which was used for carrying the money to the bank. It was facing south, that is, "the wrong way." Duff got in and put his bag on the floor of the car. Mr. Condit, following, walked around the car to the right side, the side toward the center of the street—and was about to hand Duff his bag. (Cas. p. 348, l. 40.) At that moment, a large car, headed North, drove up alongside the Chevrolet and a man seated in the rear of the car commanded Duff to "stick them up."

> "And then a man came in between our car and in between both cars; there was a scuffle, I heard a shot and saw Mr. Condit fall, and this man that came down in between grabbed the bag, and there was another shot and I felt this sting in my leg." (Cas. p. 349, l. 10.)

The man or men outside of the car threw both money bags into it, jumped in, and the car sped north and away.

Mr. Philip Seigel—of whose testimony more anon—took Mr. Condit and Mr. Duff in his automobile to St. Michael's Hospital.

Mr. Condit was dead when he reached the hospital. (Cas. p. 338.)

The autopsy disclosed that a bullet had entered the right side of the body about two and one-half inches below the armpit and passed directly through the body and out on the left side about two inches lower than the point of entrance. The bullet passed through the lung and fractured one rib in entering and another in leaving the body. It was not necessarily a fatal wound.

Another bullet entered the middle of the back, cutting the spine, passing through the chest and leaving the body on the left side about nine inches below the left armpit. This wound caused death by extensive bleeding in the left pleural cavity. (Cas. pp. 377 to 379.)

From the fact that the second bullet passed entirely through the body and was not deflected by striking the spinal column, Dr. Martland, the County Physician, expressed an opinion that the bullet was over 38 caliber in size. (Cas., p. 383.) He was not asked about the size of the other bullet but the same reasoning would seem to apply.

Two hours after the robbery a passerby found at the scene two empty cartridge cases, of 45 calibre. (Cas., p. 471, Ex. S. 17.)

Several witnesses of the holdup noted the number of the license plates on the Pierce-Arrow, D 1926. (Cas., pp. 278, 387, 443 and 1002.) They had been issued to Thomas L. Bell, a dealer in Montclair. In April, 1926, Bell furnished a car bearing these license plates to a man named Carmine. (Cas., p. 339.)

Stephen Carmine conducted a restaurant known as the Clifford Lodge at Ridgefield, N. J. On the evening of April 23, the car with the license

plates D 1926 was parked in front of his place of business. About midnight he noticed that both plates had been removed. (Cas., p. 343.)

The defendant Capozzi was at the Clifford Lodge four or five times within a period of four or five weeks following the 15th of April. (Cas., p. 342.

Philip Seigel was a druggist with one store in Kearny and another in Newark. He purchased ice cream from the Reid Ice Cream Company. At about 9:45 or 10 A. M., on July 19, he went to that company's place of business in his automobile. (Cas., p. 243.)

He stopped his car facing north, so that the front of it was at the center of the driveway leading into Mt. Pleasant avenue at the south of the Reid plant. This driveway is shown on Exhibits S. 11 and S. 12. It will be noticed that it slopes toward the center and that, running down the center of the driveway, is a slightly depressed gutter or drain. Here is where Seigel stopped. (Cas., p. 247, l. 27.)

It will be also noticed on these pictures that there is no sidewalk in the ordinary sense between the asphalt roadway of Mt. Pleasant avenue and the Reid plant, but that the space between the asphalt and the building is paved with granite block, so that trucks can drive right up to the building. Mr. Seigel stopped his car, at the center of the driveway and on the granite block pavement east of the asphalt. (Cas., p. 244, l. 35, to p. 245, l. 10.)

The Reid Company's Chevrolet was also standing on the block pavement facing Seigel's car, in

just about the position shown in Exhibit S. 11. (Cas., p. 347, l. 30.)

By reference to the map, Exhibit S. 1, it will be seen that these two cars were only about twenty-five feet apart. This is important as bearing on the opportunity which Seigel had to see the events to which he testified.

As Mr. Seigel drove north the 150 feet or so in Mt. Pleasant avenue from Clay street to the point where he stopped, a Pierce-Arrow drove along on his left side. The Pierce-Arrow stopped about 10 or 15 feet in front and to the left of his car. (Cas., p. 246.) The rear fender of the Pierce-Arrow was then opposite the bottom of the stairs leading to the Ice Cream Company. (Cas., p. 247, l. 35.)

Two men had been running in back of the Pierce-Arrow as it drove up. (Cas., p. 246, l. 25.) One ran around in front of it and between it and the Chevrolet, and the other between the Chevrolet and the building. (Cas., p. 248, l. 5.) Seigel heard two shots and saw Mr. Condit fall as he was about to get on the Chevrolet. (Cas., p. 248, l. 35, p. 249, l. 1.)

> "Then I saw a bag being taken out from the side of the car where Mr. Condit was and thrown into—as the doors were opened—the Pierce-Arrow. And another man that was along the side of the car to my right, another bag threw into the car and as they got into the car, the window was open in the rear, and another shot was fired into the Chevrolet." (Cas., p. 250, l. 12.)

Mr. Seigel picked out the four defendants and Boudreau as the robbers. (Cas., p. 252, l. 35.) Big Joe Juliano was the man he saw in the back of the car. He noticed him as the two cars were

moving along the street parallel with each other. (Cas., p. 253, l. 1.)

> "They passed me and he was looking out of the rear window toward Clay street." (Cas., p. 253, l. 15.)

At that moment the rear fender of the Pierce-Arrow was alongside of Seigel's front window. The distance between the two men was about nine feet. (Cas., p. 254, l. 25.)

Nicholas Joseph Juliano was the man in the front seat of the Pierce-Arrow, on the right side of the driver. (Cas., p. 255, l. 1.) After the car stopped, Seigel saw him open a door and point a gun up at the girls who were looking out of the window of the plant. (Cas., p. 255, l. 15.) He also noticed this defendant on the seat facing backward toward Seigel, leaning toward the rear door. The door then opened but Seigel could not say whether Little Joe's hand did the opening. (Cas., p. 255, l. 25.)

Mr. Seigel noticed the defendant Capozzi, alias Kid Ruff, between the Pierce-Arrow and the Chevrolet, and also getting into the back seat of the Pierce-Arrow.

> "After he got in the car, the window was down. He is the one that pointed the gun into the Chevrolet." (Cas., p. 256, l. 9.)

The fourth defendant, Barone, Mr. Seigel saw in front of the Reid plant.

> "He had the bag and got in between my car and the Chevrolet, and threw it inside, inside into the car."

In getting into the car, Barone passed between Seigel's car and the Chevrolet. (Cas., p. 256, l. 30.)

Boudreau he identified as the driver. (Cas., p. 256, l. 35.)

The defense, in the attempt to weaken Seigel's testimony, tried to show that at Police Headquarters at a lineup, he picked out as one of the robbers, another man, namely, Carl Bielke. And further, that he was influenced in identifying the defendants by photographs of the defendants which he saw in newspapers before going to Police Headquarters.

Seigel testified that he did not identify Bielke but that he did put his hand on him and asked him to take off his cap, and that Captain Brex, who was present, asked all in the lineup to take off their caps. (Cas., p. 257.)

Detective Giuliano of the Prosecutor's Office, who was present at Police Headquarters, testified that Seigel put his hand on Bielke and asked everyone in the room to take their hats off. He added that Seigel had been told to put his hand on anybody he had recognized as being in the Reid holdup. (Cas., p. 585.)

Captain Brex testified that Seigel placed one hand on Bielke and pointed with the other hand toward his hat (Cas., p. 624, l. 2.); that he said that Bielke looked like the man until he took his hat off. (Cas., p. 625, l. 12.)

Boudreau testified that Seigel picked out both him and Bielke. (Cas., p. 229.)

Now as to the newspaper pictures, Seigel testified that he regularly received the Newark Ledger from his news dealers and that on the morning of the Sunday on which he went to Police Headquarters to view the lineup, he saw pictures in the Ledger of men who were charged with being implicated in the Reid holdup. (Cas., p. 259, l. 35.)

That morning he was busy in his Kearny store (Cas., p. 258, l. 22) and did not read the

story in the Ledger but just glanced at the paper. (Cas., p. 260, l. 10.)

The photograph in the Ledger is Exhibit D. 1.

A long gruelling cross examination covering eighty pages of the printed record, failed to shake the testimony of Mr. Seigel, except that he said he was not sure of the identification of Big Joe. (Cas., p. 330, l. 35.)

Seigel was sitting in his automobile from the time the Pierce-Arrow drove up, until it sped away after the holdup was completed. During this time, all of the defendants were immediately in front of him at distances of from 10 to 30 feet. He had the best of opportunities to observe them carefully so that he might remember their faces when he should see them again.

Joseph Duff was wounded in the leg just before the car with the robbers was driven away from the scene of the holdup. At the time he felt a sting in his leg, he saw a man with a pistol pointed in his direction in the rear of the car on the side toward Duff, that is, on the east side. This man he identified as Capozzi. (Cas., 349, l. 20.)

The Pierce-Arrow, and the Chevrolet in which Duff was sitting, were only 2 or 3 feet apart. (Cas., p. 354.) Allowing for the fact that the rear of the Pierce-Arrow was 5 or 6 feet south of the front of the Chevrolet, the two men were less than 10 feet apart. The circumstances were such as to impress the features of Capozzi on the mind of Duff.

Duff was unable to say whether or not any of the other defendants were any of the persons whom he saw at the holdup. (Cas., p. 350, l. 20.)

Mr. Seigel testified in effect that three of the robbers were in the Pierce-Arrow all the time, namely, Boudreau at the driver's seat, Little Joe Juliano beside him, and Big Joe Juliano in the rear seat; that Barone and Capozzi arrived at the scene, running beside or in back of the Pierce-Arrow; that after the money bags were seized, these two jumped into the car and that Capozzi from the rear seat fired a shot into the Chevrolet. Mr. Duff testified that he did not see anyone get into or out of the Pierce-Arrow (Cas., p. 357, l. 15); that he saw two men who attacked Mr. Condit between the cars; that they came from the rear of the Chevrolet and that Capozzi was not one of these men. (Cas., p. 360, l. 30, to p. 361, l. 1.) He was positive that Capozzi was the man in the rear seat who pointed a pistol at him. (Cas., p. 360, l. 20.)

Discrepancies in detail at a time of great excitement are to be expected. The absence of them would be a suspicious circumstance. The slight variance between the evidence of these witnesses strengthens the State's case.

Miss Helen Gillard and Miss Betty Hanley were employed in the office of the company on the second floor. They heard the noise of firing and looked out the window. Miss Gillard testified,

> "I watched the man in the back of the car and he had a gun in his hand." (Cas., p. 565, l. 36.)

She then identified Capozzi as a man that she saw. (Cas., p. 566.)

> "Well, he was in the back of the car and he appeared to me to be in the middle. * * *
>
> "Q He was seated in the middle of the rear seat then, is that right? A No, he did not appear to be seated, he appeared to be getting up or sitting down. He was a little

off the middle of the seat." (Cas., p. 566, l. 30, to p. 567, l. 10.)

The window sills on the second floor may be estimated from the photograph, Exhibit S. 12, to be about 16 feet above the ground. The Pierce-Arrow was standing about the same distance from the wall of the building. Miss Gillard was only 20 or 25 feet from Capozzi.

Miss Hanley, looking out of the window at the same time, concentrated her attention upon Barone.

> "The man who had grabbed the bag from Mr. Condit sat in the back of the car, the green car, I heard a shot, and he looked up and pointed the gun at us and told us to keep our mouths shut." (Cas., p. 513, l. 36.)

> "When did you get a look at his face? A Just as he sat in the car and looked up at us, he must have looked at us for three seconds.
> "Q Whereabouts in the car was he sitting? A In the back, on the right-hand side." (Cas., p. 514, l. 20.)

At the same time that she was staring fascinated at Barone, she heard the voice of someone else calling from below 'Pull your head in or I will shoot' or words to that effect. (Cas., p. 543, l. 15, to p. 544, l. 5.)

There was one other person in the Reid office who might be expected to have seen the holdup, Raymond C. McKenna. He, however, only glanced out of the window and then ran back to the cashier's office for a pistol. When he got back to the window, the Pierce-Arrow was some distance away, going north on Mt. Pleasant avenue. He fired four shots from the window, in the direction of the car. (Cas., p. 395.)

During his first glance out of the window, he did not see the faces of any of the men. (Cas., p. 394.)

At the time of the holdup a truck was standing backed against the west curb 150 feet or so north of the Reid plant. It was the same truck and in the same position shown in Exhibit S. 11. (Cas., p. 400, l. 25, and p. 401, l. 20.)

Mr. Ellis S. Oliver, the owner of a group of individual garages at 273-281 Mt. Pleasant avenue, just north of where the truck was standing, was on the sidewalk when he heard shots. He walked out into the street in order to see past the truck.

> "And just as I walked out in the middle of the street, there was a big touring car—limousine—went by. It was a dark blue or a green car and it came pretty close to me. I do not know whether the man tried to run me down, but he kind of slackened up, and in the back of this car I saw a face smiling." (Cas., p. 546, l. 23.)

This face was the face of Big Joe Juliano. (Cas., p. 547.)

Mr. Oliver realized the seriousness of being called upon to identify one on trial for murder. On cross examination he was asked:

> "Q And you do not think you could be mistaken? A Well, I do not think I could be, but there are mistakes made lots of times.
>
> "Q Yes, now, do you think you are making a—do you think you may be mistaken in this identification, realizing that this is a trial on a charge of murder? A I realize that fact.
>
> "Q Do you think you may be mistaken? A Not in this case.
>
> "Q You don't think so? A No.
>
> "Q And you do not think you may be? A I am sorry, I am not mistaken." (Cas., p. 560, l. 35.)

Robert W. Boudreau, named in the indictment with the defendants on trial, testified for the State. Boudreau was twenty-eight years old. His parents were named Gamash (Cas., p. 123, l. 1) and lived in New Hampshire (Cas., p. 149, l. 40), but they separated from each other when he was about two years old and he was thereafter brought up by his grandmother, Mrs. Boudreau, and took her name. (Cas., p. 107.)

When he was about twenty-one years old, that is, in 1919, he was convicted at Chelsea, Mass., for stealing a ring (Cas., p. 107, l. 25), and was sentenced to thirty days at Dear Island.

About 1923, he was convicted of stealing some furniture and was placed on probation. (Cas., p. 108, l. 3.)

He lived in Boston for some four years (Cas., p. 123, l. 15) and came from there to Newark. (Cas., p. 149, l. 37.)

At the time of the holdup, he was living at 16 Ogden Street, Newark. This address is half a dozen blocks north and one block east of the Reid plant.

His story on direct examination of the happenings on that day, was as follows:

He got up about seven o'clock and went to a rendezvous on Broad Street where, after waiting about one hour, he met Little Joe Juliano. Juliano arrived in a Hudson brougham, Boudreau got in and they drove to the corner of Drift Street and Clifton Avenue. While Boudreau waited, Juliano walked down Drift Street. In about fifteen or twenty minutes he came back in a green Pierce-Arrow in which were three other men, Big Joe Juliano, Capozzi and Barone. This car also stopped on Clifton Avenue, a little

north of Drift Street, and Boudreau got into it, taking the driver's seat. He drove north to Park Avenue, east on Park Avenue to Bloomfield Avenue and through Bloomfield Avenue, Belleville Avenue, across Broad Street, into Clay Street, and stopped against the southerly curb of Clay Street, in front of the Albert Brass Foundry opposite Mt. Pleasant Avenue. (Cas., pp. 109 to 112.)

Chris Barone and Ruff got out of the car. (Cas., p. 113, l. 2.) Boudreau put on a chauffeur's cap.

There occurred a wait of over an hour. Then Chris Barone gave a signal by pulling out a handkerchief and Boudreau drove the Pierce-Arrow up to the Reid Ice Cream Company and stopped it along side of the Chevrolet.

The Chevrolet, according to Boudreau, was standing a few feet in front of where it is shown in the photograph, Exhibit S. 11. (Cas., p. 116, l. 10.)

As Boudreau drove the Pierce-Arrow, Barone and Ruff ran alongside and when he stopped they "came around the front of the car, both having guns and cried 'Stick 'em up'."

Boudreau was told by Little Joe Juliano to put the car in second; he then heard a shot; then another shot. He saw Barone put something in the back of the car. Barone and Ruff both got in the back and Boudreau was told to go ahead, which he did. All this while, Little Joe was in the front with Boudreau and Big Joe in the back seat. (Cas., pp. 118, 119.)

Boudreau drove up Mt. Pleasant Avenue to Gouverneur Street, turned left to Broad Street, north on Broad Street to Third Avenue and left

to Belleville Avenue. There he slowed the car and jumped out and the car went away to the north.

Boudreau had been told that he would be dropped off within three or four blocks and that he should go back to the Reid plant to see if anyone was recognized, and then to report back at a club on Drift Street. He did not, however, go back to the Reid plant.

Boudreau continued to live at 16 Ogden Street until he was arrested in October. (Cas., pp. 120 to 122.)

Little Joe Juliano came to live at the same place some time in September.

Boudreau's cross examination was very long (Cas., pp. 122 to 242), occupying about one whole day. The chief purpose of the cross examination seemed to be to suggest that Boudreau was engaged in numerous other robberies with men other than the defendants on trial, and that these other men were the persons with whom he committed the Reid holdup, and that he was induced by the police, in order to save his own life, falsely to testify that the defendants were with him on this crime.

The men most prominently mentioned in this cross examination and with whom it was insinuated that Boudreau associated in criminal enterprises—Tony Di Phillips; Peter Ruggiero, alias Rogers; Charles Connors, alias Brownie, and Bielke, were all brought into court during the trial and attention publicly called to them, and not a single eye witness identified any of them as being, or looking like, the robbers with the exception of Bielke, as mentioned below.

It was developed by the defense on the cross examination of Boudreau and of some of the police officers that the accusation of Boudreau of this crime was brought about by Bielke and that Boudreau knew of this at the time he made his confession. Surely, under these circumstances, if Bielke had been involved in the holdup, Boudreau would not have shielded him.

The suggestion that Boudreau was induced by the police in order to save his own life, falsely to involve the defendants, was not supported by a shred of evidence. On the other hand, the testimony was positive that no promises were made to Boudreau in order to obtain his confession or the names of his accomplices, and that he named the defendants without any suggestion by the police and that his naming them was the first inkling that they had that the defendants were involved in this crime. (Cas., p. 581, l. 15; p. 615, l. 3.)

As soon as Boudreau mentioned the names of the four defendants, the police brought in six or eight photographs, including photographs of Big Joe, Capozzi and Barone—they did not have a picture of Little Joe in the Rogues Gallery—and showed them to Boudreau in order to test his story. He picked out and named the three defendants.

The four defendants were then arrested and now occurred the incident of the phone booth. Boudreau, with his face covered by a mask, was put in a phone booth with a glass door of the ordinary type, and the defendants were brought into the room to be viewed by him. They were taken out again and half an hour later an ordinary lineup was held, and he picked out the four defendants from the lineup.

Boudreau testified that he asked for the mask because he was afraid. This is certainly understandable. Captain Brex assumed responsibility for the mask; apparently he had hoped that the defendants, thinking that an additional witness had identified them, would confess. He also said that another reason for this lineup was further to test Boudreau's story before subjecting the defendants to a formal charge. He made this test by asking Boudreau after his view of the four, to name the order in which they had stood while he was in the phone booth.

This phone booth episode, as well as the act of the police in giving photographs of the defendants to the newspapers, greatly handicapped the State at the trial, but these acts of the police constitute no reason why the conviction of the defendants should be reversed.

Mr. McGeehan, in his brief, lays much emphasis on the lack of acquaintance by Boudreau with his three clients. It was the theory of the State that Boudreau's part in this crime was to supply the local knowledge. He lived only half a dozen blocks from the Reid plant; he frequented the lunch wagon at the corner of Broad Street and Clay; he had doubtless observed minutely the movements of the car containing the Reid Company's money; he knew Mr. Condit by sight. He and Little Joe became acquainted at a dive on Drift Street; they exchanged confidences of their criminal experience and discussed the feasibility of this holdup, to perpetrate which, Little Joe brought in the gang consisting of his cousin, Big Joe, and the latter's pals.

Boudreau testified that he did not share in the money stolen from Mr. Condit (Cas., p. 193, l. 1), and that when, about a week after the holdup, he

asked Little Joe about the money, he was told that it was being held in New York "to see if everything is allright" and that Little Joe added a threat that they would get Boudreau if he should squeal. (Cas., p. 233, l. 15.)

It was doubtless a part of the plan in order to avert suspicion that Boudreau should not see the other members of the gang and if he should see them that he should not recognize them.

In addition to the witnesses above mentioned, the State called to the stand, James B. Hubert, bookkeeper for the Albert Company, who testified that he noticed the Pierce-Arrow in front of the foundry between 8 and 9 A. M. and again around 9:30. (Cas., pp. 412 and 415.) Also Mrs. Julia I. Yokum and a fifteen-year-old boy, Thomas J. Clark, both of whom from the west side of Mt. Pleasant Avenue, witnessed the holdup.

Mrs. Yokum testified:

> "Well, I heard shots and I noticed a little girl across the street in the Reid Company on the second floor at the first window, and she was acting very strangely and I saw this man with the revolver in his hand, shooting." (Cas., p. 427, l. 35.)

She does not appear to have noticed anyone else particularly and she only saw the back of this man. The defendant Capozzi from the back view, looked like this man (Cas., p. 430, l. 20), although, of course, she could not say definitely that he was the same person. (Cas., p. 430, l. 39.)

The Clark boy testified:

> "When I was walking along, a big car stopped right beside a Chevrolet coupe. * * * I saw a few men step from the side toward the river, step from the car and then they fired. Three shots were fired and one of the

fellows threw two bags into the large Pierce-Arrow and then they went up Mt. Pleasant Avenue." (Cas., p. 441, l. 20.)

Asked if he had a good enough look at any of the men to be able to identify them, he replied that the chauffeur was looking in his direction and he identified Boudreau as that man. He would not be able to identify any of the others if he should see them again. (Cas., p. 442, l. 38, to p. 443, l. 25.)

The defense called several witnesses who saw the holdup or were in its vicinity.

Edward J. Geldart was in the frame building, 319 Mt. Pleasant Avenue, directly across from the Reid plant.

"I heard somebody holler 'the payroll' and I heard I thought it was a shot, but I am not sure about the shot. * * * I came to the door and looked out. * * * I saw two men run across the street diagonally towards the middle of the two cars, both the big sedan and the small paycar or receipt car, whatever it is. As they came across the street, the man nearest the inside fired two shots." (Cas., p. 1026, l. 36, to p. 1027, l. 18.)

He testified that he got a pretty fair look at the man nearest him crossing the street and that he was not one of the defendants. (Cas., p. 1027, l. 20.)

On cross examination, Geldart said that this man crossing the street was in such a position that Geldart only saw "his face from a three-quarter view from the back."

"Q So the most you saw of him was his back? A His back and the side of his head

under the straw hat." (Cas., p. 1031, l. 25, to p. 1032, l. 3.)

Geldart left the doorway before the holdup was completed and went back into the building; came back again to the door, stayed there a while; picked up some pieces of wood from the floor and hurled them after the car as it sped away. (Cas., p. 1028, l. 30.)

John J. Friend had a linoleum store on Carlyle Place about 70 feet east of Mt. Pleasant avenue. Sometime between 9 and 9:30 o'clock the morning of the holdup, two men came along the street and Friend asked them if they wanted any linoleum. They replied that they did not and walked on as far as Ogden street. He later saw the same men standing on the corner of Mt. Pleasant avenue and Carlyle street, where the gasoline station is. (Cas., pp. 1246 and 1247.)

Mr. Friend testified that he did not know whether the two men referred to had anything to do with the Reid holdup or whether they were just standing around, and that he did not know whether or not these men were two of the defendants. (Cas., p. 1250.)

Thomas J. Osborn was a salesman for the Pittsburgh Plate Glass Company. At the time of the holdup, he was driving an automobile from Broad street east into Clay street. He reached a point about 10 feet east of Spring street when he heard a shot, and looked in the direction of the Reid plant.

> "After I heard the first shot, I saw this Mr. Condit fall, and as he fell, there was another shot fired, and I turned toward Mt. Pleasant avenue then." (Cas., p. 1001, l. 2.)

When he saw Mr. Condit fall, he thought that he was squeezed between the two cars and it was

not until he heard the second shot that he thought "something funny was going on." The Pierce-Arrow started away before Osborn got to the scene of the holdup. He followed it as far as Belleville avenue and Gouverneur street. (Cas., p. 1001.) He drove back past the Reid plant to the corner of Broad and Clay streets where he found an officer of the Fire Department whom he told of the holdup. (Cas., p. 1002.)

The witness testified that he got a pretty good look at a man standing between the two cars and that this man was not any of the defendants. (Cas., p. 1006, l. 3.)

Mr. Osborn was driving on the car tracks when his attention was first directed to the Reid plant. The second shot was fired just before he turned his car to enter Mt. Pleasant avenue, and "just as I entered the street, the third shot was fired and the car started to move away." (Cas., p. 1007, l. 30.)

> "I never saw a car get away so fast before." (Cas., p. 1005, l. 8.)

> Mr. Osborne got a look at his man's face just before the car started, "while he just about put his right foot on the running board of the car, he looked down at Mr. Condit." (Cas., p. 1005, l. 25.)

AT THIS TIME, AS APPEARS FROM THE MAP, OSBORN WAS ABOUT 175 FEET DISTANT FROM THE PIERCE-ARROW.

Mr. Osborn made the turn into Mt. Pleasant avenue at a speed of about twenty miles an hour and as soon as he had made the turn, drove as fast as he could go. (Cas., p. 1011, l. 10.)

The officer of the Fire Department referred to by Mr. Osborn was Deputy Chief Lynch. (Cas., p. 1009, l. 38.) Mr. Lynch testified that he asked

Osborn when he saw him immediately after the holdup, what kind of looking fellows the robbers were, and that he replied,

> "I did not see them but someone in the crowd told me that they went up Mt. Pleasant avenue in a blue car No. 1926." (Cas., p. 1442, l. 10.)

Detective Robert W. Anderson of the Newark Police Department, talked with Osborn the day of the holdup and testified that Osborn told him that he could not identify the robbers, that he did not see any of the men. (Cas., p. 1438, l. 10.)

John J. Murphy and Philip Henry were employed in a printing shop on the third floor of No. 81-85 Clay street, above the Albert Company's foundry. They noticed two men standing on the northwest corner of Clay street and Mt. Pleasant avenue. (Cas., p. 1173, l. 30, and p. 1185, l. 30.) None of the defendants appeared like either of these men. (Cas., p. 1175, l. 37, and p. 1193, l. 36.)

Mr. Murphy, with rare prophetic insight, remarked to his companion, "They are going to hold up Reid's." (Cas., p. 1174, l. 40.)

On cross examination of Mr. Murphy, the Prosecutor had Carl Bielke, mentioned above, stand up and asked the witness if he looked like one of the men whom he saw the morning of the holdup. The witness replied that he was built similarly to one of the men. (Cas., p. 1180, l. 8.)

Sometime after noticing the men standing by the gasoline station, Mr. Henry heard shooting and ran to the window.

On second thought, he testified that his attention was attracted not by shooting but by "hollering—something about 'get the police' or something like that." (Cas., p. 1189.) When he got

to the window, he saw a car going up Mt. Pleasant avenue toward the Reid plant and two men running behind it. He heard a shot and saw a man fall between the two cars. (Cas., p. 1189.)

The automobile when he saw it, was halfway between the Reid plant and Clay street (Cas., p. 1194, l. 30) and the men who were running behind the automobile were the same men he had noticed standing on the corner. (Cas., p. 1194.)

We suggest that it is evident that the men whom Murphy and Henry saw had nothing to do with the robbery. The two men loafing by the gasoline station and the two men upstairs in the printing shop were all attracted by the same commotion, and the men upstairs saw the men on the street running to the scene of the crime. The automobile that they saw was doubtless Mr. Osborn's car. The shots they heard after they reached the window were the shots fired by Mr. McKenna. The man they saw fall to the pavement was Mr. Duff who climbed out of the Chevrolet immediately after the holdup and slumped to the ground. (Cas., p. 350.)

The witnesses whose evidence is summarized above, include all the witnesses called by either the State or the defense who saw the holdup. It will be observed that the action occurred on the east side of Mt. Pleasant avenue between the green Pierce-Arrow and the Reid plant; that the faces of the robbers were in general, turned toward the east, first to accomplish the robbery and later to threaten the girls looking out of the window. For this reason, none of the witnesses who were on the west side of Mt. Pleasant avenue had a clear view of the faces of the robbers. Mrs. Yokum saw only their backs. The Clark boy saw the face only of Boudreau. Mr. Geldart had a three-quarter back view of one man, an indis-

tinct glimpse of the face of another, and looking through the Pierce-Arrow, caught sight of a third.

The witnesses who had a really good view of the robbery, Mr. Seigel, Miss Hanley, Miss Gillard, all identify one or more of the defendants. Mr. Oliver, close to the automobile as it passed him a few hundred feet up the street, adds his identification of Big Joe.

Furthermore, the testimony of Boudreau, though he was an accomplice, bore the earmarks of sincerity and truth and was worthy of credence.

Against this mass of evidence the defendants relied on their respective alibis.

Little Joe Juliano claimed that he was with his wife at the home of her parents in Morristown. Big Joe testified that he was at the Berwick (formerly the Continental) Hotel in Newark with Little Joe's sister, Mrs. D'Amato. Capozzi, that he was at the Hotel St. Francis on East Park street, Newark, and Barone's story was that he was at his home in Nutley.

Mrs. Nick Joe Juliano's parents, Mr. and Mrs. John Kean, lived in a six-story apartment house in Morristown. Little Joe testified that during the summer of 1926, he and his wife habitually spent the week-ends there; that they drove to Morristown in his Hudson brougham which he would always park in front of the apartment house; that he never put it in a garage; that he usually returned to Newark on Tuesday; that he spent the morning of Monday, July 19, in the Kean apartment, not arising until about 11

o'clock; the day before, namely, Sunday, the 18th, in the evening, Nick Joe and his wife, and Mr. and Mrs. Kean, took a drive, going to Springfield and to Dover.

His alibi was particularly supported by his wife, Loretta Juliano, and in general, by her sister Florence, and her parents, John Kean and Isabelle Kean. No neighbors or disinterested parties were called to testify that they saw Little Joe in Morristown, or his automobile standing in front of the house. His defense was not supported in any material respect by a single disinterested witness.

Barone lived in Nutley with his mother, his brother Joseph, generally known as Buck Josephs, his sister-in-law, Mrs. Joseph Barone, his brothers Fred and John, and two sisters, and during three months that summer, with one Charlie Mass (whose real name was Mazzucco), Mrs. Mazzucco and their two children. (Cas., pp. 1285 and 1286.) Mrs. Mazzucco was a cousin of the Barones. (Cas., pp. 1274 and 1275.)

The evening of Sunday, July 18, he did not get home until after midnight. He asked his sister-in-law to call him the next morning about 10:30 so that he might keep an appointment at noon with Big Joe and one Max Silverman. He was to take $1,000 from Mass to Big Joe and to receive $1,500 which Silverman owed him. (Cas., p. 1276.)

His sister-in-law called him sometime after 10 o'clock and he left the house after 11. Barone owned two Cadillac automobiles and had a chauffeur whom he knew only as Ambrose but whose name was Joseph Scaglione.

Opposite the Barone's house was a garage, kept by John H. McDonald. Barone testified

that when he left the house, Ambrose was greasing one of his cars at this garage and that he (Barone) went to the garage and while waiting for Ambrose to finish with the car, talked to Mr. McDonald about paying him a bill which Barone owed and which he did pay the following day. (Cas., p. 1279.) He then drove to Newark with his brother Joseph, and Charlie Mass, and met Silverman and Big Joe at Child's Restaurant at noon. (Cas., p. 1280.) Barone testified that he made his living bootlegging. (Cas., p. 1273, l. 30.)

This alibi was supported by the testimony of Joseph Barone, Joseph's wife, Angelina, the chauffeur, Joseph Scaglione, Charlie Mass and one Anthony Coffazzo.

Coffazzo was an uncle of Chris Barone who lived in Brooklyn and who testified that he called at the Barone's home between 10:30 and 11 the morning of the holdup and that he saw Christopher there. (Cas., p. 1341.)

Charlie Mass or Mazzucco testified that he was vice-president and general manager of W. Burton & Company, manufacturers of Burton's vanilla; that he also dealt in real estate and was financially interested in Kemp & Company, a security company at 50 Broad street, New York City, and in a large garage known as Waldo's Garage at Richmond Hill (Cas., pp. 1327 to 1329), and lastly, that he was interested in the building business and was president of the F. C. M. Realty & Construction Company. (Cas., p. 1332.)

Chris Barone had asked him in the middle of the previous week to lend Big Joe $1,000, so on Saturday morning he got a $1,000 bill, not from his bank but from his safe deposit box (Cas., p.

1335) and this was the bill he handed to Big Joe Monday.

Scaglione had been convicted of entering, larceny and receiving in January, 1924. (Cas., p. 1357.)

Barone's alibi was corroborated by the evidence only of the interested parties mentioned above. The garage keeper, John McDonald, with whom Barone testified that he talked about 11 o'clock the morning of the holdup, recalled that he greased a car for the Barones on Monday, July 19, and that he was assisted by Ambrose (Cas., p. 1262, l. 17), and that the only other person present was his mechanic and that he did not recall who drove away with the car. (Cas., p. 1268.)

He did not corroborate Barone's alibi.

Big Joe spent Sunday night, July 18, at the Berwick with Mrs. D'Amato. The State did not dispute that fact. The State argued, however, that he must have left the Hotel by 8 o'clock or so, while Big Joe, on the other hand, testified that he remained at the Hotel and left with Mrs. D'Amato about 11.

There were two telephone calls from the room occupied by Big Joe and Mrs. D'Amato, one at 9:55 A. M. to Humbolt 2842, Big Joe's home, and the other at 11:15 A. M. to Mitchell 0936, the club or resort on Drift street, kept by Angelo Grande, otherwise known as Guili. Big Joe testified that he made these calls himself. The first one to his sister, Mrs. Porretti, to inquire if she and their mother wanted to drive to the shore that day, and the second time to Angelo Grande's nephew, Anthony Grande, who acted as chauffeur for Big Joe, to tell him he need not drive to the shore that day.

It was the State's theory that Mrs. D'Amato made these calls in the attempt to reach Big Joe probably to learn if there had been any trouble at the holdup.

Mrs. Porretti testified to receiving a call from Big Joe about 10 A. M. (Cas., p. 1149); that she did not think there were any other calls that morning. (Cas., p. 1151.)

Angelo Grande, who had been convicted once of transporting liquor and apparently another time of running a pool room (Cas., p. 1255), testified that Big Joe was accustomed to 'phone for Tony Grande at his resort, but that he could not remember whether he called on the 19th. (Cas., p. 1254.) He also testified that Big Joe sometimes answered 'phone calls at his place. (Cas., p. 1256.)

Big Joe's alibi was supported by Mrs. D'Amato, by Frank C. Amore, and Paul Smith. Amore was one of the gang that hung out at Guili Grande's. (Cas., p. 1138.) He was a very close friend of Big Joe and many a time borrowed his car. (Cas., p. 1135, l. 20.) His wife often made dresses for Mrs. D'Amato. (Cas., p. 1140, l. 15.)

He testified that he worked for Armour & Company near the Lackawanna Railroad (Cas., p. 1134) and that about 11:30 A. M. Monday, July 19, he was standing in front of the beef house and that Big Joe and Mrs. D'Amato came driving by and stopped and they talked together. (Cas., pp. 1136 and 1137.)

Paul Smith was a bellboy at the Berwick. On Sunday, July 18, he was on duty until after midnight. On Monday, July 19, he went on duty at 7 A. M., and remained on duty until noon. (Cas., p. 1072.) He testified that when Big Joe checked

out, he, Smith, took a bag for him to a car outside in which there was a young lady sitting. (Cas., p. 1074.)

He also refreshed his memory by looking at the bellboy's book, Exhibit D. 15, and testified that the item "O. S. service, 10:40—10:45" meant service outside the Hotel (the evening before the holdup) and that he recalled this particular item—that he was sent out for sandwiches. (Cas., pp. 1073 and 1074.)

In the same book, Exhibit D. 15, the second item before that of outside service, is an entry for room 402, "No bags, 10:30—10:30." This would seem to indicate that Big Joe and Mrs. D'Amato brought no bags with them. Smith also testified that some time before the trial, Lieutenant Linarducci and Detective Kenny showed him a picture of Big Joe and that the witness remembered him as soon as he saw the picture (Cas. p. 1075, l. 10), and that he believed he told them of taking something out to the car. (Cas. p. 1080, l. 15.)

Lieutenant Linarducci of the Prosecutor's Office, and Detective Kenny of the Newark Police, had a conversation with Smith at the Hotel about November 11, four or five days before the start of the trial. They testified that they showed him the photograph, Exhibit S. 26, and pointed out to him in particular the picture of Big Joe, and that Smith said he did not recognize the picture; that they also went over with him the bellboy's book and that he said he did not remember anything about the item of outside service and that he did not say anything about taking something to the car of Big Joe. (Cas. pp. 1421 and 1430.)

Motorcycle Officer Manning of the Newark Police, was riding along North Broad street near Clay around 10:30 A. M. the day of the holdup. Someone told him of the occurrence and he rode around in that vicinity and through the First Ward on the lookout for the green Pierce-Arrow. (Cas. pp. 1448 and 1449.) Just before 11, he was on Drift street and saw Big Joe whom he had known for about 10 years, drive up to Grande's in a Cadillac car. With him, Manning testified, was another man "that I now believe is Little Joe Juliano." They went into Grande's. (Cas., pp. 1447 and 1448.)

Of course, Manning had no reason at that time to connect the Julianos with the Reid holdup, so he went on his way to the police box at Crane street and Belleville avenue, a few hundred yards away, and made his regular duty call by pulling the box at 11 o'clock. (Cas., pp. 1462 and 1483, l. 1.)

Manning's testimony not only contradicts Big Joe's alibi, but tends to support Boudreau's testimony that the robbers were to gather on Drift street, right after the holdup. It fits in with the State's theory that they hid the Pierce-Arrow with the stolen license plates, within a radius of a couple of miles of the scene of the holdup and took to their own cars.

All the places mentioned in the testimony—the Reid plant, the Berwick, Drift street—are within about half a mile of each other. The time between the holdup at 10 or 10:15 and the hour mentioned by Manning, 10:55, was ample to allow Manning to cover the territory which he testified he covered with his motorcycle, and to allow the defendants to dispose of the Pierce-Arrow and to get back to Drift street.

Capozzi or Ruff was living at the St. Francis Hotel. He testified that he remained there in bed until shortly before 2 P. M. on July 19, when he met Barone and Max Silverman at Child's Restaurant. His alibi was corroborated by Max Silverman, a professional bondsman, who gave evidence that he went to the St. Francis and saw Ruff there about 9 or 9:10 that morning; that Ruff at that time signed the name "John Roma" to a conditional Bill of Sale for a Packard automobile which Ruff was purchasing under the name of Roma.

His alibi was also supported by the evidence of a woman, Dorothy Miller, who had been living with him and who testified that she had been spending the week with Mr. and Mrs. Earl Spitzner at 140 Brandywine avenue, Wilmington Delaware, a three-family house. (Cas., p. 1202.)

She testified that she telephoned from a drug store in Wilmington, to Ruff at the St. Francis Hotel between 11:30 and noon. (Cas. p. 1205.)

As soon as her testimony was given, the State sent to Wilmington Detective Joseph Coccozza of the Prosecutor's office. He returned in time to testify in rebuttal that there was no Brandywine avenue in that city; that there was a Brandywine street, but no No. 140, and no three-family house on the street, and no Mr. and Mrs. Earl Spitzner known in the neighborhood. (Cas. p. 1371.)

The State did not dispute that Silverman went to the St. Francis at the hour mentioned in his evidence, or that he went from there to the Packard Motor Company, or that he there delivered a conditional Bill of Sale signed by Ruff with the name, John Roma. But Silverman had

had the Bill of Sale in his possession since the preceding Saturday and had had ample opportunity to have it signed by Ruff either Saturday or Sunday.

Except for the testimony of the Miller woman and of Silverman, Capozzi's alibi was unsupported, although the defense called a large number of reputable witnesses to give the appearance of supporting the alibi. None of these witnesses, however, saw Ruff the morning of the holdup, none of them testified to anything which in the slightest contradicted the State's case.

The weight of the evidence not only supports the verdict but establishes the guilt of the defendants so conclusively, that any other verdict would have been most surprising.

II.

The Motion to Quash the Indictment.

Mr. Kavanagh's Brief, Point 3.

The motion to quash the indictment is found in the Case, p. 44.

The indictment is in the form prescribed by Criminal Procedure Act, Section 36, and charges that the defendants wilfully, feloniously and of their malice aforethought, did kill and murder the deceased. The State, before the trial, served on the defendants' counsel a Bill of Particulars to the effect that the defendants killed the deceased in committing or attempting to commit a robbery at a certain time and place, and further alleging that the State was unable to specify with certainty which of the defendants fired the fatal shot. This Bill of Particulars was made the basis of the motion to quash the indictment.

The argument for the defendants is that the indictment did not inform the defendants of the nature and cause of the accusation as required by the Constitution, and that the statutory form of indictment is not sufficient when the murder was committed in the course of a robbery, and that the indictment is insufficient because it does not apprise the defendants "whether they are charged as principals or accessories."

The constitutionality of this form of indictment was upheld in 1883 and has never since been doubted.

Graves v. *State,* 45 N. J. L. 203, affd. *id.* 347.

It has also been established that the statutory form of indictment is sufficient when the murder is raised to the degree of murder in the first degree because it is committed in the perpetration of one of the crimes mentioned in Section 107 of the Crimes Act.

Titus v. *State,* 49 N. J. L. 36, 7 Atl. 621.

The objection that the indictment did not inform each of the defendants whether he was charged as a principal or as an accessory, is apparently based on the notion that the one who fired the fatal shot is the only principal and the others are accessories. This is not the law. All the defendants were principals and were so indicted and convicted.

State v. *Carlino,* 98 N. J. L. 48, 118 Atl. 784, affd. 122 Atl. 830.

It may further be noted that the action of the Oyer on a motion to quash is not reviewable.

State v. *Harris,* 124 A. 602.

The attack on the indictment was not renewed on motion to direct a verdict, or otherwise.

III.

Motion for a Continuance.

Mr. McGeehan's Brief, Point 2.

Defendants' counsel moved for a postponement of the trial in order to enable the defense completely, adequately and properly to prepare their case. (Cas. p. 32.) This motion was denied. Defendants then withdrew their pleas and moved to quash the indictment. This motion was also denied and the pleas were reinstated and then the trial began. (Cas. p. 44.)

The motion for a continuance was addressed to the sound discretion of the court.

Boyd v. *Husted,* 127 Atl. 667.

Therefore it is not reviewable on strict writ of error.

The motion preceded the trial and was not part thereof, and hence cannot be considered under Section 136 of the Criminal Procedure Act.

State v. *Harris,* 124 Atl. 602.
State v. *Toughanni,* 96 N. J. L. 63, 114 Atl. 250.

It is true that this court in *State* v. *Lynch,* 134 Atl. 760, considered whether a continuance had been properly refused, but it does not appear from the report of that case that counsel called the attention of this court to previous decisions, that matters preceding the trial are not reviewable under Section 136.

Assuming, however, that this court should review the action of the Oyer on the motion for a continuance, the State contends that the motion was properly denied. The defendants were arrested October 16; the indictment was presented October 19 (Cas. p. 6, l. 11); the defendants were arraigned October 25 (Cas. p. 6, l. 28), and the trial was moved November 15, 1926 (Cas. p. 28), just thirty days after the arrest.

There was sufficient time for the preparation of the defense and hence there was no abuse of discretion in denying the motion for a continuance.

IV.

Motion for a Severance.

Mr. McGeehan's Point 1.

In general, refusing a severance for trial is a matter of discretion not reviewable on error. Also, as it precedes the trial, it is not within the scope of Section 136.

> *State* v. *Toughanni,* 96 N. J. L. 63, 114 Atl. 250.

Defendants, however, rested their application for a severance not on the common law relative thereto but on Section 64 of the Criminal Procedure Act of 1898:

> "When two or more persons are or shall be jointly indicted for the same offense, except for conspiracy, and such indictment, before the trial thereof, hath been or shall be removed into the supreme court of this state, by certiorari or otherwise, any one of the said persons, on application to said supreme court, upon affidavit that some one

> or more of said persons so jointly indicted with him, whom he shall name, is or are, as he is advised by his counsel, whom he shall also name, and verily believes, a material witness or witnesses for him on the trial of said indictment, and without whose testimony he cannot safely proceed to trial, shall, by order of said supreme court, be allowed a trial separate from the person or persons whom he shall so name as such material witness or witnesses."

This section was originally enacted in 1864 as a supplement to the Criminal Procedure Act of 1846, P. L. 1864, p. 561.

Until 1849, the rule of the common law prevailed in New Jersey that a party to the record, whether in a civil or a criminal suit, could not be a witness either for himself or a co-suiter, and further, that no party to the record could be compelled to testify.

> *Little* v. *Arrowsmith,* 16 N. J. L. 221;
> *State* v. *Carr,* 1 N. J. L. 1.

> 1 *Greenleaf on Evidence,* Section 353. "The rule which excludes a party to a suit from being admitted as a witness, is also a rule of protection. No person who is a party to the record, being compellable to testify."

These rules were greatly modified by successive acts of the Legislature.

> P. L. 1849, p. 264 (now Section 2 of the Evidence Act). "In all civil actions in any court of record, in this State, the parties thereto shall hereafter be admitted to be sworn and give evidence therein, when called as witnesses by the adverse party in such action." * * *

This statute referred only to civil actions. A defendant in a criminal case cannot, of course, be compelled to testify for the State and prob-

ably cannot be compelled to testify for a co-defendant.

> P. L. 1859, p. 489 (now Section 3 of the Evidence Act). "No person shall be disqualified as a witness in any suit or proceeding at law or in equity, by reason of his interest in the event of the same as a party or otherwise."

The Act of 1849 allowed a party to be called by his adversary but not to be sworn in his own behalf. The Act of 1859 first permitted a party to testify for himself. This Act only affected civil suits and did not permit a defendant upon the trial of an indictment to testify for himself.

In this situation of the law, the statute of 1864 was enacted requiring a severance in certain cases. The draftsman of that Act evidently understood the law to be that upon a severance, a defendant named in the indictment but not upon trial could testify in behalf of his co-defendant. This view of the law was established by the Supreme Court in 1868.

State v. *Brien,* 32 N. J. L. 414.

I do not know why the provisions of the Act of 1864 were limited to cases removed into the Supreme Court by certiorari or otherwise. It may be that the Legislature intended in this way to limit the right of defendants to a severance to those cases which were of unusual difficulty or importance and which therefore came before the Supreme Court rather than the Oyer or the Sessions. Certainly the restrictions in the statute cannot be disregarded entirely as counsel for the defendants contends they should be, so that the statute would apply with equal force to cases not removed into the Supreme Court.

In 1871 the Legislature, for the first time, permitted a defendant upon his own trial to testify.

> P. L. 1871, p. 12 (now Section 57 of the Criminal Procedure Act.) "Upon the trial of any indictment the defendant shall be admitted to testify if he shall offer himself as a witness."

With the passage of this Act, the reason for the enactment of the statute on which the defendants rely, ceased to exist. Neither Act permitted a defendant to be called against his will to testify in behalf of his co-defendant. The Act of 1871 permitted a defendant to testify whether or not a severance was granted.

I would contend that the Act of 1864 had been impliedly repealed by the Act of 1871 or had become obsolete with its enactment, had it not been retained in the revisions of 1874 and 1898; but certainly its provisions should not be broadened by construction and should not be applied to cases pending in the Oyer.

Mr. McGeehan relies upon the decision of Justice Dixon in the Passaic Oyer (not in the Supreme Court) in *State* v. *Kerr,* 24 N. J. L. Journal 435.

Justice Dixon said that the Oyer

> "is certainly within the spirit of the law and therefore I deem myself almost constrained by this statute to grant the motion."

The affidavit drawn pursuant to this statute which Mr. McGeehan presented to the Oyer stated that the defendants whom he represented, Big Joe Juliano, Capozzi and Barone, desired to call as a witness the other defendant, Little Joe Juliano. Mr. McGeehan states in his brief that his clients

> "Were deprived of the right to call this other defendant as their witness for direct

> examination and were confined to the right to cross examine him upon his own direct examination in his own case, thereby limiting the scope of his testimony in behalf of the defendants."

This statement appears to have been made by inadvertence. After Little Joe Juliano rested his case (Cas. p. 825, l. 21), he was called in behalf of his co-defendants and examined in chief by Mr. McGeehan. (Cas. p. 1350.)

The refusal to grant a severance did not prejudice the defendants in maintaining their defense upon the merits.

V.

The Challenge to the Array.

Mr. McGeehan's Brief, Point 3.

Mr. Kavanagh's Brief, Point 2.

The defendants challenged the array on the ground that the special list or panel of forty-eight was not drawn from the general panel.

The Chancellor-Sheriff Jury Act, P. L. 1913, p. 828, 1 S. C. S. 1652, directs the jury commissioners, prior to the commencement of each term of court, to prepare a "petit jury list" of persons liable to jury duty and to draw from this list, in the presence of a justice of the Supreme Court, such number of persons as he shall direct, and provides, Section 7, that these persons,

> "Shall constitute the panel of petit jurors to serve in and for such county for the next ensuing term of the courts thereof and shall be so summoned."

The act further provides,

9. "The justice of the Supreme Court may direct that the panel of petit jurors so drawn shall serve for a designated portion of the next ensuing term only and in such event they shall be so summoned and the said justice may direct said commissioners at a time to be fixed by the justice to draw a new panel or panels of petit jurors to serve for another designated part of such term, and such new panel or panels shall be drawn and summoned from the list certified by the commissioners prior to the commencement of such term in the same manner as hereinabove provided."

In Essex County, panels are usually drawn to serve two weeks and consist of about 150 names each. The special panel of 48 in the case at bar was drawn from the fourth panel of petty jurors of the September term. (Cas. p. 38, l. 12.)

The challenge was based on the theory that the special list should have been drawn not from the fourth panel but from all the names on the first four panels, namely, about 600 names.

The Criminal Procedure Act, Section 82, provides for the special panel as follows:

"It shall be the duty of the sheriff or other proper officer to draw such list of forty-eight jurors * * * from the general panel of jurors that may have been drawn and summoned to attend as jurors at the term at which such defendant is to be tried; but * * * if, for any reason, the number of jurors drawn or summoned shall be reduced below forty-eight or such larger number as the court in which such indictment shall be pending, shall, by special order, direct, then the said sheriff or officer shall add to the number so drawn and summoned as many more persons," etc.

The act further directs, Section 83, that when the special panel is exhausted before a jury is obtained,

> "Talesmen shall be taken from the general panel of jurors returned for the term at which such defendant is to be tried, if any remain."

Counsel contends that the term "general panel" as used in Section 82 of the Criminal Procedure Act means the sum of all the panels drawn for service at the same term.

If a defendant were tried at the beginning of a term and before the second, third, fourth and fifth panels for service at that term had been drawn, it would be impossible to know what persons would constitute the general panel, as that phrase is construed by defendants. Their interpretation of the statute in such case would be an obvious absurdity.

Section 82 directs the special list to be drawn from the

> "general panel of jurors that may have been drawn and summoned to attend as jurors at the term at which such defendant is to be tried."

Section 83 directs that upon exhaustion of the special panel, talesmen shall be taken

> "from the general panel of jurors returned for the term at which such defendant is to be tried, if any remain."

Plainly, the same general panel is meant by these two sections. It follows that if the special panel should be drawn from the six hundred names, the talesmen should also be drawn from the six hundred.

The special list is to be drawn from one panel. The six hundred names do not constitute a panel but are the sum of four separate panels.

Section 82 provides that "if, for any reason, the number of jurors drawn or summoned shall be reduced below forty-eight" the sheriff shall go outside of the special panel to make up the number forty-eight. This provision clearly indicates that the special panel is to be drawn only from those still in attendance upon the court. If we assume that the defendants' construction of the phrase "general panel" is correct and means the whole six hundred names, still that number had been reduced by the expiration of the term of service of the first three panels, so that, at the time the special panel was drawn, the general panel in attendance upon the court consisted only of the one hundred persons from whom the special panel was actually drawn.

So far, we have been dealing merely with phraseology. The purpose of the special panel must be considered. It is a list of persons from whom the trial jury or a large part thereof shall be drawn, and it is served upon the defendant in advance of the trial so that he may investigate their qualifications and impartiality. If the list for this trial had been drawn in accordance with defendants' contention, it would have contained the names of many jurors summoned not for the week beginning November 15, but drawn for service in September and October and who had been duly discharged.

It would be a mockery to serve on the defendants a list drawn from men so discharged and who would not be present in court to try the defendants.

The challenge to the array was properly overruled.

VI.

Challenge to the Polls.

Mr. McGeehan's Brief, Point 4.

Mr. Kavanagh's Brief, Point 4.

These assignments all allege as error that the court sustained challenges of the State to individual members of the panel. In each case, the examination of the juror disclosed that he had such a prejudice against capital punishment that whatever the evidence, he would not bring in a verdict which would entail that penalty.

One talesman was excused by the court on its own motion. The others were excused on challenge by the State.

A.

The only penalty for murder in the first degree in most of our states in former years was death. In this situation of the law, it was uniformly held that a disbelief in capital punishment was good cause for challenge.

35 *C. J.* 354.

> "A juror is incompetent who is so opposed to a particular form of punishment that it would influence his verdict. * * * It is now well settled that in capital cases the State may challenge for cause a juror who states that he has conscientious scruples against finding a prisoner guilty where the punishment is death."
>
> *People* v. *Damon,* 13, Wend. 351.

In a number of states, including New Jersey, the jury fixes the penalty for murder. In these states it has been generally held that scruples against capital punishment remain a good cause for challenge.

State v. *Comery* (N. H.) 95 Atl. 670.

"A juror who declares that he cannot exercise judgment upon that question (shall the penalty be death or life imprisonment) is not indifferent and should not be permitted to serve. Instead of going to the jury room prepared to weigh the evidence and consider argument, he would go with a mind fully made up without regard to what had been put before him during the trial."

Gross v. *State,* 2 Ind. 329.

"The reason why a juror is considered disqualified by such scruples is, that they would prevent him from performing his part as such juror in the due administration of the law. We think this reason applies with equal force, whether the law prescribes the single punishment of death, or invests the jury with a discretionary power to inflict that punishment or another. If in the one case his scruples would not permit him to render a verdict in accordance with the law, in the other they would not permit him to exercise the discretionary power with which he is invested, and which it is essential he should exercise to carry out the spirit and intention of the law."

State v. *Wooley,* (Mo.) 115 S. W. 417, 434.

"In our opinion, jurors should possess such qualifications as would enable them to fully conform to the provisions of the statute and if the testimony developed upon the trial should show a case of such an aggravated character as demanded the infliction of the highest punishment, they would do so."

Demato v. *People,* (Col.) 111 Pac. 703, 35 L. R. A., N. S. 621.

"Under the law, it is the bounden duty of the jury convicting one of the crime of murder in the first degree, to exercise their discretion in fixing the penalty to be im-

posed. To follow and uphold the law is the duty of courts and juries. Manifestly, one who says he would not exercise the discretion vested in him by law by declaring under oath that he would not fix the death penalty in a proper case, cannot discharge the duties which his oath prescribes."

People v. *Tanner,* 2 Cal. 257.

"Here the law had attached the penalty of death as well as imprisonment and it cannot fail to strike everyone that if the juror could not affix the penalty of death to the crime of grand larceny, he was not in a situation to exercise that discretion upon a full hearing of the case which the law contemplated he should possess. By his conscientious scruples or prejudice, a portion of that discretion was cut off and his verdict could, in no case, have amounted to more than a sentence of imprisonment. * * * It would be a mockery of justice to allow or compel a juror to be sworn and placed upon a jury when he declared that his conscience was so at war with a law that he would not, under any circumstances, consent to the highest punishment provided for a breach of that law and that his fellow jurors must shape their verdict to his preconceived opinions, he having no discretion in the premises."

Smith v. *State,* (Okla.) 114 Pac. 350.

"The punishment for murder being in the alternative, the State had a right to have upon the jury only those who had no scruples against either form of punishment but who would decide the matter entirely upon the issues as presented to them without bias in favor of, or against either manner of punishment."

State v. *Melvin,* 11 La. Ann. 535.

"The statute allows jurors in a specified class of cases to render a verdict in two

> forms. If they have conscientious scruples against either form, they cannot carry into effect the whole law, and therefore do not stand indifferent between the State and the accused."
>
> *Spain* v. *State,* 59 Miss. 19. Same rule.

In New Jersey capital punishment was the only penalty for murder in the first degree until 1916.

P. L. 1916, p. 576.

> "Every person convicted of murder in the first degree * * * shall suffer death, unless the jury, at the time of rendering the verdict in such case, shall recommend imprisonment at hard labor for life, in which case this and no greater punishment shall be imposed."
>
> *State* v. *Martin,* 92 N. J. L. 436, 106 Atl. 385.

This court considered the statute of 1916 and held that the recommendation was not a part of the verdict, and further,

> "While a jury may be influenced to recommend life imprisonment as a punishment by the very matters which evidenced the guilt of the accused, and perhaps properly so, still in law the jury are not bound to consider such evidence in determining whether to make or refuse a recommendation."

The court further held that any instructions which tended to influence the discretion of the jury in deciding whether or not to make a recommendation, were erroneous.

Chancellor Walker, dissenting, said:

> "I dissent from the holding that the facts upon which the conviction rests have no legal connection with the recommendation upon the theory that the recommendation is discretionary and requires no consideration of the facts upon which the conviction is based. * * * I concede that it is dis-

> cretionary with the jury to make such a recommendation but am of opinion that that discretion may properly be arrived at only by a consideration of the evidence."
>
> "I agree that the jury should be instructed that they have an absolute discretion in the matter of making or withholding the recommendation, provided, however, they are told that their determination to do the one or the other is confined to and arises out of a consideration of the evidence."

This case was decided March 3, 1919. Within six weeks thereafter the Legislature amended the statute in question.

P. L. 1919, p. 303.

> "Every person convicted of murder in the first degree * * * shall suffer death unless the jury shall, by their verdict and as a part thereof, upon and after consideration of all the evidence, recommend imprisonment at hard labor for life, in which case this and no greater punishment shall be imposed."

The Legislature clearly intended that the making or withholding of the recommendation should depend upon the evidence and the particular facts of the case and should not be made regardless of the evidence, solely because of the conscientious scruples against capital punishment upon the part of jurymen.

By a consideration of the evidence, the Legislature meant a consideration which might influence the jury and not a consideration which is a meaningless waste of time, as it would be if the jury, because of religious or other scruples, were determined to recommend life imprisonment, regardless of the evidence.

A juryman having such scruples obviously cannot base his vote as to the recommendation

on the evidence and is therefore disqualified to sit in such a case.

There was no error in excusing the jurymen who had such strong convictions against capital punishment that they were unable to base their recommendation, or lack of it, upon the evidence.

B.

Even if there were error in this regard, the defendants did not suffer thereby since they did not exhaust their peremptory challenges.

Each defendant challenged nineteen members of the panel (Cas., p. 9, l. 10 and p. 22, l. 22), making seventy-six challenges in all. Each defendant had one peremptory challenge which he did not use.

State v. *Langhans,* 95 N. J. L. 213, 112 Atl. 191. Headnote.

> "It is not reversible error for the court in the trial of an indictment to have improperly allowed on motion of the Prosecutor of the Pleas, a challenge to the favor where a jury has been obtained from the panel without the exhaustion by the State and defendant of their peremptory challenges as the defendant, by such action, has not been prejudiced in maintaining his defense upon the merits."

This decision depended upon the principle that:

> "The right of challenge however, is the right of exclusion, not a right of selection. It does not give to a defendant the right of saying what particular jurors shall try him."

This was an embezzlement case in which the defendant was not entitled to have served upon him a special panel of forty-eight names. Counsel

for the defendants contend that there is a distinction on the ground that by the allowance of the State's challenges for cause, the special panel was exhausted and the defendants forced to proceed with a jury drawn in part from the general panel. It appears from the record that nine jurors were chosen from the special panel (Cas. p. 9, l. 15) and after it was exhausted (Cas. p. 9, l. 30) the remaining three were selected from the general panel.

Three of the talesmen excused on the State's challenge for cause, Fred W. Lyon, William H. Billings and Frank Farley, appear to have been on the special panel and the others to have been on the general panel. (Cas. p. 67, l. 10.)

One hundred and eighteen jurors were examined in all, before the jury was completed. (Cas. p. 9, l. 10.) Hence, even if none of the State's challenges for cause had been allowed the special panel would have been exhausted.

The principle that the right of the defendant is one of exclusion and not one of selection, and hence that errors on the drawing of the jury are not ground for reversal unless the defendant exhausts his peremptory challenges, has been applied to murder cases where the special panel has been exhausted.

State v. *Deliso,* 75 N. J. L. 808, 69 Atl. 218;
State v. *Morehous,* 97 N. J. L. 285, 117 Atl. 296.

The only effect of the erroneous allowance of a challenge of a member of the special panel, is to reduce the number of the panel from which the trial jury is selected. It has been held repeatedly that the reduction of the number of the special panel, whether by failure to serve

a member of it with a summons or by excusing a member, is not a ground for reversal.

State v. *Camill Martin,* 94 N. J. L. 139, 109 Atl. 350;

State v. *Frank Martin,* 132 Atl. 93;

State v. *Doro,* 134 Atl. 611.

No cause for reversal appears in the selection of the jury.

VII.
Admission of Photograph.

Mr. McGeehan's Brief, Point 5.

Mr. Kavanagh's Brief, Point 5.

The State proved by the photographer the taking of the photograph which was marked S. 11 for identification. (Cas. p. 104.) When it was first offered in evidence, objection was made that there was no proof that the conditions on July 19 were the same as on the day the photograph was taken. (Cas. p. 106, l. 20.)

S. 11 is a view of Mt. Pleasant avenue, looking north, showing the Reid plant on the right of the picture. An automobile appears in front of the plant and a truck appears backed against the curb, north of the plant on the opposite side of the street. Two persons also appear on the side of the plant, watching the photographer, and a number of automobiles are in the background.

The witness, Boudreau, was questioned as follows:

> "Q I show you Exhibit S. 11 for identification and ask you to look at that photograph carefully and see whether the building—I am not speaking of the automobile—but the

building and the street and the pavement as shown in the photograph, are substantially as they were on the 19th day of July? A The Chevrolet is not where it was.

"Q I am not asking you about the automobile. I am asking you about the buildings and the street? A Yes." (Cas. p. 115, l. 28.)

The witness was then asked about the position of the Chevrolet on July 19th, and replied that it was a few feet in front of where it is shown in the photograph.

Mr. McGeehan then stated that he did not know the Prosecutor was referring to a photograph not in evidence and,

"I do not think the witness can testify from a photograph marked for identification. I ask that that be stricken out.

Mr. Bigelow: "We have to connect up the photographs so they can be offered in evidence." (Cas. p. 116.)

The photograph was then offered.

Mr. McGeehan: "I object on the ground that it shows movable objects, to wit, an automobile and a motor truck which are shown in the photograph and which were not and are not proven to have existed in the same manner as at the time the photograph was taken, and consequently contains matters not evidential against the defendants.

Mr. Kavanagh: "The same objection.

The Court: "I will admit it subject to the same explanation that these objects were not there and admit it as containing simply an exact reproduction of the place at this time." (Cas. p. 117.)

If a photograph of a scene of a crime were objectionable because it contained movable objects which were not there at the time of the crime, then it would be frequently impossible to procure any admissible photographs. Neither

the State nor the defense has authority to clear a street of traffic and to drive away all spectators in order to take a photograph.

The State, however, admits that the Chevrolet automobile and the motor truck shown in the photograph and especially mentioned in Mr. McGeehan's brief were "posed" by the State when the photograph was taken. The State was prepared to prove, when offering the photograph, that the very same automobile and truck occupied the same positions on the scene at the time of the holdup.

The failure of the State to make this proof before the photographs were received in evidence was due solely to the objection of defendant's counsel set forth above.

State v. *Fiore,* 94 N. J. L. 477. Headnote.

> "To justify the admission of a photograph in evidence it is only necessary that in addition to being relevant it be testified to by a witness having personal visual knowledge of the object depicted as being a correct representation of such object."

Goldsboro v. *Railroad Co.,* 60 N. J. L. 49. Whether a photograph is sufficiently verified is a preliminary question of fact for the trial court.

State v. *Noel,* 133 Atl 274. Decision of fact by the trial court will not be disturbed if supported by any evidence.

The State proved by Boudreau (Cas. p. 116, l. 12; p. 117, l. 37 to p. 118, l. 6), and also by the witness, Duff (Cas. p. 347, l. 30), the position of the automobile and by Boudreau (Cas. p. 121, l. 27) and Caruso (Cas. p. 401, l. 21), that the motor truck at the time of the murder was in the same position as in the photograph.

The fact of the murder was not controverted, but only the identity of the criminals. This photograph affected the question of identity in no way. The reception of Ex. S. 11 did not harm the defendants.

VIII.

Cross-examination of Boudreau.

Prout v. *Sand Company,* 77 N. J. L. 719.

> "The discretion of the trial court in regulating and limiting cross examination is very great and extends, among other things, to matters affecting the credibility of the witness and matters not directly in issue."

This principle applies not only to the cross examination of Boudreau but to the cross examination of other witnesses discussed in other points of this brief.

Mr. McGeehan's Brief, Points 6 and 11.

Mr. Kavanagh's Brief, Point 6.

On the cross examination of Boudreau, counsel sought to prove or to insinuate that Boudreau had committed many crimes and holdups in company with persons not including the defendants. The purpose of this seems to have been two-fold; first, to discredit the witness, and second, to lay a basis for argument that since Boudreau and others than the defendants, committed other crimes and holdups, therefore Boudreau and these others, not the defendants, were guilty of the murder of Mr. Condit.

Such questions as the following were asked on cross examination:

"Q You are pretty experienced in committing robberies, aren't you? A No, sir." (Cas. p. 123, l. 36.)

* * * * * *

"Q Yes, you went to Nutley to an Atlantic & Pacific tea store, didn't you? A I did not.

"Q Did you admit to Miss Sorrenson—

"Mr. Bigelow: I object—

"Mr. MeGeehan: I want to show that this man is a member of a gang who went around committing robberies at this time with men who did not include these defendants.

"The Court: Strike that out and the jury will be instructed not to consider it." (Cas. p. 146, l. 9.)

* * * * * *

"Q Do you remember being with her and stopping in front of the lunch wagon, the lunch wagon that I have spoken of, and calling a man out and saying that 'We have got a big job on tonight,' do you remember that? A No, sir." (Cas. p. 148, l. 1.)

* * * * * *

"Q But you swear that you and George did not make a stop there and do a job down there? A Positive.

"Q Were you in Kansas City on that trip? A We were.

"Q Did you make a stop there? A Yes.

"Q Arrested there? A Yes." (Cas. p. 151, l. 17.)

* * * * * *

"Q Gone out with him a good deal? A I have been out with him, yes sir.

"Q With him on various jobs, haven't you?"

Objection sustained. (Cas. p. 194, l. 32.)

* * * * * *

"Q He took a trip to Chancellor avenue with you, didn't he? A He didn't.

"Q Didn't you go one night to Chancellor avenue, one night with Brown and with George, Brownie, George and you, to Chancellor avenue one night? A We didn't." (Cas. p. 197, l. 39.)

* * * * * *

"Q You knew he was arrested in front of your house with burglars' tools? A I did not.

"Q Nick Marone and Carl Bielke and you took a trip to Scotch Plains one night? A Yes." (Cas. p. 198, l. 36.)

* * * * * *

"Q And they committed crimes with you, did they not?"

Objection sustained. (Cas. p. 199, l. 6.)

* * * * * *

"Mr. McGeehan: I want to show that he habitually committed crimes with a gang of which he was a member." (Cas. p. 199, l. 22.)

* * * * * *

"Q And do you remember saying to Ralph at that time 'Jesus Christ, I just missed four grand up at Scotch Plains, George.'"

Objection sustained. (Cas. p. 201, l. 35.)

* * * * * *

"Q Do you swear that you never came back from Scotch Plains on that night?"

Objection sustained. (Cas. p. 202, l. 25.)

* * * * * *

For the same purpose, counsel asked Boudreau innumerable questions about his friends and acquaintances:

George, who ran the garage (Case. p. 145, l. 32).

Brownie, now in the penitentiary (Case. p. 146, l. 1), whose name was Arthur O'Connor (Cas. p. 149, l. 26).

Pete Ruggiero, alias Pete Rogers (Cas. p. 146, l. 22).

Joe Ross, who, with Rogers, ran the Firestone A. C. (Cas. p. 147, l. 20).

Tony DiPhillips (Cas. p. 146, l. 22), whose brother was once assistant paymaster of the Reid Ice Cream Company (Cas. p. 148, l. 30).

Carl Bielke (Cas. p. 126, l. 36).

The brother of the Sorrenson girl (Cas. p. 150, l. 25).

Tony Illario (Cas. p. 194, l. 15).

Nick Marone (Cas. p. 194, l. 30).

Frank Pilsato, who may have been arrested for carrying burglars' tools (Cas. p. 198, l. 28).

Ralph Sciavo, the barber (Cas. p. 200, l. 22).

Counsel assigns as error that the Court sustained objection to the question:

> "Who did you go around with about the time this hold-up occurred, who were your friends" (Cas. p. 144, l. 11)?

The materiality of this question is not at all clear. On the other hand, it is plain that the court allowed counsel to go to great lengths in examining Boudreau on his associations. There was no error in this ruling.

Error is also assigned because the court sustained an objection to the question:

> "And they committed crimes with you, did they not" (Cas. p. 199, l. 6)?

The impropriety of this question is obvious. The proof of criminal conduct for the purpose of affecting the credibility of a witness can only be made by evidence of the conviction.

Or if it be urged that this testimony was admissible for the purpose of showing that these other persons probably committed the crime charged in the indictment, it may be answered that the fact that a person commits one crime is not material on the question whether he committed another crime, even of the same character.

Bullock v. *State,* 65 N. J. L. 557, 576.

This rule has usually been applied for the benefit of defendants in order to exclude proof of offenses other than the one charged in the indictment. But, obviously, the reasoning applies not only to offenses which a defendant may have committed, but to offenses which other parties may have committed.

State v. *Bossone,* 88 N. J. L. 45, 89 N. J. L. 724.

If the rule were otherwise, each trial would develop into a review of all similar crimes committed in the neighborhood for a considerable period before and after the event charged in the indictment. There was no error in excluding this evidence.

Mr. McGeehan's Brief, Points 7 and 8.

Mr. Kavanagh's Brief, Point 7.

Early in Boudreau's cross examination, he stated that he had signed two statements (Cas., p. 129, l. 10); that the second one he gave to Assistant Prosecutor Fisch one night and that he didn't recall the date but "it was shortly after my first statement." (Cas., p. 129, ll. 35 to 38.)

At a later session of court, counsel returned to this subject and brought out that the first statement was signed about a day and a half

after Boudreau was arrested. (Cas. p. 170, l. 25.)

"How long after that was the next one signed?"

The Prosecutor objected that the question was immaterial and the court asked counsel:

"Are you asking the question for the purpose of laying a foundation to impeach him?"

Mr. McGeehan: "I decline to state that."

The Court: "I overrule the question."

* * * * * *

"Q Two statements you made before, and which you signed, differ from each other and differ from the testimony given by you at this trial."

Objection sustained. (Cas., pp. 170 to 172.)

As to the first question, namely, when was the second statement signed, it may be said that the materiality of the evidence did not appear, and further that the witness had already stated that he didn't know the exact date but it was shortly after he had made the first statement. The question was probably a preliminary one. There was no error in overruling it and the defendants were not harmed thereby.

The second question was clearly improper because counsel should have shown the statements to the witness and have called his attention to the parts thereof which he contended were inconsistent with each other and inconsistent with his testimony.

2 *Wigmore* 1263;

1 *Greenleaf on Evidence,* Section 463;

Morford v. *Peck,* 46 Conn. 380;

The Queen's Case, 2 B. & B. 286; 129 E. R. 976.

If it be suggested that the statements were in the possession of the State and that counsel for the defendant could not show them to the witness, it may be replied that counsel could at least have asked the State to produce the statements for that purpose.

Mr. Kavanagh's Brief, Point 8.

The State's witness, Boudreau, was cross examined first by Mr. McGeehan and then by Mr. Kavanagh. On objection by the State, the Court ruled that Mr. Kavanagh's cross examination should be limited to the direct examination and that he should not be permitted to cross examine on the prior cross examination. (Cas., p. 204.) This ruling is assigned as error.

At the opening of the next session of court and while Boudreau was still on the stand, the Court reversed this ruling.

> "I wish to say to you now that you are privileged to cross examine Boudreau or any other witness, not only on the direct examination but upon Mr. McGeehan's cross examination and if you wish to recall Boudreau now for the purpose of further cross examination, you may do so." (Cas., p. 221.)

Boudreau thereupon resumed the stand and his cross examination by Mr. Kavanagh continued.

Obviously, the defendant, Nicholas Joseph Juliano, was not harmed by the ruling of the Court to which exception was taken.

IX.

Cross Examination of Siegel.

Mr. McGeehan's Brief, Point 12.

Siegel testified in behalf of the State to the happenings at the Reid plant at the time of the murder, and identified Boudreau and the four defendants as the bandits. (Cas., pp. 243 to 256.) He further testified that at a lineup in Police Headquarters he saw Boudreau and picked him out and in the same lineup, put his hand on another man (Bielke) whose photograph he identified in court and that later at another lineup at Police Headquarters, he saw the four defendants. (Cas., pp. 257 and 258.)

His cross examination was very lengthy. (Cas., pp. 258 to 337.)

Among other things, he was asked what the police told him at the first lineup (Cas., p. 284, l. 1) and in general as to his talks with the police about this case (Cas., p. 292, l. 39), and then he was questioned more fully as to his examination by the police. (Cas., p. 306 to 311.) The witness testified on this cross examination that immediately after the holdup he was questioned by the police at Mullins' Morgue and at the hospital; that he was not at Police Headquarters prior to the lineup; that he was questioned at his store, and told the detectives what he had seen and gave them a description of the bandits.

> "Q Did you tell the police that there were only four men there? A I did not.
>
> "Q And did you tell them that one of them was about thirty-five years old, five feet eleven, thin face, light complexion? A I did not." (Cas., p. 307, l. 39 to 308; l. 4.)

Counsel then repeated the question in substance, the State objected, and the Court ruled that Mr. McGeehan should mention the name of the police officer and the time and the place. The question was again reframed and objection sustained. This is the ruling alleged to be erroneous.

Clearly, the ruling was not harmful as the witness had just testified that he did not tell the police that one of the bandits was about thirty-five years old, five feet eleven, thin face and light complexion.

Mr. McGeehan's Brief, Point 13.

After the ruling last above considered, Seigel was asked,

> "Who was that officer, do you know what his name was?" (Cas., p. 309, l. 18.)

The only purpose of this question apparent at the time it was asked, was to enable counsel to comply with the Court's direction to mention the name of the officer when asking Siegel whether he had described one of the bandits as tall, thin faced, and blonde. As the witness had already answered this latter question, the ruling on the question as to the name of the officer was harmless.

Furthermore, the question, "Who was that officer" from the context appeared to mean "Who was the officer to whom you stated that one of the bandits had a light complexion, etc." The question improperly assumed, contrary to the evidence, that the witness had in fact made such a statement to some officer.

Mr. McGeehan's Brief, Point 18.

"Q Didn't you tell the detectives who came to your store a couple of days after the holdup, that there were four men and not five men in the holdup?" (Cas., p. 322.)

This question had already been answered as noted above. The defendant was not harmed by the action of the Court in sustaining the State's objection.

Mr. McGeehan's Brief, Point 14.

"Q Were you shown by the police who came to your store, a police circular saying four men were sought and one of them was of light complexion * * * and did you say that the description of those four men there was correct?" (Cas., p. 310.)

This question was obviously improper. Counsel should have shown the witness the circular when asking him about it. Authorities on this subject are noted under Point 13 above.

Mr. McGeehan's Brief, Point 16.

Siegel further testified on cross examination that a few days after the holdup, he was asked to look over pictures in the rogues gallery at Police Headquarters, and that he did not pick out any pictures as being persons involved in the crime. He was then asked:

"Q Now, do you know whether you were actually shown pictures of the four defendants here, right after the holdup occurred, and looking at their pictures, didn't say any one of them were identified by you as being in the holdup? A No, they told me to go to the rogues gallery and look over all the pictures.

"Q Didn't they show you all these pictures? * * * A No, sir, * * * positive.

"Q Weren't you shown the pictures, the pictures that you did look at, were the pictures of these defendants among them? A Well, there were too many of them. I looked and I got sort of upset and I stopped looking at them.

"Q Now, I ask you this question. If you were shown pictures of these men, you did not identify them as being the men you saw participate in the holdup, did you?" (Cas., pp. 312 and 313.)

Objection to this question was sustained and the ruling of the Court is assigned as error.

This question had already been answered in another form; the witness had testified that he did not identify any of the pictures that he looked at. Furthermore, it seems from his replies to the questions first above quoted, that no specific pictures of the defendants or others were shown or pointed out to him. He was merely left to browse through the rogues gallery.

X.

Examination of Kenny.

Mr. McGeehan's Brief, Point 20.

Mr. Kavanagh's Brief, Point 10.

Thomas J. Clark, the fifteen-year-old boy who was on the west side of Mt. Pleasant avenue, identified Boudreau as the driver of the bandit car and said that he would not be able to identify any of the other men if he saw them again. (Cas., p. 443.)

On cross examination, he was questioned at length about lineups which he witnessed at Police Headquarters. He said that he went to

Police Headquarters a few times (Cas., p. 445, l. 8) and that he did not pick out anyone. (Cas., p. 446, l. 37); that before viewing the men in the lineup, he was shown a few pictures. Mr. McGeehan then called the witness' attention to a picture cut from a newspaper and asked him if it appeared to be a picture of the same men shown in the photographs which he had seen at Police Headquarters. The witness replied that he thought so. (Cas., pp. 448 to 449, l. 5.) He was then asked:

> "Now, Thomas, after looking at that picture which was shown to you, you went into the line and did pick out some men that did look like those pictures? A I didn't pick out any men."

The various newspaper pictures used by counsel in this case, Exhibits D. 1, D. 2, D. 3, all show the defendants and Boudreau. The effect of this cross examination was to cast doubt on Clark's identification of Boudreau and also on the methods of the police in obtaining identifications.

These photographs were published on October 16 and 17, immediately after the arrest of the defendants.

On re-direct examination, the State tried to establish that young Clark had not been to Police Headquarters since the defendants and Boudreau were arrested or since these pictures were published. He proved, however, to be very vague and uncertain about the lineups. He thought he had attended three and probably four. (Cas., p. 451, l. 20.) That the last occasion was after school opened in the fall, but whether before or after Columbus Day, he could not say, nor did he remember what day of the week it was.

He finally testified that he was supposed to go to a lineup but did not, on a Sunday about four weeks before the day on which he was testifying, and that he did not go to a lineup the Saturday or the Friday before that Sunday. (Cas., p. 452.)

The State then called Detective Kenny who had worked on this case, who testified that the four defendants were arrested October 15th and that Boudreau was arrested October 14th, and that the Clark boy was not at Police Headquarters on the 14th or at any lineup since then. (Cas., p. 456, l. 39, to p. 457, l. 10.)

Counsel for the defendants had evidently been informed by them that some boy had attended a lineup in the endeavor to identify them, so on cross examination of Officer Kenny, he asked:

> "Q Now, who was the boy that was at the lineup of these men? A The boy?
>
> "Q Who was the boy that was at the lineup of these men?
>
> "Mr. Bigelow: There is no evidence that there was any boy.
>
> "Q Was there a boy at any of these lineups? A About what age?
>
> "Q About this boy's age. * * *A Not that I recall." (Cas., p. 458, l. 1.)

In spite of this answer, counsel returned to the subject and asked:

> "Q And was there any boy at any one of those (lineups), about the size, age and appearance of this little boy? A Yes, there was one." (Cas., p. 458, l. 32.)

Counsel then questioned the witness vigorously on his first answer that he did not recall any such boy, and brought out that the witness could not recall the name of the boy.

As the State had no witness who answered to the description of this boy, it would appear to

the jury that the State was not only withholding from the stand a material witness, but was concealing his name so that the defense could not call him. To correct this impression on re-direct examination, the State asked Kenny:

> "Q Was this boy from East Orange there in connection with the case on trial? A Not in connection. * * * No, sir." (Cas., p. 466, l. 1.)

And further, entirely to eradicate the impression that the State was withholding and concealing evidence and for that purpose only the State sought to make it clear that this boy from East Orange was the same boy mentioned by Kenny on the cross examination. (Cas., p. 466, l. 39 to 467; l. 20.) Then to the great surprise of the State, the witness said that the boy was present in connection with the case on trial. (Cas., p. 467, ll. 25 to 468; l. 29.)

This testimony then followed:

> "Q Now, the defendants were then in a lineup in connection with the Reid case? A Right.
>
> "Q And was that boy—was he present at Headquarters at that time in connection with the Reid case? A No.
>
> "Q What case was he present in connection with?"

Mr. McGeehan objects and states the ground of his objection.

> The Court: "I will allow him to answer the question but I will not permit him to state whether or not an identification was made.
>
> "He was brought in reference to the Ward case." (Cas., p. 468, ll. 30 to 469; l. 40.)

The fact that this boy witnessed a lineup was brought out by counsel for defendants from an obviously reluctant witness. Officer Kenny was

properly loath to mention this boy, but the boy having been thus injected into the case, and Kenny having become confused and stated that he was at Headquarters in connection with the Reid case, it was within the sound discretion of the Court to show something more positive than the statement that the boy was not there in connection with the Reid case, namely, that he was on the Ward case.

There was no evidence that he identified the defendants, no evidence of what the Ward case was, and nothing to prejudice the defendants.

XI.

Examination of Carrington.

Mr. McGeehan's Brief, Point 21.

Dr. Martland testified that, in his opinion, Mr. Condit's wounds were caused by bullets larger than 38 caliber. (Cas., p. 383.)

Mr. Phillips testified that he picked up two used cartridge shells at the scene of the robbery shortly after noon that same day. (Cas., pp. 471 and 472.) They were put in evidence as Exhibit S. 17 and appear to be of 45 caliber.

The State then placed on the stand, Charles G. Carrington, in order to prove that the defendants or some of them, at or about the time of murder, were in possession of large caliber pistols.

Carrington was a porter in a turkish bath establishment in Newark, and testified that he was on the night shift at the bath the week beginning Tuesday, July 13, 1926 (Cas., p. 474, l. 15) and including the day of the murder; that

during that week, the defendants, Big Joe Juliano and Barone, came to the bath; that Big Joe gave him a bundle containing revolvers of large caliber. (Cas., p. 476.) This evidence was admitted over objection of counsel. It seems obviously material.

3 *Greenleaf on Evidence,* Section 137.

> "Other circumstances such as possession of poison or a weapon wherewith the deed may have been done * * * are equally competent evidence."

XII.

Cross examination of Miss Hanley.

Mr. McGeehan's Brief, Point 22.

Miss Hanley identified Barone as one of the robbers. (Cas., p. 514.) Her testimony, both on direct and cross examination, was notably clear and frank. Mr. McGeehan tried to weaken the effect of her positive identification by suggesting Barone merely looked like the robber.

> "Q Then, of course, do you know what kind of a hat Barone, the man you picked out as looking like the man you saw the day of the holdup?
>
> Mr. Bigelow: "I object to that. She said he was the man.
>
> "Q You say he was the man because you think and believe he looks like him? A Yes." (Cas., p. 534, l. 20.)

Mr. McGeehan then asked the following questions which were overruled by the Court:

> "Q Now, you have been mistaken in your young lifetime on memory of faces?" (Cas., p. 535, l. 5.)
>
> * * * * * *

"Q Have you a pretty good memory of faces of persons you saw on that day at police headquarters?" (Cas., p. 537, l. 27.)

* * * * * *

"Q Have you ever tested your ability to remember faces?" (Cas., p. 539, l. 29.)

* * * * * *

"Q Have you ever, in any one way trained yourself to remember faces?" (Cas., p. 540, l. 1.)

It is submitted that none of these questions were calculated to assist the jury in determining what weight should be given to the evidence of Miss Hanley. None of them bore on the issues in the trial.

The admissability of these questions was solely in the discretion of the Court—if they were admissable at all.

2 *Wigmore,* Section 995.

XIII.

Cross Examination of Detective Giuliano.

Mr. McGeehan's Brief, Point 23.

Mr. Giuliano is one of the County Detectives of Essex County. He testified to the arrest of Boudreau on October 14th and to questioning of him. This testimony in effect was admitted by consent as the Court expressly asked Mr. McGeehan if he objected and he replied that he did not. Giuliano also testified that Boudreau was identified by Siegel in a lineup before he confessed. (Cas., pp. 583 and 584.)

On cross examination, Mr. McGeehan asked:

"Was Philip Siegel shown the pictures of the defendants or any of them right after this holdup had occurred?" (Cas., p. 587.)

This was clearly not proper cross examination. Detective Giuliano, on his direct examination, had not testified to anything that happened prior to October 15th, about two months after the holdup. He had not testified as to any identification of the defendants or any of them, by Siegel, and had not testified about any photographs shown to Siegel.

The Court allowed counsel for the defense to examine this witness very fully on the subjects mentioned in the direct examination and particularly on the questioning of Boudreau, and in this way brought before the jury numerous holdups in which Boudreau was suspected of participation. (Cas., pp. 589, 590.)

XIV.

Cross examination of Brex.

Mr. McGeehan's Brief, Point 24.

Captain Brex was the head of the Detective Bureau of the Newark Police. He testified to the questioning of Boudreau and to the identification of Boudreau by Siegel, and to the arrest of the defendants (Cas., p. 615) and to their identification by Boudreau and others.

On cross examination, objections were sustained to the following questions:

> "Now, none of the defendants in this case were picked out by photographs by any of the eye witnesses of the holdup after it occurred, were they?"
>
> * * * * * *
>
> "The persons that you have said in your direct testimony, picked the defendants out in lineups, never picked out the photographs of any of the defendants shortly after the

Reid holdup occurred, did they?'' (Cas., pp. 644 and 645.)

None of Captain Brex' direct testimony related to events prior to the arrest of Boudreau on October 14th. None of it related to photographs except photographs shown Boudreau. (Cas., p. 613, ll. 35 to 614; l. 25.)

Three questions lacked this basis, namely, there was no evidence that the persons who, according to Captain Brex, picked out the defendants had seen photographs of the defendants shortly after the Reid holdup. Immediately after these questions were overruled, Captain Brex was asked:

> ''The persons who you testified on direct examination, picked out the defendants from the lineup, were shown pictures of defendants shortly after the holdup had occurred, were they not? A I do not know of my own personal knowledge.'' (Cas., p. 645, l. 30.)

Obviously, since the captain did not know whether they had been shown photographs, he could not know whether they had failed to pick out the photographs of the defendants.

The defendants were not injured by the exclusion of this question.

Mr. McGeehan's Brief, Point 25.

> ''Q Did Siegel tell you that he saw and recognized five people right after this holdup occurred.'' (Cas., p. 657, l. 40.)

Captain Brex had not testified on direct examination as to any conversations with Siegel. He had testified that Siegel had identified Boudreau and had put his hand on Bielke in a lineup (Cas., p. 620, ll. 20 to 40), and that at a later lineup, Siegel identified the four defend-

ants as well as Boudreau. (Cas., p. 620, l. 18.) There was no other mention of Siegel in the direct examination. The question as to what Siegel told Captain Brex right after the holdup, was properly excluded.

State. v. *Brady,* 71 N. J. L. 360.

XV.

Examination of Miss Sorenson.

Mr. McGeehan's Brief, Point 26.

Miss Sorenson was called by the defense in an attempt to prove that Boudreau had written to her a letter in August, 1925 (Cas., p. 831, l. 22), nearly a year before the murder, in which he said that he took dope. (Cas., p. 831, l. 8.)

This offer the Court rejected.

The State of New Jersey and not Boudreau was the party plaintiff on this trial, and hence, an admission by Boudreau that he took dope was not evidential of that fact as against the State.

Even if it had been evidential, the letter was written so long before the murder that its materality was within the discretion of the Court.

It is true that Boudreau testified on cross examination that he did not use dope and that he had not written Miss Sorenson to the contrary, but such testimony, while it might go to affect Boudreau's credit, was certainly collateral to the issue whether the defendants were guilty of murder, and therefore the defense was bound by Boudreau's answers to these questions and was not entitled to introduce independent evidence to contradict him.

The letter was properly excluded.

The Court did allow Miss Sorenson to testify that on a later occasion Boudreau told her that he was going to take a couple of shots of dope; that he left the room and returned shortly, saying that he had taken some morphine. (Cas., p. 834, l. 15.)

Mr. McGeehan's Brief, Point 27.

The Court also refused to allow Miss Sorenson to testify that the night of Boudreau's arrest, three months after the murder, he called a man out of a lunch wagon and said "We got a big job on tonight." (Cas., p. 834, l. 30, to p. 836, l. 35.)

Counsel states in his brief very frankly that the purpose of this evidence was to show that Boudreau was a member of a gang which did not include the defendants and which committed a series of robberies and holdups.

This line of testimony has already been considered above under Point VIII.

XVI.

Cross Examination of Kelly.

Mr. McGeehan's Brief, Point 28.

Edward J. Kelly was sworn in behalf of the defendants. On his direct examination he was not asked his residence, business or other such question which might assist the jury in determining what weight to give to his evidence.

On cross examination, he was asked:

"Q Mr. Kelly, where do you live? A 677 Springfield avenue * * *.

"Q What is your occupation? A Nothing at present.

"Q You were on the police force of Newark at one time, weren't you? A I was.

"Q How did you happen to leave the force? (Objection made and overruled.) A I got dismissed." (Cas. p. 1252.)

It will be noted that the State did not insinuate or elicit that the witness was guilty of criminal conduct. Patrolmen are generally, if not always, dismissed from a police force for violation of department regulations.

40 *Cyc.* 2488.

"Cross examination may properly be directed toward throwing light on the character and antecedents of the witness or showing his business."

There was no error in permitting this cross examination.

XVII.

Charge to the Jury—Statements of Law.

Mr. McGeehan's Brief, Point 29.

Mr. Kavanagh's Brief, Point 11.

The Court charged the jury on the subject of alibi as follows:

"An alibi is a defense arising upon proof that the prisoner was elsewhere at the time the crime was committed, and consequently incapable of being the guilty person. If such a defense be overcome by the State or be discarded by a jury, the State will not thereby be relieved of the burden of establishing the guilt of the accused by affirmative evidence which shall satisfy you that he is guilty. If reasonable doubt of guilt is raised even by inconclusive evidence of the alibi, defendant is entitled to the benefit of it. In that event a defense which otherwise would overcome and put at naught

the State's evidence would simply be put out of the case."

Counsel for the defendants construe the last sentence quoted above to mean that if reasonable doubt of guilt is raised by the evidence of the alibi, then the defense of alibi is put out of the case. If this is the proper construction, the charge was obviously erroneous but we contend that such is not the proper interpretation of the charge. The phrase "in that event" refers back to the second preceding sentence, so that from a logical standpoint this part of the charge must be construed,

> "If such a defense be overcome by the State or be discarded by a jury, the State will not thereby be relieved of the burden of establishing the guilt of the accused by affirmative evidence which shall satisfy you that he is guilty. In that event, a defense which otherwise would overcome and put at naught the State's evidence, would simply be put out of the case."

The intervening sentence is parenthetical and does not disturb the meaning of the paragraph as a whole.

The interpretation of the charge advanced by counsel gives to the sentence in question such an absurd meaning and so contradictory to the instructions on alibi immediately preceding it, that the jury could not have taken it in that sense.

Mr. McGeehan's Brief, Point 36.

Error is assigned in that the Court instructed the jury that in weighing the testimony of a witness they had a right to consider the interest of the witness in the outcome of the trial.

It has been so frequently held that such an instruction is proper and that the Trial Court need not refer to the interest of every witness, that no citation of authority is necessary on this point.

Mr. McGeehan's Brief, Point 37.

> "When I read to you the statute in this case, I pointed out that the crime these men are charged with is murder and that the statute makes a murder in the perpetration of a robbery to be murder in the first degree. I charge you that in this case, your verdict ought to be if you believe the defendants or any of them guilty of murder in the first degree. If you are not satisfied from the proof that the State has made out a case beyond a reasonable doubt as to any or all, your verdict ought to be not guilty. In other words, there should be one of two verdicts, a verdict of murder in the first degree or an acquittal." (Cas., p. 1525.)

Defendants' counsel contends that by the second sentence above quoted, the jury was instructed to convict the defendants if they believed the testimony of the defendants. Of course, such an instruction would be erroneous.

The State contends that this sentence meant that the verdict should be in the first degree if the jury believed the defendants guilty of murder.

The instructions to the jury are delivered orally without punctuation. The punctuation is inserted by the stenographer when, later, the case is written up.

While counsel for defendant specifically excepted to part of the paragraph in the charge above quoted, namely the instruction that the verdict must be either murder in the first degree

or acquittal, he did not except on the ground that the court directed a conviction, if the jury believed the defendants' evidence. This failure to except strongly suggests that the charge as delivered,—the oral pauses and emphases,—did not permit the construction which counsel now urges.

The real question before this Court is this: Could the jury have understood that they were to convict if they believed the defendants' story —if they believed that the defendants were not present at the scene of the murder and had nothing to do with it. If the jury could have believed this, there should be a reversal. Otherwise there should not be a reversal on this ground.

A consideration of the case as a whole and of the fact that such able counsel as Mr. McGeehan and Mr. Kavanagh summed up for the defendants, a consideration of the charge as a whole and of the paragraph above quoted, exclude the possibility that the jury convicted because they thought the defendants innocent.

Mr. McGeehan's Brief, Point 42.

> "Because the court failed to charge and it was impossible for the jury to learn from the charge of the court, what facts, if proved to their satisfaction beyond a reasonable doubt, would warrant the jury in convicting the defendants."

We answer in the first place that the Court did charge what facts would warrant a conviction.

The Court informed the jury that the defendants were charged with murder (Cas. p. 1503, l. 26) and defined murder,

> "Murder is defined as the unlawful killing of a human being with malice aforethought, by a person of sound mind and discretion" (Cas. p. 1504, l. 27).

The Court had already advised the jury that the State contended that the killing of Mr. Condit grew out of a robbery and had read the statutory provision,

> "Murder which shall be committed in perpetrating or attempting to perpetrate any robbery, shall be murder in the first degree" (Cas. p. 1504, l. 15).

The statutory definition of robbery was then read to the jury (Cas. p. 1504, l. 17).

The instructions to the jury concluded as follows:

> "When I read to you the statute in this case, I pointed out that the crime these men are charged with is murder, and that the statute makes a murder in the perpetration of a robbery to be murder in the first degree. * * * If you are not satisfied from the proof that the State has made out a case beyond a reasonable doubt as to any or all, your verdict ought to be not guilty. In other words, there should be one of two verdicts, a verdict of murder in the first degree or an acquital." (Cas. p. 1525, l. 1).

The portions of the charge above referred to made clear to the jury the facts they must find in order to convict.

But even if the Court had not instructed the jury on that subject, there should be no reversal for such an omission.

> *State* v. *Geltzeiler,* 127 Atl. 322, affd. 128 Atl. 240.
>
> "The next point argued is that the conviction should be reversed because the court failed in its charge to define the crime for which the defendants were being tried. This is not error. A court is not obliged to define the crime. A court can submit a case to the jury without a charge if it desires to do so. People *v.* Gray, 5 Wendell 289. State *v.*

Ross, 147 Pac. 1149. The method to be taken to secure a charge upon any branch of the case is by a request to charge."

XVIII.

Charge to the Jury—Comment on Evidence.

Mr. McGeehan's Brief Point 30.

"At that time Myrtle Foster testified that there was a conversation between Barone and Boudreau—between Barone and Little Joe—and there was some reference made about going to New York and meeting at their hangout" (Cas. p. 1511, l. 36).

Counsel objects to this part of the charge on the ground that Myrtle Foster did not testify to a conversation between Barone and Boudreau.

It will be observed that the Court immediately corrected this slip by substituting Little Joe for Boudreau.

Mr. McGeehan's Brief Point 31.

"Capozzi, in support of his defense, said * * * that he left to keep an appointment at 12 o'clock with Barone and Big Joe" (Cas. p. 1513, l. 3).

Capozzi testified that he left the hotel "before 2 o'clock, around 1:40 or 2 o'clock" (Cas. p. 969, l. 20), that he drove to Belleville and back, "around 3 o'clock, a little after 3, I cannot just recall the hour" (Cas. p. 970, l. 30), to Childs' restaurant on Market street, where he saw Big Joe Juliano (Cas. p. 972, l. 8); that he went with him shopping to Weber & Heilbroner's on Broad street, then back to Childs' (Cas. p. 972). Then still with Big Joe to the Pennsylvania Station to meet Dorothy Miller (Cas. p. 988), who,

he testified, arrived on a train due about 4 o'clock (Cas. p. 987).

The holdup occurred about 10 A. M. The variance between 12 o'clock and 1:40 was immaterial, as it was also immaterial whether Capozzi met Big Joe casually or by appointment.

Barone had testified to an appointment with Big Joe and Max Silverman at Childs' restaurant at noon (Cas. p. 1276, l. 1).

Mr. McGeehan's Brief Point 32.

> "Mr. Shelter further testified that on Sunday Max Silverman was at his house in company with Barone, one of these defendants, and I think Buck Joseph, if I am not mistaken, was also present, and that at that time a duplicate set of papers were given to Silverman for Roma's signature" (Cas. p. 1513, l. 28).

Exception was taken to this statement (Cas. p. 1526, l. 30).

Shelter testified that he received the original set of papers on Thursday (Cas. p. 857, l. 30); that Silverman, Barone and Buck Joseph came to his house Sunday and Silverman told him he had had duplicate papers made up (Cas. p. 858, l. 12).

The duplicate papers were the ones that were signed by Capozzi with the name Roma and which were put in evidence. The State contended that Silverman had them signed by Capozzi either Saturday or Sunday. The slight inaccuracy by the Court was helpful to the defense as it shortened the time within which Capozzi could have signed the papers.

Mr. McGeehan's Point 33.

"He (Capozzi) testified that he had an appointment with Barone and Big Joe and they met pursuant to that appointment, at or near Childs' or at 18 Trent Place; that they went to Weber & Heilbroner's and made some purchases and then later on Big Joe went to the railroad station to meet Dot Miller" (Cas. p. 1514, l. 28).

This comment refers to the meeting the afternoon of the murder.

There is no inaccuracy in it, except that it includes Barone and speaks of the meeting as one made by appointment instead of by chance.

Barone met Capozzi, Big Joe and Dot Miller at Childs' that same evening and went with them to Long Branch in Capozzi's Packard (Cas. pp. 1282 and 1283).

Mr. McGeehan's Point 34.

"And then I think we had as a witness an ex-police officer, Kelly, who met Big Joe at Giuli Grande's in the neighborhood of 12 o'clock and then rode downtown with Big Joe to keep his appointment with Capozzi and Barone" (Cas. p. 1515, l. 40).

The only inaccuracy in this is the inclusion of the name Capozzi. Big Joe met Capozzi downtown two hours later.

Mr. McGeehan's Brief Point 35.

Mr. Kavanagh's Brief Point 12.

"At that time he (Officer Manning) saw Big Joe get out of the car with another man who he now says is Little Joe. He says the reason why he fixes the time at five minutes to eleven is because he made his pull at a signal box. Yesterday Lieutenant Rowe of Police Headquarters testified that

Officer Manning made his pull at eleven o'clock at the box which Officer Manning testified he pulled from" (Cas. p. 1517, l. 20).

Manning testified,

"Q Did anyone get out of the car? A Yes, a man that I now believe is Little Joe Juliano went into the place first. Big Joe got out second and last" (Cas. p. 1448, l. 7).

Lieutenant Rowe testified,

"There is a pull registered here from 22 box at just 11 A. M. credited to Motorcycle Officer Manning." (Cas., p. 1482, l. 40.)

With reference to all the foregoing minor inaccuracies in the Court's review of the evidence, it may be remarked that none of them bore directly on any issue in the case. They were not misstatements with relation to facts of moment. In the *Noel* case relied upon by defendants' counsel, the real issue was whether the defendant was sane and knew the distinction between right and wrong. The Court stated in its charge that a certain doctor testified that the defendant did know this distinction when in fact he had not so testified. Clearly, that was a misstatement of a fact of moment.

Furthermore, in the case at bar, the Court charged the jury as follows:

"The jury, however, are the sole judges of the facts, the weight of testimony and the credibility of witnesses, the inference to be drawn from the evidence and the ultimate conclusions to be reached upon all of the facts in the case.

"The Court, in referring to testimony, is not to be understood as deciding any facts, but merely as attempting to elucidate the evidence for the convenience or assistance of the jury.

"If the Court errs in its statement as to any evidence or assumes the existence in its statement of any evidence, or assumes the

existence of any evidence that it not actually before the jury, the jury are to rely upon their own 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 are not to disregard other evidence which they may deem of greater importance.

"It is the duty of the jury to consider all the evidence and the pertinent proof bearing upon the questions involved in this case, not only which are mentioned by the Court, but which have been presented to you" (Cas. p. 1502, ll. 11 to 35).

After the jury had retired and after the exceptions had been taken to the charge, the jury was recalled and the Court stated to them:

"My attention has been directed to some reference of mine with regard to the testimony. I will read to you again part of my charge" (Cas. p. 1534).

The Court then read to the jury for the second time the part of the charge above quoted.

It is clear that the Court in the final analysis left the decision to the jury and that the errors in the Court's recollection, of which the defendants complain, afford no ground for reversal.

State v. *Kashkevich,* 98 N. J. L. 23;
State v. *Knoll,* 87 N. J. L. 330;
State v. *Hummer,* 73 N. J. L. 714.

XIX.

Requests to Charge on Behalf of Nicholas Joseph Juliano.

Mr. Kavanagh's Brief Point 14.

It may be gathered from the record that Mr. Kavanagh submitted certain requests after the summation both of the defense and of the State

and that he understood the rule to be that requests to charge were timely if submitted before the Court instructed the jury (Cas. pp. 1525 and 1533). The Court refused to accept these requests.

There was no error or abuse of discretion in this action of the Court. It is unnecessary, however, to consider this feature of the matter as all the requests submitted by Mr. Kavanagh were identical with requests submitted by Mr. McGeehan which are considered in the next point.

XX.

Requests to Charge by the Other Defendants.

Mr. McGeehan submitted twenty-six requests to charge, of which a number were charged verbatim as follows:

Request No. 2—Charged Cas. p. 1521, l. 6.
Request No. 3—Charged Cas. p. 1521, l. 15.
Request No. 4—Charged Cas. p. 1521, l. 27.
Request No. 5—Charged Cas. p. 1521, l. 35.
Request No. 8—Charged Cas. p. 1522, l. 25.
Request No. 11—Charged Cas. p. 1522, l. 39.
Request No. 13—Charged Cas. p. 1523, l. 15.
Request No. 14—Charged Cas. p. 1523, l. 38.
Request No. 20—Charged Cas. p. 1524, l. 20.

Several of the other requests were charged in substance.

Request No. 1.

> "The defendants, and each of them, in this case are presumed to be innocent and the burden of proof is upon the State to prove them guilty of the charge contained in the

indictment beyond a reasonable doubt, and if the evidence fails to convince you beyond a reasonable doubt of the guilt of these defendants, it is your duty to acquit." (Cas., p. 1535, ll. 28 to 34.)

The Court charged:

"The law presumes in this case, as in all other criminal cases, that the defendants are innocent and that presumption attaches to every man who is charged with crime. This presumption can only be overcome by evidence showing beyond a reasonable doubt the guilt of the defendants. The State must prove all the essential elements of the crime beyond a reasonable doubt. The State has that burden and it does not shift throughout the case." (Cas., p. 1502, l. 36 to p. 1503, l. 5.)

The Court further charged in detail on this subject at p. 1521.

Request No. 6.

"Certain motions for directions of verdict of acquittal were made to the Court by these defendants which the Court denied, but you must not consider the rulings of the Court as any determination of any of the facts in dispute or even as indications of the Court's opinion as to the facts, the Court having merely ruled that the evidence presents questions of fact for the jury rather than questions of law for the Court." (Cas., p. 1536, l. 36 to p. 1537, l. 9.)

The Court charged part of this request:

"Certain motions for directions of verdict of acquittal were made to the Court by these defendants which the Court denied, but you must not consider the rulings of the Court as any determination of any of the facts in dispute." (Cas., p. 1522, l. 15.)

The Court also instructed the jury that they were not bound by any indications of the Court's

opinion as to the facts." (Cas., p. 1502, ll. 11 to 20.)

Request No. 7.

> "In considering the question of the guilt of each of these defendants, I charge you that you are not to take into consideration the fact that such defendants have been previously convicted of crime, except so far as this fact may affect their credibility as witnesses in this case, and under no circumstances may you take it into consideration as creating any probability that the defendants, or any of them, were guilty of the crime charged in the indictment, nor should it influence you in any way in passing upon their conduct or actions at the time mentioned in the indictment." (Cas., p. 1537, ll. 9 to 20.)

This request was too broad. According to it, the prior convictions should not influence the jury in any way in passing upon the defendants' conduct or actions at the time mentioned in the indictment. The jury pass upon such conduct and actions by determining whether or not the defendants are guilty. In reaching this determination, they may properly discredit the testimony of defendants because of prior convictions. Hence, it is proper, contrary to this request, that the fact of prior convictions should influence the jury in passing upon the defendants' conduct and actions.

The Court properly instructed the jury as to the purpose and effect of the evidence of prior convictions;

The Court charged:

> "You have heard witnesses, too, who have admitted a conviction of crime. Of course, the law does not say that because a man was convicted of crime, sometime must be

guilty of the instant crime, because of the fact that he had been convicted at some time prior.

"I will read the statute itself. 'No person offered as a witness in any action or proceeding of a civil or criminal nature shall be excluded by reason of his having been convicted of crime, but such conviction may be shown on the cross examination of the witness, or, by the production of the record thereof, for the purpose of affecting his credit.'

"That is why evidence was relevant in this case as to the conviction of crime of people parties to the cause or any witness who has testified before you." (Cas., p. 1519, l. 30.)

Request No. 9.

"In this case, the presence of these defendants at the scene of the commission of the crime must be proven beyond a reasonable doubt, and if you have a reasonable doubt as to the presence of any of the defendants at such scene of the crime, then such defendants as you have a reasonable doubt in respect to must be acquitted. Even if the jury should find that any particular defendant has not proven his absence from the scene of the crime, or his alibi, yet if the testimony as to such alibi creates such a degree of uncertainty as to his whereabouts that the jury is not satisfied beyond a reasonable doubt of his guilt of the crime for which he is indicted, he is entitled to an acquittal." (Cas., p. 1537, l. 32.)

The Court charged:

"An alibi is a defense arising upon proof that the prisoner was elsewhere at the time the crime was committed, and consequently incapable of being the guilty person. If such a defense be overcome by the State or be discarded by a jury, the State will not thereby be relieved of the burden of establishing the guilt of the accused by affirma-

tive evidence which shall satisfy you that he is guilty. If reasonable doubt of guilt is raised even by inconclusive evidence of the alibi, defendant is entitled to the benefit of it." (Cas., p. 1506, l. 1.)

The Court further charged:

"The defense in this case of the three defendants, Joseph Juliano, Louis Capozzi and Christopher Barone, is that of complete innocence of the commission of the crime charged in the indictment and in conjunction with and in support thereof, these defendants have testified that they were not at the place where it was committed when it was committed, and this feature of the evidence is termed in law an alibi, and if a reasonable doubt of guilt is raised, even by inconclusive evidence of an alibi, the defendants, and each of them, are entitled to the benefit of that doubt and to an acquittal." (Cas., p. 1521, l. 35.)

Request No. 10.

"The jury is instructed that the indictment in this case is of itself a mere accusation or charge against the defendants and creates no presumption whatever of their guilt and is not of itself any evidence of the guilt of the defendants who are presumed to be innocent in spite of the indictment." (Cas., p. 1538, l. 11 to l. 17.)

The Court charged:

"The finding of an indictment is merely a step in the regular course of procedure, and under our constitution, no man can be charged with crime unless he is first presented by a grand jury and it has no evidential value against the defendants." (Cas., p. 1503, l. 37 to p. 1504, l. 3.)

Request No. 12.

"The Court instructs the jury that the law does not require that the defendants

sustain the burden of proving themselves innocent, but the law imposes upon the prosecution the burden of proving that the defendants are guilty in manner and form as charged in the indictment beyond a reasonable doubt." (Cas., p. 1538, l. 28.)

This request is substantially the same as Request No. 1 above considered and was covered by the same part of the charge then referred to.

Request No. 15.

"The jury are further instructed that if, upon a fair and impartial consideration of all the evidence in the case, they find that there are two reasonable theories equally supported by the testimony in the case, and that one of such theories is consistent with the innocence of the defendants, then it is the policy of the law, and the law makes it the duty of the jury to adopt that theory which is consistent with the innocence of the defendants, and to find the defendants not guilty." (Cas., p. 1539, l. 32.)

The Court charged:

"The evidence in order to establish the guilt of the defendants must not only be consistent with the theory of guilt but must be inconsistent with and exclude every reasonable theory of innocence, and as long as the jury are able to reconcile the evidence with any reasonable theory of the innocence of the defendants, the law makes it their duty so to do; and if, upon a full consideration of all the facts in the case, the jury entertain a reasonable doubt as to whether these defendants are guilty of the crime charged against them in the indictment, then you should find them 'Not guilty.'" (Cas., p. 1523, l. 25.)

Requests Nos. 16, 17, 18, 19, 21, 22 and 23.

None of these requests contain any legal principle; they are merely requests for comment on

evidence. Therefore, the Court was not under any legal duty to charge these requests.

State v. *Panelli,* 81 N. J. L. 346;
State v. *Fuer,* 126 Atl. 432.

Requests Nos. 24, 25 and 26.

"24. If the jury shall find that the State has not sustained the burden of proving beyond a reasonable doubt that the defendant Joseph Juliano is guilty, he is entitled to an acquittal."

Requests Nos. 25 and 26 were identical, except that they substituted the names of other defendants.

The Court charged:

"Although the four (4) defendants are indicted and tried jointly, you must consider each defendant's case separately, applying the evidence to his case which, under this charge, is admissible against or binding upon him, and if you find that the State has not sustained the burden of proving such one or more of the defendants guilty beyond a reasonable doubt, then such defendant or defendants is or are entitled to an acquittal." (Cas., p. 1522, l. 25 to l. 35.)

There was no error in any refusal to charge as requested.

XXI.

Answer to Jury's Question.

Mr. McGeehan's Point 40.

Some time after the jury had retired they returned into the court room, having sent to the Court a written question:

"Can a verdict be given in the first degree with life imprisonment?"

The Court then read to them the statute of 1919, providing for a recommendation of life imprisonment, and concluded by asking,

"Is that sufficiently clear." (Cas., p. 1535.)

Apparently it was, for the jury then retired.

No exception was taken to the alleged failure of the Court to answer the jury's question more specifically. There was no error in this regard.

XXII.

Conclusion.

From the fact that there were one hundred and seventy-six assignments of error and one hundred and eighty-five specifications of cause for reversal, and that the briefs for the defendants present some fifty distinct points, it may appear at first thought that this case was tried in a narrow, technical manner in the Court below, and that the rules of evidence were applied strictly against the defendants with a view of keeping from the jury facts which might influence them to acquit. Such was not, however, the case.

The trial consumed nearly three weeks. The printed record contains more than sixteen hundred pages. In proportion to the length of the trial but few objections were made on either side. The defendants were given great latitude in presenting their case.

The State, it is true, presented some hearsay evidence in describing the various lineups, but this was with the consent of the defense, as both the defense and the State thought that it would assist the jury to inform them fully of the circumstances under which the original identifications were made.

It appeared that during the two months between the murder and the arrest of the defendants, the various eye witnesses were taken from one lineup of suspects to another, in New York, Paterson, Passaic, Hackensack and Newark, and that after each lineup, each witness shook his head and said he recognized no one. Then the defendants were arrested and the same witnesses brought one after another before them in line with other men. And then witness after witness picked out at least one of the defendants as one of the bandits.

The trial was most carefully conducted. The defendants were represented by counsel of outstanding ability. Not only the Court, but counsel for the State, realizing the seriousness of the matter, tried so to conduct the trial that all observers would know that the defendants had had a fair trial and stood convicted on the merits of the case.

The judgment of the Essex Oyer should be affirmed.

Respectfully submitted,

JOSEPH L. SMITH,
Prosecutor of the Pleas.

SIMON L. FISCH,
First Assistant Prosecutor.

J. O. BIGELOW,
Of Counsel.

New Jersey Court of Errors and Appeals

State of New Jersey, Defendant-in-Error, *vs.* Nicholas Joseph Juliano, *et als.*, Plaintiffs-in-Error.	On Indictment for Murder. On Writ of Error to Essex Oyer and Terminer.

BRIEF FOR PLAINTIFFS-IN-ERROR.

Joseph Juliano, alias "Big Joe", together with Nick Joseph Juliano, alias "Little Joe", Christopher Barone, Louis Capozzi, alias "Kid Ruff" and Robert W. Boudreau, were indicted for murder by the Essex County Grand Jury. The said indictment against said four defendants read as follows:

> "The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that Joseph Juliano, alias "Big Joe", Nicholas Joseph Juliano, alias "Little Joe", Christopher Barone, Louis Capozzi, alias "Kid Ruff" and Robert W. Boudreau, on the nineteenth day of July, in the year of Our Lord, One Thousand Nine Hundred and Twenty-six, at the City of Newark, in the County of Essex, aforesaid, did wilfully, feloniously, and of their malice aforethought, kill and murder, George Condit, contrary to the form and Statute in such case made and provided, and against the Peace of this State, the Government and dignity of the same".

Four of the said defendants, viz., Nicholas Joseph Juliano, Joseph Juliano, Christopher Barone

and Louis Capozzi, were found guilty of murder in the first degree and sentenced to be electrocuted. The defendant Robert W. Boudreau was not brought to trial, he having become a witness for the State.

Writs of Error have been issued out of the New Jersey Court of Errors and Appeals, and the case is before this Court on Assignments of Error and Specifications of Causes for reversal, the entire record having been certified and returned pursuant to Section 136 of our Criminal Procedure Act.

There are ninety-five Assignments of Error (S. C. 1592 to 1621) and one hundred and three Specifications of Causes for reversal (S. C. 1622 to 1652), which Assignments of Error and Causes for reversal are practically the same, as nearly all of the Assignments of Error are directed to errors of the Trial Court in overruling the challenge of the defendants to the Array of Jurors, and to the sustaining of certain challenges for cause made by the State against certain talesmen satisfactory to defendants; to certain errors of the Trial Court in the admission and rejection of evidence; to the failure of the Trial Court to charge the requests of the defendants, and to alleged injurious error appearing in the Charge of the Court; and also the fact that the verdict was against the weight of the evidence.

At the trial, which began on Monday, November 15, 1926, counsel for the defendants made a motion before the Trial Court for a postponement of said trial of said defendants on the ground that only three weeks had intervened from the time of the arrest and indictment of said defendants, and that said short space of time was not sufficient and adequate a length of time for the defendants to properly and adequately prepare their defense to such a serious charge as that of murder; said motion for a further postponement of the trial

was denied by the Trial Court and defendant's counsel ordered to proceed to trial over objection.

Counsel for the defense also at the beginning of the trial challenged the Array of Jurors drawn for the trial of the indictment and moved to quash the said Array upon the grounds that their Array was not drawn upon the special panel of Jurors served upon the defendants, and was not drawn legally, because said Special Panel served upon the defendants was not drawn in the presence of the Judge or the Clerk of the Court of Quarter Sessions of Oyer and Terminer, as required by law, and also because said Special Panel was not drawn from the panel of Jurors that "may have been drawn and summoned to attend as jurors at the term for which such defendants are to be tried", but instead was drawn from a box containing only the names of a portion of this General Panel. Said motions were also denied by the Trial Court over objection.

Counsel for the defense also at the beginning of the trial moved to quash the indictment on the ground that according to the Bill of Particulars served upon the Defendants by the State, the State was unable to specify with certainty which one of the defendants fired the fatal shot, and that consequently in the indictment found against the defendants in its present form was fatally defective, inasmuch as, under the law each defendant was entitled to know whether he was charged with having committed the murder as a principal, by firing a shot, or as an accessory to the alleged crime, the indictment itself being the ordinary form of indictment for murder and not containing or specifically setting forth the statutory form of an indictment for murder alleged to have been committed in the perpetration or the attempting to perpetrate a robbery, etc. The motion to quash said indictment on the above ground

was also denied by the Trial Court over the objection of Counsel.

Facts.

Briefly, the occurrences developed at the trial were:

That a Chevrolet automobile of the Reid Ice Cream Co. was standing in front of the Reid Ice Cream Company Factory, at Mt. Pleasant Avenue, Newark, about ten o'clock or thereabouts on the morning of July 19, 1926, when another automobile containing three men with two men running beside the said automobile drew up alongside of said Reid Ice Cream Company's automobile parked in front of the said company's factory on Mt. Pleasant Avenue. In the Chevrolet automobile was a young man by the name of Duff, an employee of the Reid Ice Cream Company. The deceased, George Condit, an employee of the Reid Ice Cream Company was about to board the Chevrolet car with bags containing money and checks belonging to the Reid Ice Cream Company when shots were fired by someone and Mr. Condit fell fatally wounded. The bags were taken by someone from the side of the Chevrolet car where Mr. Condit fell and were thrown into the other car, which immediately drove away, another shot being fired at or about the time of its departure.

It was claimed by the State that the defendant Nicholas Joseph Juliano, together with the other three defendants Joseph Juliano, Christopher Barone and Louis Capozzi, was in some way implicated in the aforesaid shooting and robbery of the said George Condit.

The defense consisted of a complete alibi. It is contended here that the conviction of the plaintiffs-in-error, defendants below, was the result of

prejudice and passion coupled with incorrect, mistaken and unsatisfactory indentification of all of the said defendants as the persons in, near or at the automobile that was used in perpetration of said robbery and murder.

POINT ONE.

Assignment 1. Specification 1.

The Trial Court should have granted the motion of the defendants for a continuance of the case in order to give the defendants more time to properly and adequately prepare their defense, three weeks not having been sufficient time for the proper preparation of the defense on so serious a charge of murder.

It is contended that there was an abuse of discretion on the part of the Trial Court in refusing to grant defendants a longer period of time for the proper preparation of their defense.

> "Application for a continuance is a prerequisite to the right to complain for the lack of preparation as ground for a new trial. The proper practice is first to apply for the continuance, setting forth specifically the reasons for the lack of preparation, and if on such application it appears that defendant has been diligent in attempting to prepare for trial, the refusal of the continuance may be assigned as ground for a new trial."
>
> *16 Corpus Juris*, p. 1130.

POINT TWO.

Assignment 2. Specification 2.

The names of all the jurors of the general panel of jurors that were drawn and summoned to attend as jurors for the term at which said defendants were tried were not placed in the box together at the time the jury for this case was drawn, in violation of sections 82 and 83 of the Criminal Procedure Act, 2 Compiled Statutes, page 1847, and section 27 of the Jury Act.

It is respectfully contended that in this case there was prejudicial error in not complying with the statutory mandate and this question was raised by timely objection.

The Statute requires giving the steps, such as drawing from the box, etc., and also requires that the jury shall be drawn from the general panel of jurors that may have been drawn and summoned to attend as jurors at the term at which said defendant is to be tried. Inasmuch as there were four defendants on trial and each defendant was entitled to twenty peremptory challenges, the entire list of jurors who were summoned for the term at which the defendants were tried, viz., for the September Term, should have been placed in the box at the time the jury was drawn. In other words there were only 150 names in the box when the jury was drawn and according to the law as set forth in sections 82 and 83 of the Criminal Procedure Act and section 27 of the Jury Act, the entire list of the names of the jurors summoned for the September Term, approximately five to six hundred names, should have been placed in the box before the jury was drawn.

It also appeared from the testimony of Under-Sheriff Walker (S. C. 37, 38 and39) that a number

of the jurors drawn on the special panel for the trial of these defendants had been excused by the Court for various causes, yet, notwithstanding that fact their names were still in the box.

It is respectfully contended that the challenge to the array should have been sustained for the aforesaid reasons and that said challenge being overruled the defendants suffered manifest wrong and injury and the action of the trial court constitutes reversible error.

Said Mr. Justice Kalisch in a dissenting opinion in the case of the *State* v. *Martin,* 132 Atl. 93, at pages 96 and 97:

> "There can be no question that a judge has the right to excuse jurors from the general panel for cause, but it is an entirely different matter, however, in excusing jurors for a sufficient cause, and having done so, nevertheless, to have them placed, as jurors, on the special panel after they have ceased to be jurors.
>
> "Chief Justice Beasley, in Aaronson *v.* State, 56 N. J. Law 10, 27 At. 937, very wisely says this:
>
> 'There seems to be no reason why the procedure touching the general list and that touching the special list would not stand on the same footing. If one or more of the persons on the general list can be discharged from service, why not one or more be similarly discharged from the special list?'
>
> This learned jurist continued:
>
> 'Nor do we think there is any substance in the suggestion that the power thus conceded will be liable to be abused, for it is certain that the court cannot arbitrarily and of its own motion excuse any of these jurors from serving in the given case; for, if no ground for the dispensation existed, the judicial action would be erroneous and could be reviewed by means of a writ of error.'

> "The farsightedness and wisdom of these remarks had in view that it would be an arbitrary act on the part of the judge to excuse jurors without cause and to decimate the number of jurors of a special panel, from which the law entitled a defendant to select a jury, and this to practically nullify the statutory right of a special panel of 48 jurors. For, if 10 of 48 jurors of the special panel may be excused out of the general panel or special panel, then there seems to be no obstacle in the way of excusing the entire general panel. If 10 may be excused, why not 48? And thus the defendant be compelled to select a jury from the general panel, contrary to the express mandate of the statute. Sections 82 and 83 were enacted for the purpose of guarding the rights of a defendant by acquainting him with the names of those persons who are to sit in judgment in his case and to give him an opportunity to inquire into an important feature necessary to secure to a defendant a fair and impartial trial; that is, to inquire into the jurors' competency, fairness and impartiality. I therefore think that the challenge should have been sustained."

Challenge to the array or panel is based upon the ground that the statutory requirements have not been complied with in selecting and summoning the jury.

A prolific source of objections to the array is the bias, partiality or irregular action of the summoning officer. A challenge on this ground is properly sustained when such summoning officer is guilty of any irregularity, or misconduct, in selecting or summoning the jurors or talesmen. Hyatt on Trials. Volume 1. Pages 562 and 563.

Similar erroneous procedure led to reversals in two reported cases. See cases of *State* v. *Rombolo,* 89 N. J. L. 545 (C. E. & A.); *State* v. *Lapp,* 84 N. J. L. 19 (Supreme Court).

POINT THREE.

Assignment 3. Specification 3.

The Trial Court erred in refusing to quash the indictment filed against the said defendants for the reason that said indictment did not apprise the defendants or any one of them whether he or they were charged as principals or accesories in the murder which is alleged to have arisen out of the robbery, and also that the indictment was in the ordinary statutory form and did not refer to the robbery upon which it was based.

It is contended that the indictment was defective in that it should have alleged the commission of the robbery as a basis for the murder charge.

The indictment was in the statutory form and did not refer to the robbery upon which it was based. It is contended that since this defendant was not proven to have fired the fatal shot that the indictment should have set forth the commission of the alleged robbery by this defendant and the other defendants as the basis of the murder charge. It may be that when the defendant is also the actual slayer that no allegations of the lesser crime out of which the murder sprang need be pleaded in the indictment.

State v. *Titus,* 49 N. J. Law, 36, seems to hold to this view, but it can hardly be said that in a situation like the one at bar that the defendants are apprised of the nature of the accusations against them, if a similar indictment for murder without stating the facts upon which the state intends to rely to prove the murder.

This point was raised by motion to quash (S. C., pages 44, 45, 46 and 47), (Assignment 3, page 1593 —Specification 3, page 1623).

In the case of the *State* vs. *Schmid,* 57 N. J. Law, 625, at page 626, the learned Justice said: "This method of pleading likewise ignores those provisions of the Constitution of this state by force of which every person held for a criminal offense is guaranteed not only that he shall be accused of such an offense by a Grand Jury, but also that he shall be informed of the nature and cause of the accusation."

Const., Art. 1, para. 7 and 8.

> "Unless the charge contains a description of the crime of which the Grand Jury accuses the defendant, and *a statement of some circumstances by which it may be identified and its particular nature disclosed,* it is readily conceivable that a true bill may be found for *one offense,* and the defendant be compelled at the trial to meet any offense that happens to fall within the general terms of the indictment."

And again (on p. 627), the Learned Jurist continues:

> "It is, undoubtedly, a well-settled general rule that in an indictment for an offense created by Statute, it is sufficient to describe the offense in the words in which the Statute describes it. This rule, however, is based upon and implies only to those cases in which the Statute describes the offense with which it has to do. Unless this is so, the mere recital of non-descriptive words from the Statute will not constitute in reasonable completeness a statement of the offense, so as to relieve the pleader from *averring the Acts* that go to make it up."

See to same effect,

State v. *Solomon,* 96 N. J. L., 124.

> "*The function of a Bill of Particulars* is not to remedy defects in indictments, or to supply essential averments omitted or neces-

sary to charge an indictable offense. No such legal effect can be given to it, without controvening, Article 1, Paragraph 7, 8, of the Constitution of this State."

"A Bill of Particulars is no part of the Indictment or judgment record."

State vs. *Lehigh Valley R. R.*, 92 N. J. Law, 261; 94 N. J. Law, 171.

In *State* vs. *Solomon*, 117 Atl. 260 (Ct. Er. & Ap.) in the opinion of the Court by Mr. Justice Kalisch, it is said:

"The fragile theory that a presumption may be raised in aid of an indictment which omits a constituent element of the statutory crime is shattered by the force of the familiar inflexible legal rules, that no presumption of guilt arises from the mere finding of an indictment against an accused, and that there is a presumption of innocence which abides with an accused until his guilt is established by proof beyond a reasonable doubt.

"Before concluding it may be well to advert here to an unbendable and substantial rule of pleading, essential to the validity of an indictment whether founded on the Common Law or Statute, which rule, though simple and familiar seems by reason of its universality often to escape attention. This rule is cogently stated by Bishop in Volume 1, on Cr. Proc. 81, 2-d. Ed. as follows:

'This principle that *the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted pervades the entire system* of the adjudged law of criminal proceedings. It is not made apparent to our understandings by a single case only.'

"Wherever we move in this department of our jurisprudence, we come in contact with it. We can no more escape from it than from the atmosphere which surrounds us.

"The same learned author in his valuable treaties on Statutory Crimes, #166, says:

'In the work on Criminal Procedure we saw that the fundamental doctrine relating to the indictment, whether at common law or under a statute, the allegations must cover every particular element of crime entering into the punishment to be inflicted'.

"And in volume 1, Cr. Proc. 521, to which above reference is made, the author says:

'And that he knows certainly what each thing is wherewith he is charged, *all the facts which enter into his defense must, especially in felony, be set down by expressed averment, nothing to be left to intendment.*'

'The legal rule is tersely and accurately expressed in Mears *vs.* Com. 2 Grant case (Pa.) 385-387, as follows:

"The general rule of pleading is that every fact or circumstance which is a necessary ingredient in the offense must be set forth in the indictment; otherwise it is defective."

'This doctrine is lucidly stated and discussed by Mr. Justice Garrison in State *v.* Schmid, 57 N. J. Law, 626, 31 Atl., 280. From what has been said it follows that no valid judgment could have been pronounced on the defendant in the present case on the indictment in question, and for this additional reason the verdict must be reversed.' "

In the present case the indictment contains no allegations of fact whatsoever. It contains mere conclusions. It fails to apprise the defendants, in any respect, of the nature of whether they are charged as principals or accessories. It does not

allege all of the facts which entered into the offense, nor does it set down by expressed averment that the alleged crime grew out of a robbery in which the said defendants are alleged to have participated.

POINT FOUR.

Assignments 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16. Specifications 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16.

The Trial Court erred in sustaining the challenges for cause interposed by the State to the serving on the jury on the trial of these defendants of the talesmen Fred. W. Lyon, William H. Billings, Frank Farley, Charles S. Weiss, Herbert A. Gries, John F. Moore, John Christiansen, Edgar C. Desch, Harry H. Gimbel, Henry M. Beckman (S. C. 49-89). All of the above talesmen being sworn on their *voir dire* testified that they would decide the case upon a consideration of the evidence and on the evidence only. There were no peremptory challenges interposed by the State against the selection of any of the above talesmen, and they were dismissed by the Trial Court from service on the jury for alleged cause, when as a matter of fact no legal causes or reasons were set forth or advanced by the Prosecutor against any or all of them, which would in law warrant the Court in discharging them or any of them from service on the jury for the trial of these defendants, to whom they were satisfactory.

POINT FIVE.

Assignment 18. Specification 18.

The court erroneously overruled the objection of the defendants (Case pps. 116-117) to the admission of a photograph in evidence, showing the locus of the alleged crime and certain movable objects therein which were not proven to have existed and to have been in the same position at the time of the commission of the alleged crime, said photograph having been taken some weeks thereafter.

It is contended that the admission of this photograph in evidence constitutes reversible error and was clearly prejudicial to the legal interests of the defendants, inasmuch as it did not show the conditions as they really existed at the time of the commission of the alleged crime, but contained matters and things which by any stretch of the imagination could not be evidential against the said defendants.

In the case of the *State* v. *Strong,* 83 N. J. Law, page 177, a series of photographs taken some time after the murder were offered by the state in evidence over the objections of the defendant. The objection was that they did not show conditions as they existed at the time of the murder and were misleading . They were admitted for the purpose of showing the conditions as they existed on the day they were taken, and there was no proof showing what changes had taken place, and under such circumstances the court said they should have been excluded as irrelevant.

Under the doctrine laid down in the aforesaid case, it is respectfully submitted that the defendants suffered manifest wrong and injury from the admission of this photograph.

POINT SIX.

Assignments 19 and 22. Specifications 19 and 22.

The Trial Court erred in sustaining the objection of the Prosecutor to the following questions asked by Counsel for the defendants on cross-examination of the State's witness Boudreau, who was also one of the defendants named in the indictment.

> "Q. Who did you go around with about the time this holdup occurred, who were your friends?" (S. C. 144).
>
> "Q. And they committed crimes with you, did they not?" S. C. 199).

It is submitted that this question was a proper question on cross-examination to test the credibility of the witness for the State, Boudreau, who was one of the defendants named in the indictment, inasmuch as the testimony of Boudreau was that he only had met the defendant, Nick Joseph Juliano ten days before the hold-up, and the refusal of the Court to permit Boudreau to name his friends and associates about the time the hold-up occurred was prejudicial and harmful to the legal interests of the defendants and constitutes reversible error.

The above questions had a vital and direct bearing on the matter in issue, the answers might have been of inestimable benefit to the accused in their defense, and did not come within the doctrine laid down by the Supreme Court in the case of the *State* vs. *Fisher,* 110 Atl. 124, where the Court said:

> "Sustaining objection to cross-examination to questions which show no direct bearing on

> the matter in issue is within the discretion of the trial court, and sustaining objections to cross-questions is harmless, and does not justify a reversal, even if technically improper, even though the answer no matter what it may have been could not have benefited accused in his defense".

The defense is entitled to great latitude in the cross-examination of an accomplice for the purpose of testing the credit due to him as a witness.

> *Abbot's Crim. Trial Brief;* pp. 495-496;
> *State* v. *Young,* 93 N. J. L. 396.

POINT SEVEN.

Assignments 20, 21. Specifications 20, 21.

The Court erred in sustaining the objections of the Prosecutor to the following questions put by defendants' counsel on cross-examination of the State's witness Boudreau, who was one of the defendants named in the indictment. Said questions referring to statements that said witness Boudreau admitted signing for the police. (Case, p. 170, line 15).

> "Q. How long after that was the next one signed?" (S. C. pp. 170).
> "Q. Two statements you made before and which you signed differ from each other and differ from the testimony given by you at this trial?" (S. C. p. 171).

It is contended that these questions were proper questions on cross-examination to test the credibility of the witness Boudreau, inasmuch as he swore that he had signed two statements for the

police, which statements were complete statements of all the facts that he knew surrounding the case, and it was proper for the defendants to propound these questions to Boudreau, the state's witness, who was an accomplice and a co-defendant with the other defendants, to affect his credibility as to an alleged prior inconsistent statement and not for the purpose of attempting to impeach him.

The refusal of the Trial Court to permit the witness, Boudreau, to answer the above very vital questions for the purpose of testing his credibility was prejudicial to the legal rights of the defendants and constituted harmful error.

The defense is entitled to great latitude in the cross-examination of an accomplice for the purpose of testing the credit due to him as a witness.

> *Abbott's Criminal Trial Brief,* pp. 495-496;
> *State* v. *Young,* 93 Law, 396.

It is permissible to ask a witness if his testimony did not vary from another statement made by him to a prosecutor.

> *State* v. *D'Adame,* 84 N. J. L. 386;
> *State* v. *Harris,* 1 Misc. 526;
> *State* v. *Kubaszewski,* 86 N. J. L. 250.

Said Chief Justice Gummere in the case of the *State* v. *Black,* 118 Atl. 103:

> "As a general rule, any fact that bears against the credibility of a witness is relevant to the issue being tried; and the party against whom the witness is called has a right to have that fact laid before the jury in order to aid them in determining what credit should be given to the person testifying."
>
> *Prout* v. *Bernards Land, etc. Co.,* 77 N. J. L. 917, 73 Atl. 486, 25 L. R. A. (N. S.) 683.

POINT EIGHT.

Assignment 25. Specification 25.

The Trial Court erred in limiting cross-examination of the witness Boudreau (S. C. 204).

The Trial Court erroneously limited the cross-examination of Counsel for defendant Nicholas Joseph Juliano, to an examination upon the direct examination only of the witness for the state, Boudreau, when as a matter of fact said counsel was legally entitled to cross-examine the said witness Boudreau not only upon his direct examination, but also upon other matters, answers and statements elicited from him under the questioning and cross-examination of the said witness for the state, Boudreau, by counsel for the other three defendants.

It is contended that the action of the Trial Court in this respect foreclosed counsel for the defendant Nicholas Joseph Juliano from eliciting facts and testimony on cross-examination upon the cross-examination of counsel for the other three defendants, which would have been beneficial to the legal interests of the Defendant Nicholas Joseph Juliano on his defense. Said erroneous ruling on the part of the Trial Court was highly prejudicial to the legal interests of the said defendant Nicholas Joseph Juliano on his defense in the aforesaid trial and constitutes reversible error (S. C. 204).

> "Where the examination in chief elicits part of a conversation the other side is entitled on cross-examination to find out whether that was all of the conversation, and, in general, to have other relevant parts thereof."
>
> "Where the statement that is testified to in chief admits of two inferences, it is the

proper function of cross-examination to eliminate, if possible, that inference or impression that was unfavorable to the party against whom the testimony in chief was given."

State v. *Glatzmayer,* 79 N. J. L. 238.

See also

State v. *Engsberg,* 110 Atl. 918.

POINT NINE.

Assignments 27, 28 and 29. Specifications 27, 28 and 29.

The Trial Court erred in sustaining the objections of the prosecutor to the following questions put by counsel for defendants on cross-examination of the State's witness Seigel.

"Q. Did you tell the officer that came to your store, the detective, that one of the persons you saw was a young man about 35 years old, 5-11, and thin face and light complexion?" (S. C. 308).

"Q. Who was that officer, did you know what his name was?" (S. C. 309).

"Q. Didn't you tell the detectives who came to your store a couple of days after the holdup, that there were four men and not five men in the holdup,"

and to the question:

"Q. You know what detective I mean without giving his name?" (S. C. 322).

The Trial Court erred in sustaining the different objections of the prosecutor to the long line of questions set forth above propounded by counsel for the defendants to the very important witness for the State, Philip Seigel, and particularly

erred in refusing to permit the said witness Seigel to give answer to the aforesaid questions, which questions were absolutely proper and pertinent questions from a legal standpoint, and said questions constituted the plainest sort of cross-examination, not only for the purpose of contradiction, but also to test the veracity and credibility of the said witness Seigel as to whether he had or had not made conflicting statements to certain officers and identified other persons than the said defendants.

It is permissible to ask a witness if his testimony did not vary from another statement made by him to a prosecutor.

State v. *D'Adame,* 84 N. J. L. 386;
State v. *Harris,* 1 Mics. 526;
State v. *Kubaszewski,* 86 N. J. L. 250.

POINT TEN.

Assignments 34, 35 and 36. Specifications 34, 35 and 36.

The Trial Court erred in permitting the witness Joseph Kenny, for the State to answer the following questions objected to by defendants, the answer to which question was highly prejudicial to the legal rights of the defendants, and the court also erred in overruling the motion of defendant's counsel to expunge from the record the answer to said question and also in overruling defendants' motion for a mis-trial by reason of said illegal testimony.

"Q. What case was he present in connection with?"

"A. He was brought in reference to the Ward Case." (S. C. 468, 469, 470).

It is contended that the said question propounded by the Prosecutor and the answer to the same created, or had a tendency to create in the minds of the Jury a detrimental opinion of said defendants, and the inuendo contained in said answer amounted to an implied accusation or insinuation that said defendants were charged with the commission of some other hold-up or crime in some way closely allied or connected with the charge on which they were being tried.

Said illegal testimony was introduced for the purpose of prejudicing the jury against the defendants, and it cannot be said that it did no harm, for the obvious answer to this is that it was harmful or it would not have been introduced. All evidence introduced by the State in a capital case is harmful; that is exactly why it was put in in this case.

It is submitted that the aforesaid answer should have been expunged from the record, as its admission served to create great prejudice in the mind of the Jury towards these defendants, and constituted harmful error.

State v. *Sprague,* 64 N. J. L. 419;
Clark v. *State,* 18 Vroom, 556;
Meyer v. *State,* 30 N. J. L. 310;
Parks v. *State,* 30 N. J. L. 573;
Ryan v. *State,* 31 Vroom, 552;
State v. *Ricardo,* 71 N. J. L. 35;
State v. *Roop,* 58 N. J. L. 479.

It is contended here that it was the design of the State to impute to the defendants by insinuation the commission or attempt at commission of like offenses at other times and upon other persons.

Said the Court in the above case of the *State* vs. *Sprague* (p. 426):

> "Such evidence was entirely inadmissible."
>
> *Clark* vs. *State,* 18 Vroom, 556;
> *Myer* vs. *State,* 30 *Id.* 310;
> *Parks* vs. *State, Id.* 573;
> *Leonard* vs. *State,* 31 *Id.* 8.
>
> "This evidence was highly prejudicial to the defendant. It was a denial to him of a fair trial upon the issue presented by the indictment, and that it was not erroneous cannot for a moment be contended. In fact, all that need be said in a case of this kind is that it 'may have been harmful'. Ruchman *vs.* Burgholtz, 8 Vroom, 437-441."

POINT ELEVEN.

Assignment 58. Specification 59.

The Trial Court erroneously charged the jury in part as follows:

> "* * * if reasonable doubt of guilt is raised even by inconclusive evidence of an alibi, defendants are entitled to the benefit of it. In that event a defense, which otherwise would overcome and put at naught the State's evidence, would simply be put out of the case. Now this refers or rather the application applies to all the defendants in this case, because all have offered proof and testimony of their presence elsewhere at the time when this crime was committed" (S. C. 1506, line 12).

This statement involves the application of the law of alibi and it is respectfully submitted that the court did not give the proper instruction on the question of alibi and incorrectly stated the legal situation applicable to the evidence adduced at the trial.

In the case of the *State* v. *Sahazian et al,* 119 Atl, 780 (at page 781), Mr. Justice Katzenbach said:

> "The proper instruction to be given by the trial judge on the question of alibi has been stated in this court recently by Mr. Justice Parker in the case of State *vs.* Parks, 96 N. J. Law 360, 115 Atl. 305, in these words:
>
> > " 'The law is entirely settled in this state that where the presence of the defendant at the place of the alleged crime is an essential link in the chain of proof, such presence, like in any essential fact must be established beyond a reasonable doubt.' "
>
> *Sherlock* vs. *State,* 60 N. J. L. 31.

In that case, it was said that:—

> "Upon the interposition of an alibi any one of three conclusions might be reached by the jury * * * (a) That defendant was present, notwithstanding such evidence; (b) That he was absent in which case he is said to have proved his alibi; or (c) That the testimony may create such a degree of uncertainty as to his whereabouts that the jury are not satisfied beyond a reasonable doubt of his guilt of the crime in question; and that by putting the burden on him to prove his absence by preponderance of evidence, he is deprived of the benefit of that reasonable doubt".

POINT TWELVE.

Assignment 68. Specification 69.

The Trial Court erroneously charged the jury in part as follows:

> " * * * at that time he saw 'Big Joe' get out of the car with another man, who he now says is 'Little Joe'. He says the reason

> why he fixes the time at five minutes to eleven is because he made his pull at a signal box. Yesterday, Lieut. Rowe, of Police Headquarters, testified that Officer Manning made this pull at eleven o'clock at the box which Officer Manning testified he pulled from." (S. C. 1517, line 20).

It is contended that this portion of the charge of the trial judge was an erroneous, inaccurate and incorrect statement of the testimony of Officer Manning, a witness for the State, as will be seen from an inspection of his testimony on cross-examination by the defendants (S. C. 1461), where the aforesaid witness Officer Manning distinctly and unqualifiedly testified that he was not sure that the person whom he saw getting out of an automobile on Drift Street on the morning after the holdup took place was Little Joe Juliano. It is a matter of great significance also how it came to pass that after thirteen days had intervened during which time this case had been on trial and after all of the State's case had been presented and the defense had rested that in the closing hours of the trial this witness Manning was brought forward by the State to attempt to show something which in point of fact was absolutely untrue, that is, to attempt to show that Big Joe Juliano and Little Joe Juliano were seen together on Drift Street an hour or so after the holdup. It is therefore respectfully submitted that this misstatement of fact on the part of the trial court to the jury was prejudicial and harmful error to the defendants wherein and whereby they suffered manifest wrong and injury.

> "It is reversible error for a trial judge to make in his charge a misstatement with relation to a fact of moment; that is, that it is proved when there was no testimony to support it".
>
> *State* vs. *Noel,* 133 Atl. 375.

"A direction of the trial court which states as a fact proven in the case a condition of affairs which is not in the case, and not properly inferable from the testimony is not judicial comment and presents grounds for reversal".

State vs. *Lovell*, 92 Atl. 376;
State vs. *Sandore*, 124 Atl. 528.

POINT THIRTEEN.

Assignment 71. Specification 72.

There was error in the charge of the Court.

In the charge of the Court to the jury the Court, after emphasizing the important character of the case, spoke as follows (S. C., page 1525):

"* * * When I read to you the statute in this case, I pointed out the crime these men are charged with is murder, and that the statute makes a murder in the participation of a robbery, to be murder in the first degree. *I charge you that in this case your verdict ought to be, if you believe the defendants or any of them, guilty of murder in the first degree.*"

It is respectfully contended that this instruction of the Trial Court to the jury was absolutely and unqualifiedly erroneous, contradictory to and in conflict with the laws of evidence of this State and erroneous in fact and in law, and highly prejudicial and harmful to defendants.

It is an instruction in which the Trial Judge categorically and without reservation told the jury that they ought to convict the defendants of murder in the first degree even if the jury believed their testimony.

It is most respectfully submitted to this Honorable Court that this one statement of the Trial Court reading as it does was highly prejudicial to the legal rights of the defendants, and as a matter of fact and of law vitiates the entire charge, and is the strongest and most patent kind of reversible error.

This excerpt is particularly important, not only on account of the phraseology employed, but also on account of the position which it occupies in the charge, that is, two sentences from the end. The defendants-in-error concede the propriety of the rule that it is improper, both as a matter of law and logic, to isolate an excerpt of the charge from the whole body of the same, and without inspecting the whole contents of the charge and endeavoring to rely on an error on one particular paragraph or circumstance, nevertheless, it is the ultimate word of the Court to the jury and the recognition of general consent of the importance of the last words of judicial admonition and instruction makes this particular part of the charge, if incorrect and untrue both in point of fact and in point of law, a matter of the greatest importance in this case.

The words of the Trial Judge in the above instruction was a categorical declaration, without any reservation whatsoever, *that the jury ought to convict the defendants of murder in the first degree even if the jury believed the testimony of the defendants* on their defense. Certainly it cannot be said that this most erroneous, prejudicial and harmful instruction in the closing sentences of the Trial Judge in his charge to the jury must not have influenced their minds and worked irreparable injury to the case of all of the defendants, to the extent that even if the jury had a reasonable doubt of the guilt of the defendants in respect to the evidence presented against them by

the State's witnesses and in respect to the testimony of all of the defendants corroborated by their numerous witnesses that they were not present at the place of the crime nor did they participate in it, nevertheless all the aforesaid evidence adduced on the part of the defendants and their witnesses establishing the innocence of the defendants of the charge of robbery and murder, surely must have found no weight with the jury and must not have been considered in any wise by them when they were advised to convict the defendants even if they *believed their testimony.*

> "A direction of the trial court which states as a fact proven in the case a condition of affairs which is not in the case, and not properly inferrable from the testimony, is not judicial comment and presents grounds for reversal."
>
> *State* v. *Lovell,* 92 Atl. 376.
>
> "An erroneous instruction is not cured by the existence of correct instruction elsewhere in the charge, unless the illegal one is withdrawn."
>
> *State* v. *Parks,* 115 Atl. 305.

It is also contended here that material evidence was withdrawn from the consideration of the jury by the aforesaid instruction of the Trial Court, and the charge considered as a whole is incorrect, conflicting and misleading.

> See case of *State* vs. *Fuerstein,* 135 Atl. 894.
>
> "It is reversible error for a trial judge to make in his charge a misstatement with relation to a fact of moment."
>
> *State* vs. *Noel,* 133 Atl. 275.
>
> "An erroneous instruction is not cured by a correct instruction upon the same point."
>
> *State* vs. *Erie R. R. Co.,* 87 Atl. 141.

"A charge depriving defendant of the benefit of reasonable doubt cured by testimony to establish an alibi is not cured by applying the correct rule to a part only of such testimony."

"It is reversible error to charge that an incriminating fact has been proved where there is neither testimony or color of testimony to support it."

State vs. *Diamond,* 86 Atl. 57;
State vs. *Sandore,* 124 Atl. 528.
See also the case of the *State* v. *Deliso,* 75 N. J. Law 808.

The defendants contend that the charge as made was confusing, that even though portions thereof, segregated from the rest, might be deemed correct, taken as a whole it was clearly erroneous. In this respect all of the defendants suffered manifest wrong and injury. No alternative was given to the jury to find the defendants not guilty inasmuch as the Court said that, even if they *believed the testimony of the defendants,* the jury ought to find them guilty of murder in the first degree.

In the case of the *State* v. *Lang,* 94 Atl. 631, at page 634 (Court of Errors and Appeals), Mr. Chancellor Walker in delivering the opinion of the Court said:

"Certainly, when sentences, that is to say, parts of a charge, are erroneous and no proper qualification of them is to be found in the context or in the entire charge, then there is error; and this is so when, as in this case, the part of the charge pointed out as erroneous is, in and of itself, a particular qualification and limitation of language which, without such qualification and limitation, is unobjectionable."

POINT FOURTEEN.

Assignments 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, and Specifications 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90 and 91.

The Court refused to charge certain requests to charge.

These requests to charge contained certain principles of law which the court refused to charge. It is contended that this is error.

These requests to charge were handed to the Trial Judge after counsel for this defendant had finished his summation to the jury at approximately 12:00 noon, on the 14th and last day of the trial. An adjournment was then taken by the court until one o'clock, P. M., when counsel for the other three defendants began his summation to the jury finishing the same at approximately 3:15 P. M. The Trial Court then began its charge to the jury.

It is respectfully submitted that the Trial Court erred in the exercise of its discretion inasmuch as although said requests to charge had been submitted after the summation of counsel for this defendant, nevertheless over three hours had intervened between the time when said requests to charge were presented to the Court before the Court began its charge to the jury.

Certainly in view of the aforesaid facts and circumstances it cannot be said that a timely presentation of such requests had not been made. It is respectfully submitted that in view of this ruling on the part of the Trial Court and the refusal of the said Court to charge the aforesaid requests the said defendant suffered manifest wrong and injury.

It is respectfully submitted in view of the aforesaid facts and circumstances the doctrine laid down by Mr. Justice Trenchard in the case of the *State* v. *Littman et al.*, 86 N. J. Law, 453, does not apply here.

In the case of the *State* v. *Degeralmo,* 83 N. J. L. R. 135, the Court said:

> "Where a request to charge calls for the application of a correct legal principle, is applied to the testimony, and clearly material to defendants case, he is entitled to have it distinctly charged in such a way as not to leave room for misapprehension or mistake by the jury."

The requests in the present case contained a correct statement of the law, were applicable to the testimony and clearly material to the defendant's case, which he was entitled to have distinctly charged, and in its refusal he suffered a manifest wrong and injury.

> "One of the most important duties of the Court is to declare the law applicable to a case to the jury when requested to do so. This should be done in such a way as not to leave room for misapprehension or mistake."

Citing (*Roe* v. *State,* 16 Vroom, 49).

> "We are of the opinion that the defendant was entitled to have the legal propositions requested distinctly charged, and that this was not complied with by the court, unless the legal effect was sufficiently covered by its charge to the jury. (*Aldrich* v. *Beckman,* 45 Vroom 711; *Mellow* v. *Victor Talking Machine Company,* 48 Vroom 670), and a careful examination of it shows that the precise point raised by the request was not adverted to by the court in any part of its charge. Therefore the defendant is entitled to have this judgment reversed and a new trial granted, and it is so ordered."

16 *Corpus Juris,* 1069, in respect to Proper Requests refused.

> "Where proper request is made for an instruction which correctly propounds the law and is warranted by the evidence and pleadings in the case and which has not already been covered in other instructions, it is the duty of the court to give it, and the refusal thereof will constitute error. The refusal of a concrete instruction is error, although an abstract instruction on the same point has been given".
>
> *12 Cyc.,* 666, in respect to Proper Requests refused.
>
> "It is reversible error to refuse to give a proper instruction which is requested and justified by the evidence and which has not already been given".
>
> *State* v. *Tanzarello,* 1 Misc. Reports 375. Before Chief Justice Gummere and Justices Swayze and Trenchard. It is *per Curiam.*
>
> "At the trial the plaintiff in error took, among others, exception to the refusal of the court to charge certain requests to charge, and took also a general exception to the charge".
>
> "The main insistence here is that the court wrongfully refused to instruct the jury on the law of alibi, notwithstanding he was expressly requested so to do and notwithstanding alibi was the defense set up by the defendant, and notwithstanding that in this case there was overwhelming evidence tending to support the alibi of the defense."

POINT FIFTEEN.

Assignment 91. Specification 92.

Because manifest injustice was done to the defendants by the whole charge to the jury.

POINT SIXTEEN.

Assignment 92. Specification 93.

That it was impossible for the jury to learn from the charge of the Court what facts, if proved to their satisfaction beyond a reasonable doubt, would warrant the jury in convicting the defendants.

POINT SEVENTEEN.

Assignment 93. Specification 94.

The Court is most respectfully and earnestly urged to consider the whole case and the strength of the defendant's case as compared with that of the State, pursuant to P. L. 1921, p. 951.

Finally, we most respectfully submit that for the errors assigned and for the specifications for reversal set forth in our brief, and also from a careful reading of the testimony contained in the entire record, it will be disclosed to this Honorable Court that the defendants have suffered manifest wrong and injury, and therefore that the conviction of these defendants ought to be set aside and a new trial granted.

Respectfully submitted,

WILLIAM A. KAVANAGH,
Attorney for and of Counsel with Plaintiff-in-Error, Nicholas Joseph Juliano.

AFFIDAVIT.

NEW JERSEY SUPREME COURT.

STATE OF NEW JERSEY, *vs.* JOSEPH JULIANO alias "Big Joe," CHRISTOPHER BARONE, LOUIS CAPOZZI alias "Kid Roff" and NICK JOSEPH JULIANO alias "Little Joe," *Defendants.*	*On Indictment for Murder.* *On Application for Separate Trial.* *Affidavit.*

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

Joseph Juliano, Christopher Barone and Louis Capozzi, of full age, being duly sworn on their respective oaths, according to law, depose and say:

We are each of us a defendant in the above cause and are jointly indicted for the same alleged offense, to wit, murder, with one Nick Joseph Juliano; the said Nick Joseph Juliano, who is so jointly indicted with us, is, as we are each advised by our counsel, John W. McGeehan, Jr., and each verily believes, a material witness for us and each of us on the trial of said indictment, and without whose testimony we and each of us cannot safely proceed to trial.

The object and purpose of this affidavit is to obtain an order for our trial or trials separate from the said defendant, Nick Joseph Juliano.

JOSEPH JULIANO,
LOUIS CAPOZZI,
CHRISTOPHER BARONE.

Sworn to and subscribed before me at Newark, N. J., this 13th day of November A. D. 1926.

JOHN M. KERNER,
An Attorney at Law of New Jersey.

New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY, *Defendant-in-Error,* *vs.* JOSEPH JULIANO, alias "Big Joe"; CHRISTOPHER BARONE, LOUIS CAPOZZI, alias "Kid Roff," and NICK JOSEPH JULIANO, alias "Little Joe," *Plaintiffs-in-Error.*	*On Indictment for Murder.* *On Writ of Error to Essex Oyer and Terminer.*

BRIEF OF DEFENDANTS, JOSEPH JULIANO, alias "Big Joe"; CHRISTOPHER BARONE and LOUIS CAPOZZI, alias "Kid Roff," Plaintiffs-in-Error.

These plaintiffs-in-error, Joseph Juliano, alias "Big Joe"; Christopher Barone and Louis Capozzi, alias "Kid Roff," together with Nick Joseph Juliano, the other plaintiff-in-error, were convicted of murder in the first degree without a recommendation for life imprisonment, after trial before the Essex County Court of Oyer and Terminer. The indictment upon which they were tried was for the alleged murder of one George Condit, who was killed during a holdup in which several men committed the robbery of the payroll of his employer in his custody, the killing having been done in the perpetration of the robbery by some one of such persons. The occurrence of the crime was on July 19, 1926, and these defendants, together with one Robert W. Boudreau, were arrested in the month of October, 1926, and one week later indicted for the murder. The said Robert W. Boudreau was not brought to trial, but testified for the State,

and the four plaintiffs-in-error, the defendants below, denied absolutely any participation in the holdup or murder and offered alibis to support their denial.

The trial, which consumed three weeks, hinged upon the veracity of the testimony of the State's witness Boudreau and upon the identification of the defendants by eyewitnesses, some of whom testified that the defendants were the men who participated and some of whom testified that the persons seen by them were not the defendants, or any of them; a complete denial and alibis were the defenses. As the argument hereinafter contained will dwell upon the evidence in detail, the numerous questions of fact and proofs presented will not be included in this general statement. Upon the convictions of the defendants by the jury, these writs of error were issued out of the Court of Errors and Appeals and the case is before this Court on assignments of error and specifications of causes for reversal, the entire record having been certified and returned pursuant to Section 136 of our Criminal Procedure Act.

Numerous errors are assigned and causes specified, consisting chiefly of rulings on motions before the trial, alleged errors in the manner of drawing and excluding jurors, rulings of the Trial Court excluding numerous questions on cross examination of State's witnesses and overruling defense's objections to questions put by the prosecutor to witnesses, as well as errors in the charge of the Court and the refusal of the Court to charge certain requests. In addition thereto, it is urged that the verdict is contrary to the weight of the evidence as to each of the defendants. The assignments of errors and specifications of causes for reversal will be ar-

gued separately, being grouped together whenever the same principles of law or questions of error apply similarly to the several.

ARGUMENT.

POINT I.

Assignment of Errors No. 1, Specification of Causes No. 1.

"Because the Trial Court refused to grant the motion of these defendants for the severance of the indictment and for a separate trial from the defendant, Nick Joseph Juliano, jointly indicted with them."

Before the commencement of the trial and before the case was moved for trial, counsel for the defendants, Joseph Juliano, Christopher Barone and Louis Capozzi, moved for a separate trial and a severance of the indictment, from the trial and indictment of Nick Joseph Juliano, jointly indicted with them, which application was made pursuant to Section 64 of the Criminal Procedure Act and in exact compliance therewith (pp. 28, 29, 30, 31, 32 S. C.).

The statute involved in this application and which was the basis for it, Section 64 of the Criminal Procedure Act of 1898, reads as follows (Comp. St. p. 1841; P. L. 1898 p. 890):

> "When two or more persons are or shall be jointly indicted for the same offense, except for conspiracy, and such indictment, before the trial thereof, hath been or shall be removed into the Supreme Court of this State by certiorari or otherwise, anyone of the said persons, on application to said Supreme Court upon affidavit that some one or more of said persons so jointly indicted with him, whom he shall name, is or are, as

> he is advised by his counsel, whom he shall also name, and verily believes, a material witness or witnesses for him on the trial of said indictment and without whose testimony he cannot safely proceed to trial, shall, by order of said Supreme Court, be allowed a trial separate from the person or persons whom he shall so name as such material witness or witnesses."

That the application provided for in Section 64 may be made directly to the Court of Oyer and Terminer, in which case the statute is as binding upon that Court as it is upon the Supreme Court upon a removal proceedings, is held by Justice Dixon, speaking for the Supreme Court in *State* v. *Kerr,* 24 N. J. L. Journal 435 (not reported in State Reports). In that case Justice Dixon held that the statute was binding upon the Court of Oyer and Terminer, and he further holds that the fact that the State intends to introduce statements of several of the defendants indicted jointly with the applicant for murder, and which statements are not evidential of the guilt of the applicant, is also sufficient grounds upon which to grant to the applicant a separate trial.

In the present case, the affidavit referred to in the statute was duly presented to the Court (p. 28, bottom), a copy of which affidavit is included in the exhibits as "Special Exhibit 1-A" before this Court, it not having been an exhibit in the trial of the cause because the application preceded the trial. An examination of this affidavit shows that it states all of the matters referred to and required by the statute. The conditions of the statute appear to be mandatory; its purpose must have been and must be to require the Court to grant the severance when such affidavit be filed. For the Court to deny

the severance and separate trial when the statute is complied with is to directly violate its provisions and to deprive the defense of the right thereby acquired to have a separate trial from the defendant jointly indicted, whose testimony is required. It also has the effect, as it had in this very case, to permit evidence to be introduced of admissions and statements made by the defendant, Nick Joseph Juliano, which were not binding upon these other defendants, but which harmed them even though the Court instructed the jury that they are not binding upon these defendants. It may be argued by the State that because Nick Joseph Juliano took the stand in the trial that this thereby rendered the refusal of the Court to grant a severance, if it were error, harmless error, but the answer to this is that the defendants were deprived of the right to call this other defendant as their witness for direct examination and were confined to the right to cross examine him upon his own direct examination in his own case, thereby limiting the scope of his testimony in behalf of the defendants; also that his evidence given as a defendant in his own trial would not bear the weight with the jury that it would if it were given by him as a witness in a trial not involving himself, but as a witness for the other defendants. The denial of the application, it is respectfully submitted, was error and error that was harmful to an extent that this Court cannot determine by speculation as to its effect. It also resulted in grave harm and injustice to the defendants in view of the fact that the State subsequently in the trial introduced evidence of the separate admissions or statements of the other defendant which were harmful to these defendants and which introduction of evidence, besides being erroneous in itself, should be considered under

this point as aggravating the harmful effect of the Court's error in refusing to grant the severance. It is respectfully submitted upon this ground that the judgment of conviction should be reversed. It may be argued that a motion for severance is discretionary with the Court, but an examination of the cases so holding will show that every one of them involved not an application for severance in, under and pursuant to the statute, but by a mere general application without the presentation of an affidavit and without any compliance with or application under the statute.

POINT II.

Assignment of Errors No. 2. Specifications of Causes No. 2.

"Because the Court refused to grant the motion of the defendants for a postponement of the trial upon the indictment for murder returned against them."

This application was made before the commencement of the trial and appears in the record, at page 32. The four defendants were indicted on October 19th, 1926, a few days after they were arrested and were called upon to plead October 25th, 1926, at which time they entered pleas of not guilty and the trial was set for November 15th, 1926, just twenty days after the plea to the indictment. The case involved charges against four separate defendants all of whom at the trial presented different, separate alibis supported by numerous witnesses and against whom numerous witnesses appeared for the State whose testimony required previous investigation and all of which proceedings referred to a time many months before the de-

fendants were suddenly arrested, during which time the Police Department and prosecutor's office were naturally working upon the case and had opportunity to study the basic facts of the crime, to locate and interview all persons who had some knowledge of the occurrence and to prepare their case for many months in advance of the defense. The defendants, on the other hand, had three weeks in which to prepare for their defense. The trial itself lasted three entire weeks, than which there could be no more striking proof of the vast number of questions involved and the great amount of work in preparation that was necessary. Under these circumstances, counsel for the defense prayed for further time in which to get ready for the trial, a trial involving the lives of four men, and it is respectfully submitted that while this was addressed to the discretion of the Court, the exercise of such discretion by the Court should be reviewed in a case as grave as this one, and both the majority and dissenting opinions in the recent case of *State* v. *Lynch,* 134 Atl. Reporter 760 (not yet reported in official reports), show that this Court will consider the circumstances of such refusal to grant a motion for postponement of trial. In the Lynch case, Chief Justice Gummere, speaking for the Court and discussing as a ground for reversal (although concluding not to reverse) the refusal of the trial court to grant an adjournment, points out that the defendant therein had knowledge months before his trial that he was indicted and furthermore that:

> "There was no suggestion then made to the trial court that there were witnesses in existence, who, if called on behalf of the defendant, would give evidence supporting his plea of not guilty, and, of course, there was no suggestion that the postponement

> was necessary in order to procure the presence of any such witnesses nor is it now claimed before us that the defendant was harmed as a result of the refusal of the motion to postpone because of the fact that, if it had been granted, he would have been able to produce such witnesses upon the adjourned day."

For these reasons, in the majority opinion of the Court, reversal was refused. In the present case, however, the elements lacking in the motion in the Lynch case were present. On page 33 counsel stated in part that one of the State's witnesses had a long police record in different states of the Union which the defendants were unable to ascertain and prove and the other counsel stated (p. 36): "As to this witness we want the complete criminal record." This statement by counsel to the Court pointed out one at least of the numerous pieces of evidence that it had been unable to obtain and which, with a short adjournment, the defendants would have been able to obtain.

Regarding the statement by the Court, in *State* v. *Lynch, supra,* that no suggestion was made on the appeal argument that there was any evidence not obtained which could have been obtained if an adjournment had been granted, we take this opportunity to state that since the trial we have obtained a great deal of evidence which was not possessed at the trial including affidavits from two of the State's witnesses who were held in the House of Detention by the State and not permitted to be seen by the defendants but who were not called to the stand by the State in the trial and could not be called to the stand by the defense because of their lack of opportunity to even interview them. In addition thereto, the defense has received

evidence since the trial which it did not possess at the trial of the circumstances under which the police officers in charge of the case obtained the identifying testimony of one of the chief identifying witnesses for the State, which additional information and evidence these defendants are prepared to submit to this Court in the form of affidavits if desired. To quote the language of Chancellor Walker in the dissenting opinion in *State* v. *Lynch:*

> "The test, in my opinion, is whether reputable counsel, either such retained by the defendant or appointed by the Court (which employment or assignment implies confidence in him) informs the Court that the time elapsed between the arraignment, or appointment, and trial if that time be extremely short (a few days), as in this case, does not afford him reasonable opportunity to fully, fairly, and bona fide prepare the defense of a man charged with murder and to be put on trial for his life, the Court should grant a continuance for a reasonable time to afford him that opportunity, and, if such request is denied, reversal should result."

It is true that in this case three weeks intervened from the time of the arraignment to the time of the trial and slightly less than four weeks from their arrest to their trial. Among the things that had to be done in this period by counsel are the following, involving, as was stated to the Court in the application, day and night labor of counsel and assistants to get ready: to investigate the circumstances of the crime including the location of it, the personnel of the plant with a view toward determining who working there may have had connections with persons who might have actually committed the crime, obtaining newspaper reports of several months before giving the general details of witnesses, names and stories, learning who the

State's witnesses would be and investigating the criminal records, associations, sanity or insanity of such persons, making an effort to follow clues indicating that other persons than the defendants were guilty and endeavoring to obtain evidence of the guilt of such other persons, trying to locate the criminal companions of the State's witness, Boudreau, who was learned to have figured in numerous hold-ups with persons other than these defendants, finding witnesses who knew Boudreau and who knew that he never was acquainted with and never was in the company of any of these defendants, finding witnesses to whom he stated that persons other than these defendants were the ones who committed the crime with him, investigating the police activities since the arrest of Boudreau and in nocturnal trips to the scene of crime with him, seeking to find the murder car in various garages and paint shops throughout Northern New Jersey with a view toward proving who possessed it before and after the crime, tracing the thieves of the stolen automobile plates which were upon the murder car after finding out what its number was, seeking eyewitnesses to the crime and interviewing and subpoening them for the defense, endeavoring to determine just where each of the four defendants were on the day of the crime, which was many months before their arrest, and obtaining numerous witnesses whom they associated with on the day in question to corroborate their testimony when their whereabouts were finally determined, seeking and obtaining hotel registers, bell boys' records and telephone operators' records of hotels where it was found two of them stopped, obtaining records of an automobile company, department store and other documentary evidence to substantiate the alibis of the defendants, investigat-

ing the special panel of jurors served upon the defendants, investigating the selection of the array, preparing affidavits and motions, as well as preparing on the law involved in the trial, and interviewing the defendants themselves in custody, are some of the things that had to be done, starting cold three weeks before the trial opened. The mass of information used by the defense in the cross examination of the State's witnesses and offered in defense by the defendants, attests to the great labor involved in preparing for trial. Approximately twenty-four witnesses testified for the State and approximately forty-eight witnesses testified for the defense, in addition to a large number of additional witnesses called in rebuttal and sur-rebuttal. This fact alone involving as it necessarily did work to anticipate and prepare for all of said witnesses and to examine not only these persons but numerous others who were found not to possess evidence would well consume more than the period allowed. It is because of such circumstances that the statement of counsel should be sufficient to require the trial court to grant a reasonable motion for an adjournment when, to grant the motion no harm could result and to deny it would be to possibly jeopardize the lives of four men to be placed on trial. It is respectfully submitted that the refusal of the trial court to grant the motion for adjournment under the circumstances was harmful error and should cause reversal.

POINT III.

Assignment of Errors No. 3; Specifications of Causes No. 3.

"Because the Court overruled the challenge of the defendants to the array of the jurors upon the ground that the special panel served upon the defendants was improperly drawn and the names thereon improperly selected from a list or box that did not contain the names of all the jurors drawn and summoned to attend as jurors at the term for which the defendants were to be tried."

The challenge to the array was put in writing and is to be found on pages 36-37 of the State of Case. The first ground of said challenge was withdrawn and the second ground reads as follows:

> "2. Said special panel was not drawn from the panel of jurors that 'May have been drawn and summoned to attend as jurors at the term for which such defendants are to be tried,' but instead was drawn from a box containing only the names of a portion of this general panel."

In support of the motion, Under Sheriff Walker was sworn and his examination reveals that the special panel was drawn from a list of one hundred fifty jurors' names who had been designated under the statute to sit for the two-week period that included the opening of the trial. He was further asked (p. 37):

> "Q Did that list have 150 names of November 8th include all of the jurors who have been called and sworn for this term of court, from the opening of the term to the present date? A No, it didn't.
>
> Q There had been approximately how many names of jurors who have been called and who have been jurors this term of court

prior to this list? A Well, I could not tell without getting my record from the office.

Q How many panels have there been? A This is the fourth."

It is respectfully contended that the statute requires the special panel to be drawn from the list of all the jurors that may have been drawn and summoned to attend as jurors at the term of court at which said defendant is to be tried. The statute (Section 82 of Criminal Procedure Act of 1898) reads as follows:

(82) "In all cases where any defendant in any indictment is entitled to twenty peremptory challenges and to have a list of the jury delivered to him previous to his trial, it shall be the duty of the sheriff, or other proper officer, to draw such list of forty-eight jurors, or such larger number as the court in which such indictment shall be pending shall by special order direct so to be served, from the box in the presence of the Judge of the Court of Quarter Sessions of the County, or in the presence of the Clerk of said Court, *from the general panel of jurors that may have been drawn and summoned to attend as jurors at the term at which such defendant is to be tried;* * * * (Italics ours.) (P. L. 1898, p. 897, as amended P. L. 1903, p. 250.)

It is submitted that the evidence shows upon the challenge to the array that the special panel was not drawn from the general panel of jurors that had been drawn and summoned to attend as jurors at the *term* at which the defendant was to be tried, but on the contrary was drawn from a fractional portion of said general list, to wit: from the portion of the panel assigned to trials during the two-week period including the commencement of the present trial. It is true that the Chancellor Sheriff Jury Act (Sections 6, 7,

9, P. L. 1913, p. 828) gives to the Justice of the Supreme Court the right to direct that the panel of petit jurors drawn in accordance with the act shall serve for a designated portion of the ensuing term only and in such event they shall be so summoned; but Section 7 and Section 9 of the Chancellor Jury Act merely provide for the summoning for service of several lists of jurors to serve for various portions of any given term and the Act does not purport to amend the Chiminal Procedure Act of 1898, Section 82, as amended, which prescribes, as aforesaid, the drawing of the special panel from the general list of the jurors *that may have been drawn and summoned to attend as jurors at the term at which such defendant is to be tried.* The effect of the failure to comply with the provisions of Section 82 of the Criminal Procedure Act is to reduce the number of jurors from whom the special panel is drawn and this is just as much of a deprivation of the right of the defendant as if the drawing of the jury itself was from a box containing less than the forty-eight names required on the special panel. This latter error has been held sufficiently harmful to require reversal. In *State* v. *Rombolo* (E. & A.), 89 N. J. Law 565, wherein this Court construed Section 82, it held that the placing of less than the names of all the special jurors on the special panel in the box was harmful error, even though the omitted names were later supplied and reversed by reason of this procedure, saying:

> "The importance to the defendant of having the names of all the persons from whom the jury will be selected placed together in the box is not merely imaginary. The value of his right to challenge as was said by the Supreme Court in State *v.* Lapp, 84 N. J. Law 19, 21, depends to a considerable

> degree upon the order in which the names are drawn from the box and may be radically effected by placing therein less than two-thirds of the whole number of names on the panel and then, after exhausting those names, place the remainder (or a portion thereof) of the names upon the panel in the box, and fill up the jury from this second installment.''

While the Court based its reversal in *State* v. *Rombolo* upon the theory that the drawing of the names from the box in the drawing of the trial jury was a violation of the statute because all the names were not placed therein when the drawing began and that this deprived him of his right of challenge to the additional jurors in the order which the names should come out of the box, yet in the present case the special panel itself included names which might not have been on it if it were selected from the whole panel of jurors for the term and also failed to contain names which it otherwise would have. In other words, the violation of the terms of the statute not only excluded other persons who might have been acceptable to the defendant but included persons who would not have appeared on the special panel, if the whole list had been drawn from. It is respectfully urged that a strict compliance with Section 82 of the Criminal Procedure Act is required and that when the directions of the statute are not followed, as in this case, there should be a reversal.

POINT IV.

Assignments of Errors and Specifications of Causes Nos. 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15:

These assignments of errors are to be found on pages 1551, 1552, 1553 and 1554 and the specifications of causes on pages 1572, 1573 and 1574 of the State of Case and on account of their length they will not be copied here except that each one of the assignments of error and specifications has a cause for reversal because the trial court sustained the challenge for cause made by the State against each of twelve jurors whose name appeared upon the special panel and dismissed each of said jurors for cause without legal cause existing and without a peremptory challenge on the part of the State and against the objections of the defendant by whom each of said jurors was accepted as satisfactory.

In each of the twelve instances of the twelve jurors mentioned in the Assignments of Error and Specifications of Causes, the juror was challenged and discharged for cause because he stated he had conscientious scruples against capital punishment.

The foregoing challenges for cause by the State were sutsained by the Court, as a result of which numerous talesmen whose names had been served upon the defendant and from whom they were entitled to select their jury were discharged by the Court although satisfactory to the defendants. It is not only reasonable that if the discharge of jurors on challenge for cause by the State is erroneously made by the Court or upon insufficient grounds to sustain such challenge for cause, that this should be reversible error, but this position was also sustained by long standing authority in this state, *State*

v. *Patterson,* 48 N. J. L. 381, until the decision in *State* v. *Langhans,* 95 N. J. L. 213. In the case of *State* v. *Patterson* (48 New Jersey Law p. 381) the conviction of the defendant was reversed because the trial court erroneously sustained the challenge for cause of the State to certain jurors. The Supreme Court in an opinion written by Justice Van Syckel reviewing the principles governing the question of error arising upon such discharge for cause of jurors stated:

> "The remaining questions to be considered relate to challenges to the favor. At common law, upon the trial of such challenges, the finding of the triers as to facts was not reviewable. The functions of the triers being, by our State, vested in the trial court, the finding of the judge upon questions of fact involved in a challenge are conclusive. The decision of the judge is the subject of exception only when he makes a mistake of principle in determining whether the challenge shall prevail. Under a system of criminal jurisprudence, which shields a defendant by the presumption of the necessity of a unanimous verdict to convict, courts of review should not be astute to seize upon ground for reversal where the challenge by the State to the favor has been successfully made. There should be very clear error to constitute a mistrial.
>
> The State challenged Sidney H. Sproul to the favor.
>
> It appeared that at the same term he had served as a juror in another case of the State against the same defendant, Patterson, in which he had formed an opinion, but he stated that he knew nothing about the present case and supposed he could try it according to the evidence. Two other jurors were challenged by the State for like cause, and the challenges were sustained by the Court.

'It is no legal objection to a juror that he had been one of the jury in another cause against the same defendant for a different offence.' United States *v.* Watkins, 3 Cranch C. C. 443.

The fact that jurors have tried and convicted a defendant of a crime does not disqualify them from sitting as jurors in the trial of another indictment against him for a similar offense at the same term. Commonwealth *v.* Hill, 4 Allen 591; Thompson & Mer. on Juries, 194, 195.

In sustaining these challenges the trial court erred.

The State also challenges William J. Johnson to the favor, because it appeared that the defendant is a brother to one Austin Patterson, and that the said Austin Patterson and the father of said Johnson married sisters. This was no legal ground of challenge and it was erroneously sustained.

The defendant challenged John S. Hubbard to the favor, because he was tenant in common of certain real estate with two of the endorsers on the promissory notes alleged to have been forged by the defendant. This challenge was properly overruled.

For the reasons given, the judgment must be reversed and a new trial ordered."

The foregoing case is cited in *State* v. *Morehouse*, 97 New Jersey Law, p. 285, as authority for the statement in the Morehouse case that the Court's finding on the challenge for cause has been a question of fact and is conclusive and is not reviewable, but the above excerpt from *State* v. *Patterson* clearly shows that the Court on appeal will consider the correctness of the trial court's basis for the discharge of the jurors on the challenge for cause and the correctness or incorrectness of its ruling from the standpoint of whether the evidence revealed any just basis for the discharge of the jurors.

It is true that this Court in *State* v. *Langhans,* in 95 New Jersey Law, p. 213, disaffirms the principles enunciated in *Patterson* v. *State,* but a careful reading of the decision in *State* v. *Langhans* reveals that one of the reasons for the decision of the Court of Errors and Appeals in that case was that neither the State nor the defendant had exhausted its number of peremptory challenges. In the present case the record shows that three of the defendants, to wit: Nicholas Joseph Juliano, Joseph Juliano and Louis Capozzi, exhausted their peremptory challenges and that the State also exhausted its peremptory challenges. This creates a different situation than existed in *State* v. *Langhans,* the force of which circumstance is to be perceived in the following extract therefrom:

> "In the present case the complaint of the defendant is that he was by the ruling of the trial court deprived of having a particular juror, Benjamin W. Brown, sit as a member of the jury for the trial of the indictments. Upon the completion of the drawing of the jury, the record shows that the State and defendant had each used only two of the ten peremptory challenges to which each was entitled. This shows that the defendant was not deprived of his right of exclusion, as he expressed his satisfaction with the jury as drawn and with the juror who had taken the place of Mr. Brown. If he had been dissatisfied, he would have exercised his right of peremptory challenge. The State had forced on the defendant no objectionable juror and had deprived the defendant indirectly of no juror which it could not have excluded by peremptory challenge. As the law is that a defendant has no right to say that some particular juror shall try him, it follows that in the present case the defendant suffered no injury by the Court's ruling. The

denial of a non-existent right can inflict no legal injury."

It is furthermore to be observed that *State* v. *Langhans* was not a murder case or case in which the defendant was entitled to the service upon him of a special panel. Under which statute the defendant in a murder case is entitled to service upon him of a list of forty-eight names of talesmen from whom his jury shall be called and it has been held that the service of this list is a right so important that it cannot be waived in a capital case. The service of this list, however, becomes a mere meaningless gesture if the trial court be permitted to deplete it by excluding a dozen persons thereon from service without requiring the State to exercise its limited number of peremptory challenges. If jurors are repeatedly excused by the Court on a challenge from the State for grounds not constituting legal ground for challenge for cause this is in effect increasing beyond the stautory number the peremptory challenges allowed to the State.

In the present case the addition of the incorrect challenges for cause and the peremptory challenges used by the State total approximately twenty-one, thus exceeding the number of peremptory challenges allowed to the State and thereby completely defeating the statute and depriving the defendant of the right to have the State exclude only twelve jurors for objections not constituting grounds for a challenge for cause.

The above contention that the rule to be applied in a murder case where a special panel is required should differ from that applying to an ordinary case is given force by the statement of this Court in *State* v. *Moore,* 75 N. J. L. 619, where the prosecution was for keeping a dis-

orderly house, where the Court stated, "The rest of the general panel was left from which a jury was selected." In the present case the rest of the special panel was not left from which a jury was selected. It is also pointed out in *State* v. *Deliso,* 75 N. J. L. 808, by Chief Justice Garrison, speaking for this Court, that in that case, as in *State* v. *Moore*, the list was not exhausted nor did the defendant exhaust his number of peremptory challenges, both of these circumstances differ in the present case from any of the above cited cases.

Furthermore an examination of the records showing the manner in which the so-called challenges for cause were made reveals that they were not made in accordance with the rules governing such challenges. In the first place the general challenge "for cause" was made by the prosecution in each case. In *State* v. *Drake,* 53 N. J. L. 23, it was held:

> "Moreover, the challenge was not legally interposed. It was merely 'for cause' without stating whether it was for principal cause or to the favor and without setting out the facts on which it rested. This is insufficient. State *v.* Spencer, 21 N. J. L. 196."

In addition thereto the challenges in many instances were made not by way of a challenge for cause followed by an examination of the jurors but by the challenge for cause after listening to the answers of the talesmen upon the general examination afforded for peremptory challenges. The rules requiring adherence to the specific manner of challenging for cause should be applied with as much strictness in reversing the decision where such challenges are incorrectly sustained when made by the State, as in affirming decisions where incorrectly

interposed challenges are overruled when made by the defendant.

That the basis for the Court's discharge of the talesmen upon the challenge for cause was not warranted but on the contrary that the Court misconceived and misapplied the law governing the juror's qualifications and obligations seems apparent by a reading of the statute now in force governing jurors and verdicts in murder cases.

This statute as amended (P. L. 1919, p. 303) reads as follows:

> "Every person convicted of murder in the first degree, his aiders, abettors, counsellors and procurers, shall suffer death unless the jury shall by their verdict, and as a part thereof, upon and after consideration of all the evidence, recommend imprisonment at hard labor for life, in which case this and no greater punishment shall be imposed; and every person convicted of murder in the second degree shall suffer imprisonment at hard labor not exceeding thirty years."

Under this statute the jury is given the right, upon and after consideration of all the evidence, to recommend life imprisonment in any case wherein they have found the defendant guilty of first degree murder. If the juror possesses the qualifications, will and purpose to sit conscientiously and impartially as a juror, to hear the evidence in the case and decide upon the defendant's guilt or innocence in accordance therewith, he is qualified to sit as a juror and the mere fact that, by reason of conscientious scruples or otherwise, he would recommend life imprisonment, after the consideration of all the evidence in the case, would not disqualify him as a juror even though it might

render him unsatisfactory to the prosecution and thereby render their *peremptory* challenge advisable. The statute gives such jurors the right to recommend life imprisonment even though the evidence shows clear guilt of the highest degree of murder known, to wit, first degree murder. The questions and answers to and of the talesmen merely show a preference on their part for life imprisonment against execution for one convicted of murder in the first degree and in no way rendered the talesmen unfit to sit in the trial.

POINT V.

Assignment of Errors No. 16; Specification of Causes No. 16.

> "Because the Court overruled the objection of the defendants to the admission of a photograph in evidence, which photograph showed movable objects, to wit, an automobile and a motor truck, which were not, and which were not proven to have existed and have been in the same positions at the time of the commission of the crime."

On account of the large number of exhibits, consisting of maps, photographs, documents, and etc., they are to be produced before the Court in a separate envelope for each member of the Court, and among them is a photograph showing an automobile and a motor truck thereon, which were taken before the trial and were intended to represent the location of vehicles having to do with the circumstances surrounding the crime.

The introduction of this particular photograph is shown in the State of the Case at pages 116 and 117. The photograph was admitted over the defendants' objection and marked Exhibit S. 11. An examination of it reveals movable ob-

jects, to wit, an automobile and a motor truck, which were not, and were not proven to have existed at the time of the crime in the same positions as when the photograph was taken. The witness, by whose testimony it was offered, testified (p. 115), that the Chevrolet was not where it was. Over the objection of counsel (p. 117, S. C.), this photograph was admitted in evidence. It is respectfully urged that this situation comes within the decision of this case in *State* v. *Smith*, 68 N. J. Law, 609, which case dealt with almost precisely the same situation, except that in that case "the *map* was not received in evidence, nor was it afterwards used for illustration"; whereas in the case *sub judicia* it (the photograph) was received in evidence over defendants' objection, was exhibited to every witness during the trial, and went with the jury into the jury room.

The position of the Chevrolet car shown upon it was of importance in the trial because the ability of certain State witnesses to identify the perpetrators of the crime from a second story window looking down on the machines, had to be determined largely by the distance which said cars were from the building at the time of the crime, as bearing upon the question of the ability of such witnesses to see or recognize the persons committing the crime. In *State* v. *Smith, supra,* the Court had before it a map of a house, which map had delineated thereon certain articles of furniture in a room in question, and the delineation of the furniture indicated its position at the time the survey was made, which was some weeks after the alleged homicide. There was no suggestion made, either by evidence or a statement of the prosecutor, that it purported to show the position of the furniture at the time

of the homicide. The Court of Errors and Appeals stated:

> "As it seems to have been claimed that the position of the movable articles in that room in their relation to the room and each other, was a question of importance in the cause, the map illustrative of the situation should not have shown them as they were at the time of the survey, unless, upon independent evidence showing that they occupied the same position at the time of the homicide."

In the present case not only was there no such independent evidence when the photograph was offered in evidence, but on the contrary the witness had stated that the Chevrolet car was not in the same position in the photograph as it had been at the time of the occurrence of the homicide. At another point, the opinion in *State* v. *Smith*, says:

> "Maps, which are not original evidence, may be admitted and used only as illustrative of evidence, otherwise offered and duly admitted. Generally, they should only delienate such physical facts as are permanent in character, or may be presumed to have existed in the same relations at the time at which the inquiry is directed. Things which are movable in their nature, and the relation of which to each other, and to immovable things around them, have a bearing on the question at issue, should not be delineated thereon, unless it is made to appear by the evidence of witnesses that they knew the position which they occupied at the time in question and had truthfully and correctly pointed out their position, to the maker of the map."

The foregoing language in principal is applicable not only to drawings of a situation, but photographs of a situation which are of the same nature and effect as evidence in a case. It is respectfully submitted that there was in

this case *sub judicia,* "no evidence of witnesses that they knew the position which they occupied at the time in question, and had truthfully and correctly pointed out their position to the maker of the map" (substitute the word photograph for map). It may be pointed out that in *State* v. *Smith,* it was held that no legal error was committed by the Trial Judge by refusing to strike out the evidence, but in *State* v. *Smith* the map itself was not put in evidence, and, as the Court points out it was not afterward used for illustration. Since the surveyor had testified in that case that it showed the position at the time of the survey, and not at the time of the murder, and the map was not put in evidence before the jury, there was no harm in not striking out this testimony. In the case at bar, however, the photograph was admitted in evidence over objection and exception taken as to the admissibility of such photograph in evidence. However, the Court of Errors and Appeals in *State* v. *Smith* observed:

> "We think that while the map, in respect to which the surveyor was first examined, was not such as, in the absence of other testimony could have been used to illustrate the position of the furniture, there was no legal error in permitting the examination, and there was no injury done to the defendant by the incident."

In the present case, however, the photograph was before every witness for the State, to guide and lead them from the beginning of the case in their testimony about the disputed subject of the position of the decedent's car. It remained in evidence, for all intents and purposes, to show and illustrate to the jury where the decedent's car was, an allegation of fact based entirely upon hearsay of persons who had

not seen the decedent's car at the time of the holdup. All of these circumstances were revealed to the Trial Court before it ruled on the objection to the photograph, and under these circumstances it is respectfully submitted that a grievous and harmful error was committed in allowing the photograph to be received in evidence and to remain in evidence with such objections upon it.

POINT VI.

Assignment of Errors No. 17; Specification of Causes No. 17.

> "Because the Court sustained the objection of the prosecutor to the following questions put by defendants' counsel on cross examination to the State witness Boudreau: 'Who did you go around with about the time this holdup occurred? Who were your friends?' "

This question is to be found in the State of Case at page 144. The question was put to the chief witness for the State, Boudreau, who was indicted for the murder, and turned State's evidence against the defendants. He had told a story of a peculiar nature in itself, that he did not know the defendants except Nicholas Joseph Juliano, before the day of the crime and never associated with them afterwards. He had admitted being convicted of other crimes. The object of the question was to show that he did not go around with the defendants, and to test his statement that he met them on the day of the crime, and to determine his veracity when he said he was not with other persons than the defendants when the crime was committed, and it appears to be a question proper in form on cross

examination, going into the subject matter of his direct testimony, and seeking a proper bit of information going into the merits of the case.

The Court instructed counsel to ask who was with him and mention names. This of course could not be done, for that was the very information that the examiner sought, and he did not have the names within his knowledge. It was not a situation where a question was asked the witness as to a prior contradictory statement made to other persons where their identity would have to be indicated in the question. The Court, however, sustained the objection of the prosecutor to the question, and the defendants were thereby deprived of an answer, and had to give up the effort to examine him on this point.

It is respectfully submitted that this constituted error particularly when considered in conjunction with the numerous other instances where a like limitation on the cross examination of State's witnesses was imposed on the defense. It is respectfully urged that the defendants, in view of their defense that they did not commit the crime with the State's witness Boudreau, but that some other persons committed it with him, and in view of the fact that he had already admitted that he participated in holdups, were entitled to show who he went around with and who his friends were at the time of the commission of the crime. Defendants were entitled to show this so as to determine whether those persons bore a resemblance to the descriptions given by eye-witnesses later in the case of the defense as to persons who actually participated with Boudreau. It also was a proper introductory question to be used in a line of examination to test and affect the credibility of the witness.

POINT VII.

Assignment of Errors No. 18; Specification of Causes No. 18.

> "Because the Court sustained the objection of the prosecutor to the following question put to the witness Boudreau on cross examination by defendants' counsel: 'Q How long after that was the next one signed?' "

The foregoing question, put to the State's witness Boudreau on cross examination, is to be found on page 170 of the State of Case. The witness had already signed, according to his testimony, two statements, both of which were long statements, and had also testified that he signed the first one about a day and a half after his arrest, and he was then asked how long afterward it was that he signed the next statement to the police.

The witness had used the name Capozzi in identifying one of the defendants in his direct testimony on the stand. He had admitted that he did not know the name of Capozzi except from having learned of it in the newspapers, and that he did not know it when he made either of the statements to the police. He further testified that the policeman had not suggested the name of Capozzi to him, and it was to affect his credibility upon this point that the proper question was asked as to when the statements were made in point of time, which he signed and in which he admitted he did not use the name Capozzi. To properly determine the truth of the witness' testimony, his credibility in stating where he got the name Capozzi and when, it is respectfully submitted that the question put to him was a proper one, and that its exclusion was an unwarranted deprivation of the right of cross examination harmful to the defense.

If his answer showed that the second statement was made after the appearance of Capozzi's name in the newspapers, and that he still did not know and include the name in that statement, it would have indicated that he lied when he said he first learned Capozzi's name by the newspapers. Questions thereafter put might have shown that the name was given to him by the police detective in charge of the case either just before taking the stand to testify or just before his alleged identification of the defendant Capozzi before trial. This subject of inquiry was particularly important when dealing with a witness who admitted that he picked the defendants from a line-up only after he was given a preliminary secret view of them by the police at headquarters by peering at them from a phone booth in which he was concealed, with a mask on, and then twenty minutes later was able to pick them from a line-up.

POINT VIII.

Assignment of Errors No. 19; Specification of Causes No. 19.

> "Because the Court sustained the objection of the prosecutor to the following question, put to the witness Boudreau by defendants' counsel on cross examination: 'Q Two statements you made before and which you signed different from each other and different from the testimony given by you at this trial?' "

The Court excluded this question on objection by the State upon the ground that it was not a proper method of laying the foundation to impeach the witness' testimony. It will be noted that the witness had testified that he signed two written statements prior to the trial. The atten-

tion of the witness, therefore, was directed to the subject matter referred to in the question, and the same was identified sufficiently to be used in the defense of the case to contradict and destroy the credibility of the witness if his answer were negative. If they differed from the testimony given on the stand, the defense, when it opened, was entitled to introduce them in evidence in order to contradict the witness. Their contents were matters not within the knowledge of the defendants unless and until they were subpoenaed and produced by a witness making his appearance at the time of the defense. This circumstance, it is submitted, rendered impossible the quotation of such parts of such statements as were contradictory of his testimony on the stand, and the defendants therefore were entitled to ask the witness whether his prior written statements did not differ from each other and from his testimony given at the trial.

POINT IX.

Assignment of Errors No. 20; Specification of Causes No. 20 are withdrawn, because they involve substantially the same questions raised in the last previous point.

POINT X.

Assignment of Errors No. 21; Specification of Causes No. 21 are withdrawn.

POINT XI.

Assignment of Errors No. 22; Specification of Causes No. 22.

> "Because the Court sustained the objection of the prosecutor to the following question put to the witness Boudreau by defendants' counsel on cross examination: 'Q And they committed crimes with you, did they not, did they not?' "

This question is to be found on page 199 of the State of Case. The witness had already testified that he and Nick Barone and Carl Bielke and one other man took a trip to Scotch Plains one night, and that the men were pals of his. He was then asked whether they committed crimes with him, counsel stating that the purpose of the question was to affect the credibility of the witness' testimony that he committed a crime with these defendants, and that he wanted to show that the witness habitually committed crimes with a gang of which he was a member. The Court sustained the objection of the prosecutor and exception was duly taken.

It would appear at first that the question was open to the objection that a witness' credibility cannot be affected by the prior commission of a crime unless a conviction were shown, under the provisions of the Evidence Act. But the object of this question was not to affect the credibility of the witness, by showing a prior conviction or commission of crime merely for the effect this circumstance would have on his evidence. He had already testified that he did not go around with or even know any of the defendants except one before or after the date of the crime charged. It seems that the defendants should have been permitted to show that he was a member of a gang habitually committing crimes to-

gether with the witness at the same time that the Reid holdup occurred, and the sustaining of the objection to this question, as well as others going to the same purpose, foreclosed the defendants from proving this fact. Certainly, in view of the improbability of his story as to his sudden and temporary connection with these defendants, the jury would have been assisted in determining the probability or improbability of defendants' guilt if it could have been shown that Boudreau committed the Reid crime with a gang as part of a series of crimes in which he engaged with this other gang.

If the witness had been permitted to answer and had answered in the affirmative, he could have been asked whether he was with any of this other gang on the day of the holdup; whether he had planned the holdup with them, and information would have been elicited that would have enabled the defendants better to meet the State's case.

It is submitted that the sustaining of the objection to this and similar questions constituted legal error and harmful error because it went to the very heart of the case on trial.

POINT XII.

Assignment of Errors No. 23; Specification of Causes No. 23.

> "Because the Court sustained the objection of the prosecutor to the following question put by defendants' counsel on cross examination to the witness Siegal: 'Q Did you tell the officer that came to your store, the detective, that one of the persons you saw was a young man about 35 years old, 5-11 and thin face and light complexion?'"

The foregoing question is to be found on page 308 of the State of Case, and the exclusion thereof seems to be about as clear a legal error in the suppression of a proper question on cross examination as could be found. Siegal, the witness under examination, had testified that he saw the four defendants, as well as the State's witness Boudreau, committing the crime. He was the one witness for the State who identified on the stand every one of the defendants as well as the State's witness Boudreau as having been seen by him committing the crime. He admitted having placed his hand on one Carl Bielke in a line-up at police headquarters, a man whom the evidence shows had light hair. The witness said, however, that he did not really pick Bielke out, but asked him to take his hat off. All of the defendants, as well as the State's witness Boudreau, were men of dark complexion, with black hair. Siegal said he saw them committing the holdup, and that they were the only ones whom he did see. Under this state of the evidence, counsel for defendants endeavored to show, as he was clearly entitled to show, a prior contradictory statement by this witness. Counsel for defendants asked the following question:

> "Q Did you tell the officer who came to your store, the detective, that one of the persons that you saw was a young man about 35 years old, 5-11 and thin face and light complexion?" (P. 308, S. C.)

This was objected to and the Court sustained the objection, to which the defendants took exception, which was duly sealed. That the witness knew who was meant by "the officer who came to your store" is clearly shown when he says on page 307, prior to the question in dispute:

> "Q Well, you were questioned at your store by detectives, then? A Yes.

Q Did you tell them what you had seen?
A Yes."

If the witness had stated that to the officer who came to his store, then it was important as affecting his credibility upon the stand, because it was a prior contradictory statement. If the witness' answer were "No," then the defense would have the right, having thus properly laid the foundation, to contradict the witness, to call the officer or officers to whom he admitted speaking at his store to show that he had made such a statement. Thereby the witness would be contradicted and his credibility affected, and his important and damaging adverse testimony destroyed.

As the result of the Court's action in sustaining the objection, the defendants were unable to produce this important evidence, for such evidence would not be admissible because the foundation had not been laid, due to the Court's sustaining of the objection. When the Court asked counsel as to whether he was prepared to contradict this man by this officer (p. 309), counsel stated that he expected to be, he hoped to be. Counsel then, to comply with the Court's direction that he give the name of this officer to whom the witness had admitted speaking, turned to the witness and asked (p. 309, l. 13):

"Q Who was that officer, do you know what his name was?"

Although this was an effort on the part of counsel to comply with the Court's direction, the Court excluded this question, to which additional exception was taken.

The foregoing appears to be an absolute foreclosure of the right of defendants to cross examine an important witness upon the most vital

point in the case, the presence or absence of defendants at the crime. If ever harmful error existed by reason of the improper overruling of a question on cross examination, it certainly resulted from the ruling of the Court in this instance.

POINT XIII.

Assignment of Errors No. 24; Specification of Causes No. 24.

This assignment and specification involve the sustaining of the objection of the prosecutor to the question put to Siegal on cross examination by defendants' counsel:

> "Q Who was that officer, do you know what his name was?"

It will not be separately argued as it is argued in conjunction with the last preceding point.

POINT XIV.

Assignment of Errors No. 25; Specification of Causes No. 25.

> "Because the Court sustained the objection of the prosecutor to the following questions put by defendants' counsel on cross examination to the witness Siegal:
> 'Q Were you shown by the detectives who came to your store a police circular saying four men were sought and one of them was of light complexion?'
> 'Q Were you shown that and did you say that the description of those four men there was correct?' "

These questions, which are to be found on page 310, involve practically the same question involved in the previous point. They are ques-

tions put to the same witness Siegal, who identified the four defendants and the witness Boudreau as being the five men he saw participating in the holdup. None of them were light-haired men, but all had black hair, four of them were Italians, and all had swarthy complexions. The witness had himself stated that on one occasion he was questioned at his store by several detectives, and that he described to them the men he had seen. It was proper, on cross examination, to ask the witness the question involved in this point.

At the conclusions of the two questions, which were asked as one, objection was made and sustained, and an exception taken. Certainly, it would affect the credibility of the witness and affect the weight to be given to his testimony if he had been shown a circular saying four men were sought and one of them was of light complexion, and he had said, when shown that description, that it was correct.

Therefore, not only was the question proper, but it was necessary to lay the foundation for the purpose of impeaching the witness by calling in defense the detectives, or some of them, as defense witnesses to contradict Siegel in the event that he denied it. Of course, he might have admitted it, in which event no contradiction would be necessary and his direct testimony would be seriously weakened. If he did deny it, then the contradictory testimony would be both proper and helpful to the defense. The only ground upon which the Court excluded the question was that the name or names of the officer or officers should be included in the question. The previous evidence shows that the witness had himself stated that such officers were to his

store on one occasion, and that he spoke to them about the descriptions of the men wanted and who had participated in the crime. The witness therefore had full knowledge of who the officers were that this question involved. He himself remembered them, remembered his conversation with them, and fixed the place as it was fixed in the question, as at his store. The witness therefore was fully capable of understanding the question and who it referred to; the witness had himself identified the particular conversation with the detectives at his store. Naming them would have served no necessary or useful purpose and would not have enlightened either the Court or jury any further than the existing state of the evidence actually did. If the witness denied his contradictory prior statement, it would have been proper to call one or more of the detectives, and show that the detective was one of those who had questioned Siegal at his store; that Siegal was shown a police circular stating that four men had committed the crime, one of whom was of light complexion, and that Siegal stated to him that this circular properly described the number of men he saw and the light complexion of one of them.

The exclusion of this question was without justification in law and was error harmful to the defendant, because it touched upon the very essence of the case, to wit, the testimony of an alleged identifying witness who identified on the stand the four defendants, and was the only witness who did identify all four defendants and the State's witness, Boudreau. That this question was intended as a real foundation, and that it had as its basis a grounding in fact, may be revealed by the questioning later in the case of Captain Brex, who was in charge of police

headquarters. Captain Brex testified that the police, after having interviewed all the eye-witnesses, were looking, not for five people, but for four people (p. 657):

> "Q From the statement made to you by the eye-witnesses to the occurrence, didn't you believe and weren't you looking for four people, and not five? A We were looking for four, at least.
>
> Q You were looking for specifically four, weren't you? A Yes."

Then followed numerous questions designed to determine whether the detective bureau had not sent out a police circular describing four persons, one of whom was a man about 35 years old, five feet, eleven inches, thin face, light complexion, wearing double breasted suit, straw hat and colored band. These questions, together with a question as to what Siegal told when he gave his statement right after the murder, were excluded because foundations had not been laid, because they had not been permitted by the Court to be laid for such evidence, the importance of which cannot be over-estimated. Under these circumstances, it is respectfully submitted that the foregoing sustaining of the State's objection to the question under consideration was harmful error, and should lead to reversal.

POINT XVI.

Assignment of Errors Nos. 26 and 27; Specification of Causes Nos. 26 and 27.

> (26) "Because the Court sustained the objection of the prosecutor to the following question put by defendants' counsel on cross examination to the witness Siegal:
>
> 'Q Now I ask you this question: If you were shown pictures of these men, you did

not identify them as being the men you saw participate in the holdup, did you?'

(27) "Because the Court sustained the objections of the prosecutor to the following questions put by defendants' counsel to the witness Siegal on cross examination:

'Q Who do you remember as being shown the pictures?

Q Without telling who the parties were?

Q Do you know who the parties were that were shown the pictures at headquarters?' "

The foregoing questions will be found on pages 313 and 314 of the State of Case. The object of all of these questions was to show that this identifying witness had been show the pictures of the defendants in the rogue's gallery at police headquarters before identifying them in a line-up and immediately after he witnessed the crime, and that he could not and did not pick them out as having been seen by him. In other words, the purpose was to show that he had looked at clear pictures of the defendants, and by his failure to pick them out had said, "These are not pictures of the men I saw." This would seem most obviously to be proper cross examination to affect the credibility of the witness in his present identification of the defendants.

The witness had admitted being shown various pictures at police headquarters. He admitted that he did not pick any of them out as being the persons he saw commit the crime. He also testified that he did not know whether or not he had been shown the pictures of the defendants (p. 312). He was then asked:

"Q Now I ask you this question: if you were shown pictures of these men, you did not identify them as being the men you saw participate in the holdup, did you?"

It is submitted that this question, if answered "I did not," would have affected the credibility

of the witness, and also have laid the foundation for later proof by detectives that he was shown the pictures of the defendants, and that the witness failed to identify them immediately after the crime.

The additional questions involved in this point are all questions going to the point of identifying the persons who were present at the time when the witness admitted he was shown some pictures. It was necessary and proper for the defense to show the persons who were present, so that if testimony were admitted to prove that Siegal was shown pictures of the defendants, it could then be proved that he was shown them on the occasion when these other persons were present. Thus it would give force to the fact and specify the time when he failed to recognize the pictures of the defendants. The sustaining of the objections to all of these questions deprived the defense of a reasonable and proper scope of cross examination and prevented the introduction of evidence destroying the credibility of this witness.

POINT XVII.

Assignment of Errors No. 28; Specification of Causes No. 28 is withdrawn.

POINT XVIII.

Assignment of Errors No. 29; Specification of Causes No. 28 is withdrawn.

> "Because the Court sustained the objection of the prosecutor to the following question put to the witness Siegal on cross examination by defendants' counsel:

'Q Didn't you tell the detective who came to your store a couple of days after the hold-up that there were four men and not five men in the holdup?''

'Q You know the detective, I mean without giving his name?' ''

These questions are to be found on page 322. The sustaining of the objections thereto are referred to here as additional grounds for reversal, but are not separately argued because the previous argument on the other questions that were excluded covered these as well. The same applies to the 30th assignment of error and specification of causes, where the witness Siegal was asked:

''Q Did you tell the police that you saw a tall, blond man there?'' (S. C., p. 331).

It is referred to here merely to show the numerous instances in which the Court overruled the defendants' proper questions upon cross examination.

POINT XIX.

Assignment of Error No. 31; Specification of Causes No. 31 are withdrawn.

POINT XX.

Assignment of Errors No. 32; Specification of Causes No. 32.

''Because the Court overruled the objection of defendants' counsel to the following question put to the witness Kenny by the prosecutor: 'Q What case was he present in connection with?' and in overruling the motion of defendants' counsel to strike out the answer thereto: 'A He was brought in reference to the Ward case.' And in over-

ruling the motion of defendants' counsel for a mistrial by reason of said question and answer."

The viciousness of the foregoing questions and answers can hardly be appreciated unless all of the questions and answers surrounding them are read. The witness was a detective from police headquarters in Newark, and he was testifying regarding a boy who appeared before the defendants in a lineup. The witness had already testified (top, p. 466):

"Q Was this boy from East Orange there in connection with the case on trial? A No, sir."

On re-direct examination he was asked:

"Q And did that young man identify any of these defendants?" (p. 467, l. 10).

This was objected to, and objection was sustained. The next question was:

"Q Did that young man appear at the lineup at which these defendants were present? A He did.

Q And was that boy present at headquarters at the time these defendants were in a lineup in connection with the Reid case?"

This was objected to on the ground that the witness had already stated that the boy from East Orange looked like this boy and he was not there in connection with the Reid case, and that there was no necessity for re-questioning him to that effect. The Court overruled the objection and the answer was:

"A Yes" (p. 468, l. 12).

The prosecutor then asked the question, although he knew from the previous testimony that the boy in question who was being spoken of was there in connection with another criminal

case, and therefore knew that he was endeavoring to show the guilt of the defendants on some crime other than that charged in this indictment.

> "Q And did he make an identification of these defendants in this case?" (p. 468, S. C.).

Defense counsel objected and was sustained. Later (bottom of p. 468), the first question on which error is assigned was asked:

> "Q What case was he present in connection with?
>
> Mr. McGeehan: I object to that upon the ground that it calls by implication for an answer that might be an accusation or a suggestion or suspicion of some charge against these defendants which has not been made by any Court and has not been the subject of any charge or conviction of crime. It should not enter into these proceedings even by innuendo.
>
> The Court: I will allow him to answer the question, but I will not permit him to state whether or not an identification was made."

Exception was duly taken to this ruling, and further argument was given.

> "Mr. McGeehan: I submit that the record has completely given this man's answer that he wasn't there on the Reid case. Further re-direct would go beyond the right of the prosecutor on re-direct, and would call for an answer prejudicial to the defendants.'
>
> The Court: I will allow the question."

An additional exception was taken. And then came the answer which counsel had anticipated, had argued strenuously against, and which was bound to hurt the defendants, particularly in view of the fact that the prosecutor had suggested by a question which was overruled that

the boy had made an identification in the other case. The harmful answer was:

> "A He was brought in reference to the Ward case."

In a final effort to remove this harmful matter from the consideration of the jury, counsel then moved (top, p. 470):

> "Mr. McGeehan: I move at this time for a striking out, expunging from the record, of that answer.
>
> The Court: I will allow it to stand. It has not connected these defendants.
>
> Mr. McGeehan: Of course, it does not, but it creates an effect that should not enter into this trial, and I move for a mistrial on this ground.
>
> "The Court: Motion denied."

An exception was then taken to both of these rulings. The Ward case was a notorious holdup of the Ward Baking Company, in which a policeman was shot. It was known from a newspaper standpoint to the jurors. The natural effect of allowing this testimony in the record and refusing to strike it out, despite the strenuous effort of counsel to prevent its introduction, was unquestionably to give to the jury the impression that these defendants were guilty of committing the Ward holdup, or at least that the police considered them guilty. It insinuated that a witness had picked them out in that case. It was unnecessary to the trial of the issue in this indictment. It was a gratuitous violation of the principle of law, well established, that while the defendants may be shown to have been convicted of prior crimes, they should not be shown to be charged therewith or to have committed the same without a conviction being shown. The prejudicial effect of this testimony on the minds of a jury cannot be calculated.

After the Court erred in overruling the objection to the question and in refusing to strike out the answer, both of which errors are grounds for reversal, the additional motion for mistrial was made. This motion, it is conceded, is always addressed to the discretion of the Court. But under the present circumstances, it is submitted that the three rulings of the Court were an abuse of that discretion, in which case, if this Court should find it to be so, this Court should reverse therefor.

POINT XXI.

Assignment of Errors No. 33; Specification of Causes No. 33.

> "Because the trial court overruled the objections of defendants' counsel to the following question put to the witness Carrington by the prosecutor: 'Q Did any of these three men give you anything to keep for him while he was in the baths, or they were in the baths?' and 'Q What did he give you?' and allowing said witness to testify: 'A Revolvers, wrapped in a cloth.' "

The witness Carrington was an employee of a Turkish bath, and he testified that sometime during the week beginning Tuesday, July 13 (July 13 being six days prior to the crime), he saw two of the defendants, Joe Juliano and Chris Barone, at the Turkish bath where he was employed. He was asked (p. 475, line 18):

> "Q Did any of these three men give you anything to keep for him while he was in the baths, or they were in the baths?"

This was objected to as being irrelevant to the inquiry, and not in any respect material, and also because it was at a time alleged to be a week or more prior to the occurrence of the

alleged crime. The Court overruled the objection and an exception was taken, and the witness answered:

> "A Yes," and that Joe Juliano gave him a bundle. The question was asked:
> "Q What did he give you?"

An objection was again made and overruled, and an exception taken, and the witness answered (p. 476, l. 21):

> "A Revolvers, wrapped in cloth.
> Q How many? A I think it was three revolvers."

The only purpose of this evidence, and the only effect of it, would be the harmful effect of prejudicing the defendants in the minds of the jurors, proving against them the prior crime of possessing revolvers and creating the probability in the minds of the jury that they would commit a crime of violence involving firearms. The possession of revolvers at a period that might have been six days prior to the offence was remote, and it rendered the possession of the revolvers irrelevant, except for prejudicial purposes and for improper purposes. It also tended to establish proof of a prior crime, which proof would be illegal unless it were by way of proof of a prior conviction, and therefore would have the effect of prejudicing and affecting the credibility of the defendants as witnesses, as well as creating the improper presumption on the part of the jury that the defendants were men likely to commit the crime charged in this indictment because they possessed revolvers at another time. It is true that the latter ground was not embodied in the objection, but the question was objected to, and as a cause specified for reversal under the statute, particularly in a capital case, it is submitted that the question was improper

and that this Court should deem it an error causing manifest injury to the defendants, apparent on the record, and a proper basis for reversal of the conviction in this case.

POINT XXII.

Assignment of Errors No. 34; Specification of Causes No. 34:

> "Because the Trial Court sustained the objection of the prosecutor to the following questions put by defendants' counsel to the witness Miss Hanley on cross examination: 'Q Now, you have been mistaken in your young lifetime on memory of faces?' and 'Q Have you ever tested you ability to remember faces?' and 'Q Have you ever in any way trained yourself to remember faces?' "

The foregoing questions were put to the witness Miss Hanley, a young lady who testified that Barone looked like one of the men she saw on the day of the holdup. In view of her uncertain testimony which was to the effect that one of the defendants, Barone, "looked like" one of the men she had seen at the holdup and the only one that she could in any degree remember, the attorney for the defendant properly desired and attempted to test the ability of the witness to remember faces, and in line with this proper examination asked (p. 535, S. C.):

> "Q Now, you have been mistaken in your young lifetime on memory of facts?"

Objection was made by the prosectuor and the Court sustained the objection. In line with this same purpose, counsel also asked on cross examination (p. 539):

> "Q Do you consider yourself very capable of remembering faces?" and

"Q Have you ever tested your ability to remember faces?"

Both of these questions were also objected to and the Court sustained the objection and on page 540 the additional question was asked:

"Q Have you ever in any way trained yourself to remember faces?"

This also was objected to and the objection sustained. It is respectfully submitted that in view of the fact that the witness was a young girl testifying to her recollection of the appearance of one of several persons whom she saw several months before her testimony, in the midst of great, sudden and unexpected excitement, that it was proper to inquire into her ability to remember faces, particularly where she expressed her identification in rather uncertain terms, to wit: That the defendant "looked like" the man she had seen. Under these circumstances, the witness, in effect, was giving her opinion as to the identity of the person, with certain doubts arising from the tricks and uncertainty of memory, and the questions put were similar in character to those constantly used in the examination of witnesses whose testimony depends upon the judgment of a fact. A witness will testify to the speed of an automobile, not as an expert but from his observation, and he may be questioned as to his experience in and ability to judge the speed of an auto. Another witness will testify to the distance apart of the vehicles in a negligence case at a given time, and the accuracy of his judgment and ability to fix and remember distances may be tested on cross examination by interrogating him as to his experience, training and ability to judge and remember distances.

So where a witness testifies that a person looks like another whom she has seen long before, it should be within the scope of proper examination to test the young lady's ability and training in that line and this was the sole purpose and effect of the questions which were excluded. It is true that the Court is vested with certain discretionary powers with respect to the latitude to be allowed counsel on cross examination, but where in so large a number of instances throughout the trial of the case and with respect to almost every witness, legitimate and proper lines of cross examination are precluded by the sustaining of objections, then, not only in the individual instances of error on particular questions, but by the combined effect of a long course of sustaining objections to numerous questions, the defendant is materially and seriously harmed thereby and reversal should result.

POINT XXIII.

Assignment of Errors No. 35; Specification of Causes No. 35.

> "Because the Trial Court sustained the objection of the prosecutor to the following question put to the witness Joseph Juliano on cross examination by defendants' counsel: 'Q Was Philip Siegel shown the pictures of the defendants, or any of them, right after this holdup had occurred?'"

To see the propriety of the foregoing question on cross examination, an exact understanding of the effect of this witness' direct testimony must be had. The witness was a detective. It was the theory of the defense that the police officers had suggested the names of three of the defendants to the State's witness Boudreau before he

had ever mentioned their names, the theory of the defense being that he did not know these three defendants or their names and had never met them and that he seized upon the suggestion of the police officers that they believed these three defendants were with Boudreau in the hold-up. It was to counteract this theory of the defense that Detective Juliano was put on the stand and he gave testimony in his direct examination (pp. 579-584, S. C.) covering the manner in which the police obtained the statement from Boudreau. Counsel for the defense purposely did not object to the testimony of this witness regarding the statements made by the witness Boudreau, although they were not made in the presence of the defendants, because Boudreau had given his testimony on the stand against the defendants and had made certain admissions and statements that counsel for the defense desired to have gone into. His statements to the police, if similar to his testimony on the stand, could harm the defendants no more than the testimony itself, while if the police officer showed that he made a different statement, it would help destroy the effect of Boudreau's testimony on the stand. Therefore, counsel specifically stated that he had no objection to this testimony. Juliano, on his direct testimony, was shown three photographs, which he testified were shown to him (Boudreau) *after* he made his statement. In a series of five questions, beginning page 581, line 33, and going to line 12, page 582, the photographs put in evidence by this witness' testimony were stated by the witness to have been shown only after Boudreau had given the names of the defendants. Therefore, the whole subject matter of the original identification of the defendants by the previous State's witness Boudreau was opened up by

this witness' testimony. The Lieutenant on cross examination testified that the first time he saw the picture of Capozzi was on the night of October 15th (bottom p. 585), but that he had seen "Big Joe's" picture in the gallery on the day of July 19th at headquarters. The subject matter of this detective's direct testimony concerned the line-ups and the general features of the original statements of the State's witnesses. Under these circumstances, it is submitted, that the defense was entitled to cross examine this witness upon the lines of his direct testimony and to do so the following questions were asked:

> "Q Did any of the witnesses for the State at any time pick out their pictures when shown to them shortly after the occurrence of the crime?"

This was objected to by the prosecutor and the objection sustained, the Court stating:

> "It is too general."

Counsel thereupon stated that he would go over each one and asked the question (p. 587, l. 8):

> "Q Was Philip Siegel shown the pictures of the defendants, or any of them (interruption)—right after this holdup had occurred?"

This was objected to and the Court sustained the objection. This question was proper on several grounds. It was a proper laying of a foundation to impeach the witness Juliano's testimony by later calling Philip Siegel to show that the officer had possessed all of the defendant's pictures and not only the one picture of Joseph Juliano on the date of the crime and thereafter from which the jury could conclude that the pictures of the defendants were viewed and looked at by the various State's witnesses without any identification of them by any of such

witnesses, which fact would have an important bearing upon the correctness of the identification made by some of the eye-witnesses in the court room. That this was an important subject is evidenced by the fact that the defense had practically as many witnesses who saw the hold-up and who saw the men who participated in it who testified that the defendants were not the men whom they saw in the hold-up, as the State had witnesses who testified that they were. In addition thereto, the question was proper because the witness had testified to the picking out of Boudreau and a man named Bielke from a line-up on his direct testimony and the question thereby became proper as a direct matter of cross examination to test the correctness of the witness' story and his credibility as a witness on the very subject matter of his direct examination. It is respectfully submitted that the question was proper and its exclusion was harmful error.

POINT XXIV.

Assignment of Errors No. 36; Specification of Causes No. 36.

> "Because the Trial Court sustained the objection of the prosecutor to the following question put to the witness Brex by defendants' counsel on cross examination: 'Did you ever show a man by the name of Gildart the pictures of a man in this case, of the defendants, any of them?' and 'Q Now, none of the defendants in this case were picked out by photographs by any of the eye-witnesses of the holdup after it occurred, were they?' and 'Q The persons that you have said in your direct testimony picked the defendants out in the line-ups, never picked out the photographs of any of the

defendants shortly after the Reid holdup occurred, did they?' "

The first question, "Did you ever show a man by the name of Gildart the pictures of a man in this case, or the defendants, any of them?" included in the above Assignment of Errors is withdrawn therefrom and the defendants concede that the question was properly objected to.

As to the two remaining questions, it seems sufficient to say that Captain Brex testified in general to the original statement involving the defendants obtained from Boudreau and to the picking out of defendants from a line-up by various State's witnesses. If the subject matter of the Captain's testimony on his direct examination was as broad as this in scope, the defense had the right to cross examine him upon the other actions of the persons whom he questioned immediately after the holdup and whom he said picked them out of a line-up when they were arrested several months later, and in pursuance of this right the two questions, which are to be found on pages 644 and 645 of the State of Case, were proper. The first one was:

"Q Now, none of the defendants in this case were picked out by photographs by any of the eye-witnesses of the holdup after it occurred, were there?"

This was objected to and objection sustained (bottom p. 644).

"Q The persons that you have said in your direct testimony picked the defendants out in line-ups, never picked out the photographs of any of the defendants shortly after the Reid holdup occurred, did they?"

This was objected to and objection sustained (p. 645, l. 10).

These questions were right in line with the ground covered by the direct testimony of this witness. The only object and purpose of the prosecutor in examining this witness and producing his testimony on direct examination was to show how the original statement against the defendants was obtained, how they were identified by State's witnesses in a line-up, and the object of this proof was to fortify the evidence given by such State's witnesses in court to allow the direct testimony to stand and then foreclose the defendants from bringing out circumstances that would weaken and destroy the effect of this direct testimony, was to deprive them almost totally of the right of cross examination, and it is respectfully submitted that because of this instance, as well as the numerous others cited, a reversal should be decreed.

POINT XXV.

Assignment of Errors No. 37, Specification of Causes No. 37:

> "Because the Trial Court sustained the objection of the prosecutor to the following question put to the witness Brex by defendants' counsel on cross examination: 'Q Did Seigel tell you that he saw and recognized five people right after this holdup occurred?' "

This question is somewhat similar in character to the questions involved in the Assignment of Errors No. 36, discussed in the preceding point. On his direct examination, Captain Brex had testified regarding Seigel (p. 620):

> "Q Who did Seigel identify? A He identified the whole five, the four defendants and the prisoner Boudreau, here."

The foregoing question is only one of numerous, similar ones in the direct examination of Captain Brex. The effect of it was to indicate that the witness Seigel prior to the trial and after the arrest of the defendants pointed out five men, including the defendants, who he alleged he had seen in the commission of the crime. Certainly the defense was entitled to cross examine Captain Brex upon this point and, therefore, the question involved in this Assignment of Errors was asked, in view of the fact that the Captain also testified to questioning Seigel right after the holdup had occurred.

> "Q Did Seigel tell you that he saw and recognized five people right after this holdup occurred?" (Bottom 657—658 top.)

The question was also justified by the statement of Captain Brex made (ll. 27-34, p. 657):

> "Q From the statement made to you by the eye-witnesses to the occurrence, didn't you believe, and weren't you looking for four people and not five? A We were looking for four at least.
>
> "Q You were looking for specifically four, weren't you? A Yes."

If the question involved in this assignment was not proper cross examination under these circumstances and in direct line with the examination of the Captain, it would be hard to conceive what would be a proper question on the cross examination from a standpoint of its direct relevancy to the direct testimony given by the witness. It is respectfully submitted that the sustaining of the objection to the question was error, justifying reversal because it went to an important question in the case and concerned a suspicious element that was intimated in the trial but could not be completely revealed by reason of the Court's refusing to permit

questions going into the subject, the subject being that the State's witness Seigel, who identified five at the trial, had made statements that he saw only four persons, one of whom was light complexioned, when he was questioned immediately after the holdup.

Assignment of Errors No. 38 and Specification of Causes No. 38 are withdrawn.

POINT XXVI.

Assignment of Errors No. 39; Specification of Causes No. 39:

> "Because the Trial Court sustained the objection of the prosecutor to the proof of a letter to contradict the State's witness Boudreau during the testimony of the witness Miss Sorenson."

The circumstances under which the above Assignment of Errors arose are as follows: Robert Boudreau was the chief witness for the State, he having been jointly indicted with the defendants and having taken the stand and testified for the State that the defendants participated in the robbery and holdup with him. The veracity and reliability of his testimony was attacked and its dependability in a large measure was the crux of the case. The defendants, in cross examination, sought to show that he was a dope fiend and had been for a long period addicted to narcotics. Of course, his ability to remember, his proneness to lie, the workings of his imagination, the destruction of his conscience, all of which the jury might determine resulted from such drug addiction for a long period of time, would enter into the credibility of his testimony and, therefore, the de-

fense cross examined him upon this subject (p. 178 S. C.):

"Q Do you remember writing a letter to the Sorenson girl—you wrote her a lot of letters, didn't you? A Some, yes.

"Q Do you remember writing a letter to her saying that you were taking too much dope? A No, sir.

"Q You swear you did not, in your own handwriting, write such a letter? A I don't remember writing such letters.

"Q You say now you don't remember that? A No, sir.

"Q Do you remember writing her that your real name was Gordon and that you wanted her to marry you and that you were taking too much dope, and sending that letter to her house? A I don't remember that; I lived there."

These questions were not objected to and were sufficient to lay a foundation to contradict the witness and show that he had written the letters, which he said he did not write or did not remember writing. Thereupon, in the defense, Miss Sorenson was put upon the stand and the question was asked (p. 830):

"Q You have letters in your possession in which he proposed that—did you ever receive a letter from him in which he proposed?"

This was objected to and in the argument counsel for the defense stated the object of and contents of the letter (top p. 831):

"Mr. McGeehan: It is one we are entitled to rebut. I asked him the question on direct, and no objection was made to it, and he denied that he took dope, and he denied that he said to this girl that he took dope in a letter. I say I am entitled to introduce that."

Thereupon counsel stated (top p. 832):

> "I am going to prove the destruction of the letter in question and produce secondary evidence of its contents."

The Court sustained the objection and in his ruling stated that he would not permit evidence of the letter in any form. (Bottom p. 832):

> "Mr. McGeehan: I will have to complete my endeavor to prove it. I just want to produce secondary evidence of the letter, and if your Honor rules that the letter is not admissible, regardless of how I submit it to the Court, that it cannot be used to contradict the witness on that point, then I will merely ask an exception.
>
> "The Court: Yes.
>
> "Mr. McGeehan: That is the ruling of the Court?
>
> "The Court: Yes, sir."

Exception was then duly taken.

In addition to denying the writing of the letter or that he did not remember signing such a letter, the witness Boudreau also denied, on cross examination, that he took dope or had ever taken dope (p. 178, l. 10.) It is respectfully submitted that proof of the letter was admissible to contradict the witness because the question on cross examination was within the legitimate scope of cross examination and the contradiction of his denial by proving the very fact in question by the letter was improperly excluded.

POINT XXVII.

Assignment of Errors No. 40; Specification of Causes No. 40:

> "Because the Trial Court sustained the objection of the prosecutor to the following questions put to the witness Miss Sorenson by defendants' counsel on direct examination: 'Q Do you remember being in an automobile with him that stopped in front of a lunch wagon in front of Clay street and Broad street, and that he called a man out of the lunch wagon and said he would be back later—'We got a big job on tonight?' and 'Q Can you tell us what the man looks like that he called out of that lunch wagon the night before he was arrested?' "

The foregoing questions are to be found on page 834, line 32, and page 836, line 8. Both questions were put to the witness Sorenson with reference to the alleged meeting of the State's witness Boudreau with a man in a lunch room, whom he called out of a lunch room the night before he was arrested. The object of the questions are revealed by the question which followed them:

> "Q Can you tell us whether he was a tall man with light hair or not?"

This question was also objected to and the objection sustained.

The object of these questions were to prove that Boudreau associated with a light haired, tall man to whom he spoke of having a "big job on tonight" for the purpose of endeavoring to prove by this and other questions, which were excluded on cross examination and hereinabove treated, to show that Boudreau was a member of a gang committing a series of robberies and hold-ups, which included a man with light hair whose description was originally given to the

police by the State's witnesses and which gang did not include the defendants. The sustaining of the objections to the questions considered in this point are simply in line with the exclusion of such line of proof throughout the entire case. It is submitted that the proper decision of the jury required their knowledge of the criminal companions of Boudreau and that the defense was materially harmed by the exclusion of such evidence.

Assignment of Errors No. 41, and Specification of Causes No. 41 are withdrawn.

POINT XXVIII.

Assignment of Errors No. 42; Specification of Causes No. 42:

> "Because the Trial Court overruled the objection of defendants' counsel to the following question put to the witness Kelly by the prosecutor on cross examination: 'Q How did you happen to leave the force?' and allowing the witness to answer: 'A I got dismissed.' "

It is respectfully submitted that the Court should have sustained the objection to the question put to the witness:

> "Q How did you happen to leave the force?" (p. 1252, S. C., l. 38) and allowing the witness to answer:
> "I got dismissed" (p. 1253, S. C., l. 14)

over and against the objections of defendants' counsel. This witness testified to the fact of a meeting with the defendant Joseph Juliano in corroboration of his alibi. He was not a party to the case nor charged with any offense. He was a witness testifying to a fact, or an alleged fact. The State would have the right to effect

his credibility by proving a prior conviction of crime against him, if any existed. It was not entitled to show his dismissal from the Police Department and by innuendo suggesting that he had committed some offense rendering him less creditable by asking this question, entirely irrelevant to the inquiry, for his testimony as to how he came to leave the force. The question was improper. It was objected to. The objection should have been sustained. By allowing the question, the answer that was given, not only improperly influenced the jury to disbelieve this witness' testimony but also harmed the defendants additionally by producing the effect of discrediting their entire defense, by indicating that the character of their witnesses was bad.

Assignment of Errors No. 43; Specification of Causes No. 43 are withdrawn.

Assignment of Errors No. 44; Specification of Causes No. 44 are withdrawn.

Assignment of Errors No. 45; Specification of Causes No. 45 are withdrawn.

POINT XXIX.

Assignment of Errors No. 46; Specification of Causes No. 46:

> "Because the Court erroneously charged the jury in part as follows: 'If reasonable doubt of guilt is raised even by inconclusive evidence of the alibi, defendant is entitled to the benefit of it. In that event a defense, which otherwise would overcome and put at naught the State's evidence, would simply be put out of the case.' Now, this reference or, rather, the application applies to all of the defendants in this case, because all have offered proof and testimony of their

presence elsewhere at the time when this crime was committed."

The foregoing portion of the charge which is excepted to, is to be found on page 1506 of the State of Case. It must be considered in connection with the immediately preceding part of the charge wherein the Court said:

"If such a defense be overcome by the State, or discarded by a jury, the State will not thereby be relieved of the burden of establishing guilt of the accused by affirmative evidence which shall satisfy you that he is guilty."

Then follows the objectionable portion:

"If reasonable doubt of guilt is raised even by inconclusive evidence of the alibi defendant is entitled to the benefit of it. *In that event* a defense which otherwise would overcome and put at naught the State's evidence, would simply be put out of the case."

Standing as it does in the charge, this sentence states that in the event that a reasonable doubt of guilt is raised, it (the alibi) would be put out of the case. The effect of this instruction was to tell the jury to disregard the defense of alibi even if a reasonable doubt were raised by inconclusive proof of it.

It is respectfully urged that under the decisions of *State* v. *Parks,* 96 N. J. Law, 360, and *Sherlock* v. *State,* 60 N. J. Law, 31; *State* v. *MacQueen,* 69 N. J. Law, 522-531; *State* v. *Tapock,* 78 N. J. Law, 208; and *State* v. *Diamond,* 84 N. J. Law, 17, the Court's language should have been "In that event the defendants would be entitled to an acquittal"; for under these cases a reasonable doubt if raised even by inconclusive evidence of the defendants' alibi, this reasonable doubt

would require that the jury find a verdict of "not guilty."

Assignment of Errors No. 47 and Specification of Causes No. 47 are withdrawn.

POINT XXX.

Assignment of Errors No. 48, Specification of Causes No. 48:

> "Because the Court erroneously charged the jury in part as follows: 'At that time Myrtle Foster testified that there was a conversation between Barone and Boudreau—between Barone and Little Joe, and there was some reference made about going to New York and meeting at their hang-out—'"

The foregoing statement of the Court was to the effect that there was a conversation between Barone and Boudreau at a time around the 10th of September, which was months after the crime. It was an important element in the case as to whether Barone knew Boudreau at that time. The defendant testified that he did not know him and never spoke to him in his life, Boudreau having testified to the contrary, that he was with Barone in the commission of the crime. Myrtle Foster actually corroborated Barone's testimony that at the accidental meeting in September, there was no conversation between Barone and Boudreau (See p. 1411, State of Case, l. 21).

> "Q And at that time did Boudreau talk to Barone at all? A He did not.
> "Q And he was sitting right in the car? A He was."

The Court's statement that there was a conversation between Barone and Boudreau is one of the numerous misleading mis-statements of

the evidence that will be treated in this and the succeeding points. It is respectfully submitted that these mis-statements had a harmful effect and were prejudicial to the defendants and because of their large number and their reference to important features of the case, they should constitute ground for reversal.

Assignment of Errors No. 49 and Specification of Causes No. 49 are withdrawn.

POINT XXXI.

Assignment of Errors No. 50, Specification of Causes No. 50:

> "Because the Court erroneously charged the jury in part as follows: 'Capozzi, in support of his defense said—that he left to keep an appointment at twelve o'clock with Barone and Big Joe.' "

The foregoing is in direct contradiction of the actual testimony of the defendant Capozzi. What he actually did say was that on July 19th, the day in question, he was at his hotel continuously up to sometime around two o'clock (p. 969, l. 20).

> "Q What time that morning, or that noontime, or whenever it was, did you leave your hotel? A It was before two o'clock, around one forty or two o'clock."

Nowhere did he testify that he had any appointment that day with Barone and Big Joe. On cross examination he stated the same thing (top p. 986). The importance of the mis-statement results from the fact that the Court's instruction indicated to the jury that the defendant Capozzi met two of the other defendants by appointment shortly after the time of the hold-up; and the evidence of Capozzi and many of the witnesses was to the effect that he left his hotel

around two o'clock, went to a restaurant where he met one Max Silverman, who had gotten a car, purchased that day by Capozzi from the Packard Company, and then went to a bank in Belleville, and did not reach the vicinity of the four corners until late in the afternoon when he accidentally met Big Joe and not Barone. This, coupled with the numerous other mis-statements of fact, tended to confuse the jury and to instruct them erroneously as to the evidence in the case, which it is respectfully submitted was of harmful effect sufficiently (particularly when considered with the numerous other erroneous statements), to warrant a reversal.

Assignment of Errors No. 51 and Specification of Causes No. 51 are withdrawn.

POINT XXXII.

Assignment of Errors No. 52, Specification of Causes No. 52:

> "Because the Court erroneously charged the jury in part as follows: 'Mr. Shelter further testified that on Sunday Max Silverman was at his home in company with Barone, one of these defendants, and I think Buck Joseph, if I am not mistaken, was also present, and that at that time a duplicate set of papers were given to Silverman for Roma's signature.'"

The foregoing mis-statement of fact asserts evidence which can not be pointed out in any part of the witness Shelter's testimony, and the complete examination of it will reveal that this witness said nothing of the sort. The only testimony in the case on this subject as to where the duplicate set of papers was gotten is in the testimony of the witness Silverman, who testified distinctly that he was given the duplicate

set of papers (which was the set actually signed by Capozzi, on the morning of July 19th, at his hotel in the presence of Silverman), at the Packard office on Central avenue on Saturday (p. 909, ll. 18 to 30). The harmful effect of the erroneous construction was to indicate that the witness Shelter contradicted the witness Silverman on this point and also to lend force to the contention of the State that Silverman may have gotten the duplicate set of papers on Sunday for the purpose of having them signed then and not on the morning when Silverman testified that he had Capozzi sign them in his hotel room, which was the morning of and about the time of the murder.

POINT XXXIII.

Assignment of Errors No. 53; Specification of Causes No. 53:

> "Because the Court erroneously charged the jury in part as follows: 'He testified that he had an appointment with Barone and Big Joe and they met pursuant to that appointment at or near Childs', or at 18 Treat Place; that they went to Weber & Heilbroner's and made some purchases, and then later on Big Joe went to the railroad station to meet Miss Dot Miller.' "

This portion of the charge of the Court referred to the testimony of the witness Capozzi and is an enlargement upon the error of the Court argued under Point 31 and the same references to the testimony contained under that point apply equally to this mis-quotation of the evidence of the Court and will therefore not be re-argued.

POINT XXXIV.

Assignment of Errors No. 54, Specification of Causes No. 54:

> "Because the Court erroneously charged the jury in part as follows: '—and, then, I think, we had as a witness an ex-police officer, Kelly, who met Big Joe at Chillie Grande's in the neighborhood of 12:00 o'clock and then rode downtown with Big Joe to keep his appointment with Capozzi and Barone.' "

The foregoing Assignment of Errors and Specifications of Causes adds to and accentuates the same general mis-statement of fact made by the Court in commenting on the witness Capozzi's testimony. The Court mis-stated (p. 1515 bottom) the witness Kelly's testimony to the same effect that it misquoted Capozzi's testimony, when it instructed the jury that Kelly rode downtown with Big Joe to keep his appointment with Barone and Big Joe. Kelly did not testify to this fact but testified that he rode down with Big Joe, who had an appointment with Barone but not with Capozzi. The effect of this and other mis-statements of evidence by the Court was to render almost the entire charge of the Court upon the facts erroneous and misleading and, therefore, necessarily harmful to the defendants.

Assignment of Errors No. 55 and Specification of Causes No. 55 are withdrawn.

POINT XXXV.

Assignment of Errors No. 56, Specification of Causes No. 56:

> "Because the Court erroneously charged the jury in part as follows: 'At that time he

saw Big Joe get out of the car with another man, whom he now says is Little Joe. He says the reason why he fixes the time at five minutes to eleven is because he made his pull at a signal box. Yesterday Lieutenant Rowe of Police Headquarters testified that Officer Manning made this pull at 11:00 o'clock at the box which Officer Manning testified he pulled from.' ''

The foregoing portion of the charge (S. C., p. 1517) refers to the evidence given by the witness Manning. In the first place, this witness on the stand did not refer to a person "whom he now says *is* Little Joe." The utmost that the witness said was that he saw Big Joe get out of the car with a man that I now *believe* is Little Joe Juliano. On his cross examination he said (p. 1461, ll. 16 to 21):

"Q And not knowing the other man whom you say was Young Joe Juliano, you did not carry his face in your mind at all, did you? Thoroughly did you, or not? A As near as I can remember his face; that is all I can testify."

And then (p. 1461, l. 38):

"*Q You are not sure at all, are you?* A *No, sir.*"

It is respectfully submitted that for the Court to charge definitely and conclusively that the witness said the man who got out with Big Joe was Little Joe, in the light of the witness saying himself that he was not sure, was a material mis-statement of fact. In fairness to the defense, the Court should at least have referred to his final admission that he was not sure. The importance of this fact in the case arises from the fact that Big Joe had sworn and Little Joe had sworn that they did not see each other and were not together that day. The testimony of the police officer Manning was intended by the

State to show that this was untrue and that they were seen together by him less than an hour after the commission of the crime. It was stated in *State* v. *Noel,* 133 Atl. Rep. 274, in the syllabus, by the Court:

> "It is reversible error for the Trial Judge to make in his charge a mis-statement with relation to a fact of moment; that is, that it was proved when there was no testimony to support it."

This principle applies to every one of the mis-quotations of evidence and fact by the Court. The Court added to its mis-statement of fact in this regard when it stated:

> "Yesterday Lt. Rowe of Police Headquarters testified that Officer Manning made his pull at eleven o'clock at the box which Officer Manning testified he pulled from."

This also is a mis-quotation of what the evidence was. Lt. Rowe, at most, testified that a call came in from that box and someone, he did not know who, had marked the name of Officer Manning alongside of the call. He had no personal knowledge that Officer Manning pulled and, at most, his testimony introduced a record, the reliability of which was in question to substantiate the witness Manning.

POINT XXXVI.

Assignment of Errors No. 57, Specification of Causes No. 57:

> "Because the Court erroneously charged the jury in part as follows: 'Then, too, you have a right to consider in measuring the value of testimony, the interest that anyone has in the outcome of this case.
>
> What interest has the wife, the mother-in-law, the father-in-law, the sisters-in-law, the brother of Little Joe Juliano? What

interest has Dot Miller and her mother? What interest has Catherine D'Amato, Amore, Policeman Kelly? What interest have Barone's sister-in-law, brother and cousin? (S. C., p. 1519, l. 10.)

You may ask yourselves very properly in considering the testimony of the defendants, in the light of the interest they have in this case. (S. C., p. 1519, l. 17.)

These men are charged with crime. Your verdict is going to determine whether or not they are convicted or acquitted, and you may very properly consider the interest they have in the outcome of this case. What interest have the police? What interest has Mr. Seigel? Miss Hanley and Miss Gillard and Mr. Oliver?' '' (S. C., p. 1519, l. 20.)

In reference to the foregoing portion of the Court's charge, it is simply desired to point out to this Court that in the query of the Court as to what interest various witnesses had in the case, the Court picked out only the witnesses related to and who were friends of the defendants and thereby insinuated that they had an interest in the case. It then picked out the State's witnesses and insinuated that they had no interest in the case. But the Court apparently purposely omitted the numerous disinterested citizens who testified for the defense that they saw the crime committed and that these defendants were not the persons who committed it; and omitted reference to the testimony of the numerous distinterested witnesses who supported the alibis through contact with the defendants on the day of the crime, but who had no connection by relationship or friendship with the defense. This appears to be but one of the harmful portions of the Charge which are such because the Court stressed the State's case and

really argued against the believability of the defense's witnesses.

Assignment of Errors No. 58 and Specification of Causes No. 58 are withdrawn.

POINT XXXVII.

Assignment of Errors No. 59, Specification of Causes No. 59:

> "Because the Court erroneously charged the jury in part as follows: 'When I read to you the statute in this case, I pointed out that the crime these men are charged with is murder and that the statute makes a murder in the perpetration of a robbery to be murder in the first degree. *I charge you that in this case your verdict ought to be, if you believe the defendants or any of them, guilty of murder in the first degree.* If you are not satisfied from the proof that the State has made out a case beyond a reasonable doubt as to any or all, your verdict ought to be not guilty. In other words, there should be one of two verdicts, a verdict of murder in the first degree or an acquittal.' " (S. C., p. 1525, l. 1.)

It is respectfully contended that this instruction of the trial court to the jury was absolutely and unqualifiedly erroneous, contradictory to and in conflict with the laws of evidence of this state and erroneous in fact and in law.

It is an instruction in which the trial judge categorically and without reservation told the jury that they ought to convict the defendants of murder in the first degree, even if the jury believed their testimony.

It is most respectfully submitted to this Court that this one statement of the trial court reading as it does was highly prejudicial to the legal

rights of the defendants on this trial, as a matter of fact and of law vitiates the entire charge and is the strongest and most patent kind of reversible error.

This excerpt is particularly important, not only on account of the phraseology employed, but also on account of the position which it occupies in the charge, that is, two sentences from the end. The defendants in error concede the propriety of the rule that it is improper, both as a matter of law and logic, to isolate an excerpt of the charge from the whole body of the same, and, without inspecting the whole contents of the charge, endeavoring to rely on an error on one particular paragraph or circumstance; nevertheless, it is the ultimate word of the Court to the jury and the recognition by general consent of the importance of the last words of judicial admonition and instruction makes this particular part of the charge, which is incorrect and untrue both in point of fact and in point of law, a matter of the greatest importance in this case.

The words of the trial judge in the above instruction was a categorical declaration, without any reservation whatsoever that the jury ought to convict the defendants of murder in the first degree even if the jury believed the testimony of the defendants on their defense. Certainly it cannot be said that this most erroneous, prejudicial and harmful instruction in the closing sentences of the trial judge in his charge to the jury must not have influenced their minds and worked irreparable injury to the case of all of the defendants to the extent that even if the jury had a reasonable doubt of the guilt of the defendants in respect to the evidence presented against them by the State's

witness and in respect to the testimony of all of the defendants corroborated by numerous witnesses that they were not present at the place of the crime nor did they participate in it, nevertheless all the aforesaid evidence adduced on the part of the defendants and their witnesses establishing the innocence of the defendants of the charge of robbery and murder surely must have found no weight with the jury and must not have been considered in anywise by them when they were advised to convict the defendants even if they believed their testimony.

It has been held that:

> "A direction of the trial court which states as a fact proven in the case a condition of affairs which is not in the case, and not properly inferrable from the testimony, is not judicial comment and presents grounds for reversal."
>
> "An erroneous instruction is not cured by the existence of correct instruction elsewhere in the charge, unless the illegal one is withdrawn."
>
> *State* v. *Parks,* 115 Atl. 305, 96 N. J. L. 360.

It is also contended here that material evidence was withdrawn from the consideration of the jury by the aforesaid instruction of the trial court, and the charge considered as a whole is incorrect, conflicting and misleading. See case of *State* v. *Fuerstein,* 135 Atl. 894.

> "It is reversible error for a trial judge to make in his charge a misstatement with relation to a fact of moment."
>
> *State* v. *Noel,* 133 Atl. 275.
>
> "An erroneous instruction is not cured by a correct instruction upon the same point."
>
> *State* v. *Erie R. R. Co.,* 87 Atl. 141, 84 N. J. L. 661.

> "It is reversible error to charge that an incriminating fact has been proved where there is neither testimony or color of testimony to support it."
>
> *State* v. *Diamond,* 86 Atl. 57, 84 N. J. L. 17.
>
> *State* v. *Sandore,* 124 Atl. 528, 1 N. J. Mis. R. 537.

See also the case of the *State* v. *Deliso,* 75 N. J. L. 808.

The defendants contend that the charge as made was confusing, that even though portions thereof, segregated from the rest, might be deemed correct, taken as a whole it was clearly erroneous. In this respect all of the defendants suffered manifest wrong and injury. No alternative was given to the jury to find the defendants not guilty inasmuch as the Court said if even they believed the testimony of the defendants the jury ought to find them guilty of murder in the first degree.

In the case of the *State* v. *Lang,* 87 N. J. L. 508, 94 Atl. 631, (Court of Errors and Appeals) Mr. Chancellor Walker in delivering the opinion of the Court stated:

> "Certainly, when sentences, that is to say, parts of a charge, are erroneous and no proper qualification of them is to be found in the context or in the entire charge, then there is error; and this is so when as in this case, the part of the charge pointed out as erroneous is, in and of itself, a particular qualification and limitation of language which, without such qualification and limitation, is unobjectionable."

POINT XXXVIII.

Assignment of Errors No. 60, Specification of Causes No. 60:

> "Because the Court erroneously failed and refused to charge the first request to charge of the defendants as requested: 'The defendants, and each of them, in this case are presumed to be innocent and the burden of proof is upon the State to prove them guilty of the charge contained in the indictment beyond a reasonable doubt, and if the evidence fails to convince you beyond a reasonable doubt of the guilt of these defendants, it is your duty to acquit.'" Requested: (S. C., p. 1535). Refused: (S. S., p. 1521).

Assignment of Errors No. 61, Specification of Causes No. 61:

> "Because the Court erroneously failed and refused to charge the First request to charge of the defendants as requested: 'Certain motions for directions of verdict of acquittal were made to the Court by these defendants which the Court denied, but you must not consider the rulings of the Court as any determination of any of the facts in dispute or even as indications of the Court's opinion as to the facts, the Court having merely ruled that the evidence presents questions of fact for the jury rather than questions of law for the Court.'" Requested: (S. C., p. 1536). Refused: (S. C., p. 1522, l. 15).

Assignment of Errors No. 62, Specification of Causes No. 62:

> "Because the Court erroneously failed and refused to charge the Seventh request to charge of the defendants as requested: 'In considering the question of the guilt of each of these defendants, I charge you that you are not to take into consideration the fact that such defendants have been pre-

viously convicted of crime, except so far as this fact may affect their credibility as witnesses in this case, and under no circumstances may you take it into consideration as creating any probability that the defendants, or any of them, were guilty of the crime charged in the indictment, nor should it influence you in any way in passing upon their conduct or actions at the time mentioned in the indictment.' " Requested: (S. C., p. 1537). Refused: (S. C., p. 1522, l. 22).

Assignment of Errors No. 63, Specification of Causes No. 63:

"Because the Court erroneously failed and refused to charge the Ninth request to charge of the defendants as requested: 'In this case, the presence of these defendants at the scene of the commission of the crime must be proven beyond a reasonable doubt, and if you have a reasonable doubt as to the presence of any of the defendants at such scene of the crime, then such defendants as you have a reasonable doubt in respect to must be acquitted. Even if the jury should find that any particular defendant has not proven his absence from the scene of the crime, of his alibi, yet if the testimony as to such alibi creates such a degree of uncertainty as to his whereabouts that the jury is not satisfied beyond a reasonable doubt of his guilt of the crime for which he is indicted, he is entitled to an acquittal.' " Requested: (S. C., p. 1537). Refused: (S. C., p. 1522, l. 35).

Assignment of Errors No. 64, Specification of Causes No. 64:

"Because the Court erroneously failed and refused to charge the Tenth request to charge of the defendants as requested: 'The jury is instructed that the indictment in this case is of itself a mere accusation or charge against the defendants and creates no presumption whatever of their guilt and is not of itself any evidence of the guilt of

the defendants who are presumed to be innocent in spite of the indictment.'" Requested: (S. C., p. 1538). Refused: (S. C., p. 1522, l. 38).

Assignment of Errors No. 65, Specification of Causes No. 65:

"Because the Court erroneously failed and refused to charge the Twelfth request to charge of the defendants as requested: 'The Court instructs the jury that the law does not require that the defendants sustain the burden of proving themselves innocent, but the law imposes upon the prosecution the burden of proving that the defendants are guilty in manner and form as charged in the indictment beyond a reasonable doubt.'" Requested: (S. C., p. 1538). Refused: (S. C., p. 1523, l. 13).

Assignment of Errors No. 66, Specification of Causes No. 66:

"Because the Court erroneously failed and refused to charge the Fifteenth request to charge of the defendants as requested: 'The jury are further instructed that if, upon a fair and impartial consideration of all the evidence in the case, they find that there are two reasonable theories equally supported by the testimony in the case, and that one of such theories is consistent with the innocence of the defendants, then it is the policy of the law, and the law makes it the duty of the jury to adopt that theory which is consistent with the innocence of the defendants, and to find the defendants not guilty.'" Requested: (S. C., p. 1539). Refused: (S. C., p. 1524, l. 14).

Assignment of Errors No. 67, Specification of Causes No. 67:

"Because the Court erroneously failed and refused to charge the Sixteenth request to charge of the defendants as requested: 'You may take into consideration as affecting the credibility of the witness Boudreau, the fact

that he admitted having previously made statements contrary to his testimony in this trial, and if you believe that the witness Boudreau, by reason of this fact or by reason of the fact that he has previously been convicted of crime, is totally unworthy of belief, then you are entitled to entirely disregard his testimony in this case.'" Requested: (S. C., p. 1540). Refused: (S. C., p. 1524, l. 17).

Assignment of Errors No. 68, Specification of Causes No. 68:

"Because the Court erroneously failed and refused to charge the Seventeenth request to charge of the defendants as requested: 'You may take into consideration the fact that some of the witnesses identifying the defendants, or some of them, in their testimony, had previously to their picking them out of a line-up, seen pictures of the defendants in newspapers, and if you find that such previous view of pictures of the defendants caused such witnesses to pick the defendants out at such line-up and to identify them at the trial and that such identification was not the result of a recollection and memory of seeing the defendants at the scene of the hold-up, then you may disregard the evidence of such witnesses as to the identity and guilt of these defendants.'" Requested: (S. C., p. 1540). Refused: (S. C., p. 1524, l. 18).

Assignment of Errors No. 69, Specification of Causes No. 69:

"Because the Court erroneously failed and refused to charge the Eighteenth request to charge of the defendants as requested: 'You may take into consideration as affecting the credibility of the witness Seigel, the evidence that he previously picked out one Bielke as one of the five persons whom he testified he saw at the scene of the crime committing the same.'" Requested: (S. C., p. 1540). Refused: (S. C., p. 1524, l. 19).

Assignment of Errors No. 70, Specification of Causes No. 70:

> "Because the Court erroneously failed and refused to charge the Nineteenth request to charge of the defendants as requested: 'The jury may take into consideration as affecting the credibility and accuracy of each witness, the conflicts between the testimony of such witness and the various other witnesses for the State as to the defendants seen or recognized by such witness according to his testimony at the trial.'" Requested: (S. C., p. 1540). Refused: (S. C., p. 1524, l. 20).

Assignment of Errors No. 71, Specification of Causes No. 71:

> "Because the Court erroneously failed and refused to charge the Twenty-first request to charge of the defendants as requested: 'The jury should take into consideration the fact that several witnesses testified for the defendants who testified that they were present at the scene and time of the hold-up and who saw some of the perpetrators of the crime and who have testified that the defendants were not the persons seen by them, and if such evidence raises a reasonable doubt of the guilt of the defendants, it is the duty of the jury to acquit.'" Requested: (S. C., p. 1541). Refused: (S. C., p. 1524, l. 32).

Assignment of Errors No. 72, Specification of Causes No. 72:

> "Because the Court erroneously failed and refused to charge the Twenty-second request to charge of the defendants as requested: 'The jury may take into consideration the fact that there is a complete lack of evidence of any previous or subsequent association of these defendants before or after the alleged crime, with the witness Boudreau, confessed participant in such crime, as affecting the cridibility of the witness Boudreau and as entering into the probabilities of the guilt

or innocence of these defendants.'" Requested: (S. C., p. 1541). Refused: (S. C., p. 1524, l. 33).

Assignment of Errors No. 73, Specification of Causes No. 73:

"Because the Court erroneously failed and refused to charge the Twenty-third request to charge of the defendants as requested: 'The jury may take into consideration as affecting the credibility of the testimony of the witness Boudreau to the effect that he knew and participated in the crime with these defendants, the evidence that before picking them from a line-up at headquarters before the trial and before giving his evidence in the trial, he obtained a view of them while he was concealed or partly concealed in a telephone booth at police headquarters.'" Requested: (S. C., p. 1541). Refused: (S. C., p. 1524, l. 34).

Assignment of Errors No. 74, Specification of Causes No. 74:

"Because the Court erroneously failed and refused to charge the Twenty-fourth request to charge of the defendants as requested: 'If the jury shall find that the State has not sustained the burden of proving beyond a reasonable doubt that the defendant Joseph Juliano is guilty, he is entitled to an acacquittal.'" Requested: (S. C., p. 1542). Refused: (S. C., p. 1524, l. 37).

Assignment of Errors No. 75, Specification of Causes No. 75:

"Because the Court erroneously failed and refused to charge the Twenty-fifth request to charge of the defendants as requested: 'If the jury shall find that the State has not sustained the burden of proving beyond a reasonable doubt that the defendant Louis Capozzi is guilty, he is entitled to an acquittal.'" Requested: (S. C., p. 1542). Refused: (S. C., p. 1524, l. 37).

Assignment of Errors No. 76, Specification of Causes No. 76:

> "Because the Court erroneously failed and refused to charge the Twenty-sixth request to charge of the defendants as requested: 'If the jury shall find that the State has not sustained the burden of proving beyond a reasonable doubt that the defendant Christopher Barone is guilty, he is entitled to an acquittal.'" Requested: (S. C., p. 1524). Refused: (S. C., p. 1524, l. 40).

The foregoing Assignments of Errors and Specifications of Causes will be argued together because they all involve requests addressed to the Court to charge the jury upon principles of law that are self-evidently correct from a reading of the requests themselves and were justified in each instance by the evidence in the case. The Court refused to charge each one of those set up in the Assignments and (particularly in view of the erroneous statements contained in the actual delivered charge of the Court), it is respectfully submitted that the Court's refusal to charge them was harmful error to the defendants. Certainly in a case as important as the one on trial, every legitimate request to charge that was not covered by the main charge of the Court should have been granted.

The First request was not charged, and while the Court did charge that the burden of proof was upon the State, it did not charge the jury what the effect of the failure of the State to sustain its burden should be, to wit: the acquittal of the defendants.

The Sixth request to charge, Assignment of Errors No. 61, requested the Court to state to the jury the effect of its denial of the motion for directions of verdict, a charge usually given in a case by the Court without request and to which,

it is submitted, the defendants are entitled, when requested, to offset the possible injurious effect of the Court's ruling.

All that the Court did say on this subject was (p. 1522):

> "You must not consider the rulings of the Court as any determination of any of the facts in dispute."

The Seventh request to charge, Assignment of Errors No. 62, was a request to the Court to charge the law as to the effect of the proof of the prior convictions of the defendants. The Court referred to this subject in its main charge (pp. 1519 and 1520 top). The Court merely read the statute which provides for the admissibility of such evidence and stated:

> "Of course, the law does not say that because a man was convicted of crime sometime he must be guilty of the instant crime, because of the fact that he had been convicted sometime prior."

This was crudely correct but it was not sufficient exposition of the law. The law not only is that the proof of prior conviction does not say "he *must* be guilty," but it also is that such proof must not be considered by the jury as creating any probability that the defendants committed the crime charged nor should it influence the jury in any way beyond its effect, if any, upon their credibility as witnesses. This is what the request submitted to the Court required him to charge and his refusal to charge it was error.

The Ninth request to charge, Assignment of Errors No. 63, which the Court refused, was a correct statement of the law as to proof of alibi and the refusal of the Court to charge it is particularly harmful in view of the erroneous charge

of the Court given on this point, as referred to in Point XXIX.

The Tenth request was merely a proper request to instruct the jury as to the non effect of an indictment upon the presumption of innocence. All the Court said upon this subject is (top p. 1504): "That an indictment has no evidential value against the defendants." It is respectfully submitted that the defendants were entitled to the full statement of the law in this regard as requested.

The Twelfth request to charge, Assignment of Errors No. 65, requesting a charge that the defendants were not required to sustain the burden of proving themselves innocent, was particularly appropriate because of the presence in the case of the affirmative defense of alibi and should have been charged.

The Sixteenth, Seventeenth, Eighteen and Nineteenth requests, being Assignments of Errors No. 67 to 70 inclusive, have to do with the rules governing what the jury might take into consideration as effecting the credibility of witnesses; and, as the Court voluntarily stressed this subject in favor of the State as to certain disinterested State witnesses and against the defense as to certain interested defense witnesses, the defense was entitled to have the same instruction given with reference to the vulnerable and credit-destroying features of the witnesses for the State.

The Twenty-fourth, Twenty-fifth and Twenty-sixth requests, being Assignments of Errors No. 74, 75 and 76, were simple requests made on behalf of each defendant individually to have the jury charged that he was entitled to an acquittal, if the State had not sustained the burden of

proving him guilty beyond a reasonable doubt. Nowhere in the charge did the Court specifically so instruct the jury and as the evidence differs as to the various defendants, each one was entitled to this specific charge, particularly when requested.

It is respectfully urged that all of the foregoing requests to charge were statements of law which the defendants were entitled to have the jury charged and that the failure and refual of the Court to charge them constituted legal error for which the verdict in this case should be reversed.

In the case of the *State* v. *DeGeralmo,* 83 N. J. Law 135, the Court said:

> "Where a request to charge calls for the application of a correct legal principle, is applicable to the testimony, and clearly material to defendant's case, he is entitled to have it distinctly charged in such a way as not to leave room for mis-apprehension or mistake by the jury."

In the above case, the requests related to the legal affect of proof of good character and to the matter and effect of circumstantial evidence in a case purely circumstantial. The Court held that the defendant had a legal right to a distinct charge on each request and by reason of the refusal of the Court to so charge, the judgment of conviction was reversed, the Court stating:

> "One of the most important duties of the Court is to declare the law applicable to a case to the jury when requested to do so. This should be done in such a way as not to leave room for mis-apprehension or mistake," *citing Rowe* v. *State,* 45 N. J. L. 49.

In 16 *C. J.* 1069, in respect to proper requests, it is stated :

> "Where proper request is made or an instruction which correctly propounds the law and is warranted by the evidence and pleadings in the case and which has not already been covered in other instructions, it is the duty of the Court to give it, and the refusal thereof will constitute error. The refusal of a concrete instruction is error, although an abstract instruction on the same point has been given."

And in *State* v. *Tanzarello,* 1 Misc. Rep. 375, (not reported in State Reports or Atlantic Reporter), the Supreme Court reversed a judgment of conviction because of the refusal of the Court to charge a proper request, the Court stating:

> "Where (as here) a request to charge calls for the application of a correct legal principle, is applicable to the testimony and clearly material to defendant's case, he is entitled to have it distinctly charged in such way as not to leave room for mis-apprehension or mistake by the jury," citing *State* v. *DeGeralmo.*

For the foregoing reason the judgment of conviction was reversed.

In this case, everyone of the requests to charge was a proper statement of the law upon points not covered by the Trial Court, and, in line with the foregoing cases, should lead to a reversal of these convictions.

POINT XXXIX.

Assignment of Errors No. 77, Specification of Causes No. 77:

> "Because the entire charge of the Court stressed the evidence unfavorable to the defendants and omitted or garbled and mis-

stated the evidence favorable to the defendants so as to confuse and mislead the jury in its consideration of the case."

POINT XL.

Assignment of Errors No. 78, Specification of Causes No. 78:

> "Because the Court failed to answer specifically and directly the question put by the jury to the Court as to whether a verdict could be given in the first degree with life imprisonment."

After the jury had retired, it returned to Court, and the Judge resumed the bench, where the following took place (see p. 1535 of the State of Case):

Caffrey, *J.*:

> "Gentlemen, I have your note, 'can a verdict be given in the first degree with life imprisonment?' I will restate what I charged in my main charge. Every person convicted of murder in the first degree, his aiders, abettors, counsellors and procurers shall suffer death unless the jury shall, by their verdict, and as a part thereof upon and after consideration of all the evidence, recommend life imprisonment at hard labor for life, in which case this and no greater punishment shall be imposed. Is that sufficiently clear?" (The jury retires.)

It is respectfully urged that the Court should have given a direct and specific answer to the question put by the jury, by informing and instructing the jury that a verdict could be given in this case in the first degree with life imprisonment. Instead, the Court read the statute to the jury without telling the jury that it was reading a statute, informing them what would happen to the defendants unless the jury should,

upon and after a consideration of all the evidence, recommend life imprisonment. The jury came into court to be informed as to their right in the present case to bring in a verdict of guilty of murder in the first degree with life imprisonment. It would have been sufficiently and completely instructed by being told "Yes." When the jury propounded the question it had a specific thought in mind apparently, and that was to obtain the assistance of the Court by finding out if it could do what it asked about, to wit: return a verdict of guilty, with a recommendation of life imprisonment. It is apparent by the jury's question that this doubt remained in its mind after the Court, in its main charge, had charged exactly what it stated in the recharge. This same statement had not been sufficient to inform the jury previously, and it may have been confusing to them when recharged in the same form as in the main charge. The jury was entitled to have the information it asked for directly and to the point, and to fail to give them it, it is respectfully urged, was error.

POINT XLI.

Assignment of Errors No. 79, Specification of Causes No. 79:

> "Because manifest injustice was done to the defendants by the whole charge of the Court."

POINT XLII.

Assignment of Errors No. 80, Specification of Causes No. 80:

> "Because the Court failed to charge and it was impossible for the jury to learn from

> the charge of the Court what facts if proved to their satisfaction beyond a reasonable doubt would warrant the jury in convicting the defendants."

An examination of the charge reveals that nowhere did the Court tell the jury what facts, if proved to their satisfaction beyond a reasonable doubt, would warrant the jury in convicting the defendants. Nowhere did the Court state in effect that if the defendants were proven beyond a reasonable doubt to have fired the fatal shot in the commission of *a* robbery, or attempt to commit a robbery, or were present aiding and abetting in such robbery and murder, that then the jury should convict such persons against whom such facts were proven beyond a reasonable doubt of murder in the first degree; and that if the evidence failed to satisfy them of these facts beyond a reasonable doubt, that then the defendants were entitled to an acquittal.

The nearest that the Court came to giving the jury such an essential instruction is on page 1504, where the Court merely read the statute defining murder in the first degree, and the statute defining robbery, and that is all. It is respectfully submitted that the jury in order to have a proper conception of the issues, and of its duties should have been specifically instructed upon this point. The one other place that the Court attempted to give the jury some direct instruction on this subject is (p. 1525 of the State of Case), the extremely erroneous statement that is contained in one of the previous exceptions, but will be repeated here to show the great measure of harm that it must have done because on it alone rested the real essence of the Court's charge.

"I charge you that in this case your verdict ought to be, if you believe the defendants or any of them, guilty of murder in the first degree."

It may be suggested that the defendants should have requested a charge on this subject, even though it be one that the Court could hardly have been expected to omit. If so, attention is called to the first request to charge, which the Court refused to charge (p. 1535 of the State of Case): "The defendants, and each of them, in this case, are presumed to be innocent, and the burden of proof is upon the State to prove them guilty of the charge contained in the indictment beyond a reasonable doubt, and if the evidence fails to convince you beyond a reasonable doubt of the guilt of these defendants, it is your duty to acquit." The Court did not even charge this to the jury, and it did not elsewhere refer to the necessity of proving the charge contained in the indictment. What it did say was (p. 1503 top): "The State must prove all the essential elements of the crime beyond a reasonable doubt," but it did not say what that crime was or what facts would constitute proof of guilt of that crime. It is respectfully urged that this omission, particularly in view of the refusal of the requests to charge, was error.

POINT XLIII.

Assignment of Errors No. 81, Specification of Causes No. 81:

> "Because the charge of the Trial Court to the jury as to the law and the facts of the case was confusing, inconsistent, incorrect and misleading, and was calculated to produce in the minds of the jurors misapprehension and mistake as to the law and facts of the case."

POINT XLIV.

Specification of Causes No. 82:

> "Because the verdict as to each of the defendants was against the weight of the evidence, this cause being assigned under and pursuant to the statute in such case made and provided, being Chapter 349 of the Laws of 1921."

It is respectfully submitted that an examination of all of the evidence in this case leads to the conclusion that the verdict was against the greater weight of the evidence, and that upon this ground there should be a reversal of the convictions of the defendants. In view of the extreme length of the case, in which the testimony consumes approximately fifteen hundred printed pages, it is practically impossible to review in detail the testimony of each witness called, and to give a minute comparison of the stories told by the various witnesses. However, the issues involved in the case lay within a comparatively few questions of fact.

That the murdered man, Mr. Condit, was killed during the perpetration of a robbery in which several men participated, was not in dispute. The ultimate question in the case was whether these defendants were the men participating in that robbery. The crime took place on July 19, 1926, and no one was apprehended in connection with it until the middle of October, 1926. Then by reason of certain statements that he had made to companions concerning his own participation in the holdup, Robert Boudreau was arrested. He denied at first his complicity in the crime. After approximately thirty or thirty-six hours of questioning by the police, he implicated the defendants with himself. The State contended that he named the defendants

of his own volition, the defense contending that the names of the defendants were suggested to him by the police officers in charge of the case as the result of their belief that he was an associate of the defendants, which the defendants contended arose because he then lived in the same house with the defendant, Nicholas Joseph Juliano, which name being similar to Big Joe Juliano's suggested the other defendants to the police. The defendants were then arrested, and each one denied participation in the holdup, and all except Nicholas Joseph Juliano denied acquaintance up to the time of their arrest, with the witness, Boudreau. Nicholas Joseph Juliano said he knew Boudreau, but had first met him in September, two months after the date of the alleged crime. The other defendants contended that they never met Boudreau in their lives, never associated with him, and that they were each elsewhere at the time the crime was committed.

In the trial of the case Boudreau testified for the State. He told a story that was improbable in its nature. He said he met the three defendants, Joseph Juliano, Christopher Barone and Louis Capozzi, for the first time on the day of the crime, and that he was introduced to them by Nicholas Joseph Juliano, referred to in the testimony as "Little Joe." He testified further to the circumstances of the holdup itself, and that the defendants participated with him. He testified that he, Boudreau, drove the bandit car, and that he jumped out of the car a few blocks away from the holdup, and that he didn't receive any share of the booty, which amounted to some thirteen thousand dollars, that he never associated again after that day with any of the defendants, except that he lived with "Little

Joe'' just before and at the time of his arrest, and admitted that while he had seen "Big Joe," or Joseph Juliano, and Christopher Barone by accident on two subsequent occasions, he did not mention the robbery, did not ask for his share of the proceeds, and never sought it; and this in the face of his admission that he had participated in other holdups, and had a criminal record.

He stated that he picked the defendants out of a lineup at Police Headquarters after they were arrested, but he admitted that fifteen or twenty minutes before he did so, he was concealed by the police in a telephone booth with a mask on, and given a secret view of all four of them while the police paraded them up and down in front of the telephone booth. Before he did this, he had been told that a companion of his by the name of Bielke, had made a statement to the effect that Boudreau had admitted participation in the Reid holdup; and he, Boudreau, had also been picked out of a lineup by the State's witness Siegel, who picked out Bielke as one of the participants at the same time. He admitted that this made him afraid, but he denied that this knowledge that the police had full evidence thereby, against him, compelled him to make a bargain with the police to give his testimony against these defendants, or that he was given a promise that his life would be saved if he testified that these defendants were his companions in the robbery.

He admitted willful and deliberate perjury on the stand in one instance where he directly changed his testimony under direct examination as to some of his activities with the police subsequent to his arrest, including visits to the scene of the crime. He adhered to his story

that the defendants were with him in the commission of the murder.

The State also produced several eye-witnesses to the shooting, including one Siegel, who identified in court the four defendants and Boudreau as having been seen by him participating in the holdup, and he said that he picked the same five out of a lineup in October at Police Headquarters. He admitted that previously he had put his hand on a light haired man by the name of Bielke, but explained that he did this merely to tell him to take off his hat. Boudreau had testified, however, that Bielke was picked out with him by Siegel. The evidence in the case developed, however, that on a Sunday morning after the defendants were arrested, a large picture, which was put in evidence, of the defendants, giving their names, was printed in the Newark Sunday Call and Newark Morning Ledger, with a story of their arrest for the Reid murder. Siegel, and every other witness produced by the State, admitted seeing and looking at this picture before going to Police Headquarters to attempt to pick the perpetrators out of a lineup. Thus, Siegel, and every other witness was given a view of the photographs of the defendants themselves on the very morning of the day when he, and the other witnesses confronted the lineup. As a lineup is intended to test a witness' recollection of the identity of persons he has seen before, and to enable him to determine if he could pick them out from his memory of them, its very purpose was defeated by the action of the police officers, which they admitted, in furnishing this photograph for publication in the Sunday morning papers before sending for the witnesses. Siegel's own testimony as to his position refutes

the possibility that he could have seen and identified all the persons he testified to seeing. Several witnesses for the State, in addition to Siegel, picked out one or more of the defendants, but an examination of the evidence of each of them reveals that their identifications were worthless, not merely because they had seen the pictures before they went to headquarters, but also because they contradicted each other directly as to which of the defendants performed the various roles of the particular participants, which such witnesses testified they saw. For instance, the witness Duff, said that he saw only one man seated in the bandit car, and identified that man as Capozzi, and although he sat in a car immediately alongside of it, looking into the open door of it, he saw no other men within the car. Betty Hanley, another witness, said that she saw one man that was between the cars and out of the bandit car, and that the man was the defendant Barone. Miss Gillard testified that she looked out of the second floor window immediately in front of which at the curb the bandit car, a closed sedan, stood; and that she saw the defendant Capozzi sitting in the middle of the rear seat, although the position of the car indicated clearly that she could not see any person within the car, as her view would be of the top of the car. This same girl, Miss Gillard, testified that she saw him during the entire time that the holdup was taking place, and that he at no time was out of the car.

Therefore, we have the witness Duff, and the witness Miss Gillard saying that they saw Capozzi within the car, and the witnesses Boudreau and Siegel saying that Capozzi was not in the car but on the street. We also have Boudreau

and Siegel testifying that Barone was on the street and sidewalk, while Miss Hanley testified that for some time before the bandit car left, she saw Barone in the car, pointing a gun up at her. This directly contradicted Siegel, who said the man he identified as Barone, only got in as the car started. The only witnesses who identified Big Joe (Joseph Juliano), were Seigel, who said he was not sure as to him; and Oliver whose identification is improbable on its face.

Another witness, Miss Yokum, identified Capozzi by saying she did not see the man's face, but only saw his build from the back, and she therefore, thought it was the defendant Capozzi whom she saw. One other man, a Mr. Oliver, said he heard the shots from a point several hundred feet away, and stepped out just in time to be almost struck by the bandit car, which was going very fast, and as it whizzed past him within a foot or two of his face, while he was startled, he saw a man's face which he picked out as that of Joseph Juliano.

As was previously stated, all of these witnesses had previously seen photographs of the defendants before going to the lineup. It will be noted that all of the evidence in the case shows that the holdup was a sudden and unexpected occurrence, and that it was all over "in a few seconds."

As against these witnesses, the defense produced the following eye-witnesses who testified that they saw the persons participating in the holdup and that the defendants were not the men that did so:

Thomas J. Osborne (p. 999) testified that he was in the neighborhood on the morning of the holdup, as a salesman for the Pittsburgh Plate

Glass Company. He heard the shots and looked at the scene of the holdup (p. 1000) and saw Mr. Condit (p. 1001) and he saw the bandit car start up as he was riding toward it and he thereupon pursued it. He was about eighty feet away (bottom p. 1004) and he saw one man in between the cars beside Mr. Condit, who was shot. He saw this man reach into the small car and throw something into the big car and he got a good look at the man (p. 1005). He testified that the man was of light complexion (p. 1005), and he was then asked the question (p. 1006 top):

"Q Did you see any of these defendants there? A No.

"Q Are you sure that the man you saw was not one of the defendants? A I am, yes."

His testimony is significant because none of the defendants are of light complexion and other witnesses, including one Murphy, throughout the case mentioned a light haired man as being in the holdup. In fact, one of the witnesses for the defense, John J. Murphy, on cross examination (p. 1180) when shown Carl Bielke, a light haired man, and the same one whom Seigel had originally picked out in a line-up, said:

"He is built something like that."

This witness Murphy also testified as an eyewitness to the occurrence. He was employed at 81 Clay street, a building facing the end of the street on which the holdup occurred. He saw two men standing on the corner (Boudreau had testified that two men participating with him waited on the corner for the signal) and he got a good look at the men (p. 1174, l. 26). That one of the men was (p. 1175, l. 18) "about six feet tall and I should judge about one hun-

dred eighty pounds, and he had a blue suit on and a straw hat with a red band and he was light complexioned." He was then asked (bottom p. 1175):

"Q You have seen the defendants sitting here in this case? A I have.

"Q Are any of these defendants either of the men you saw? A They do not appear like them."

That the men whom he saw were the men who participated in the holdup is shown by the additional testimony of another eye-witness, Philip Henry, whose testimony begins on page 1185. He testified that he was at the same window with the witness Murphy and he looked with him at the men standing on the corner. That he was looking at them when he saw a "car coming up Mt. Pleasant avenue and two men were running behind it." He then testified:

"Q And then you heard the shot? A Yes, sir."

Boudreau had testified that two of the men in in hold-up ran alongside of or in back of the bandit car, just before the shooting occurred. This witness testified that "he thought the tall man was of light complexion" (p. 1191, l. 10). This witness testified (p. 1188, l. 30):

"Q Now you have seen the defendants in this case? A Yes.

"Q And from the appearance of the men as you saw them on that day, are any of these defendants the men that you seen on the corner? A I don't believe so."

In addition thereto another witness Edward J. Geldart testified that he was in the building directly across from the Reid Ice Cream Company when the shooting occurred (top p. 1026). He came to the door when he heard what he thought

was a shot (bottom p. 1026) and he saw (p. 1027):

> "A party with a gun in his hand on the left-hand side of this big sedan toward the front of it,"

and that he saw two men run across the street diagonally toward the middle of the two cars and one of the men fired two shots. He testified that he got a pretty fair look at one or two of the men and was asked:

> "Q In your opinion was the man you saw any one of these defendants?"

and his answer was (to the repeated question) (p. 1027, l. 35):

> "A No, sir."

All of these witnesses, except Osborne, by the way, had been subpoenaed by the State but not called, so that the authenticity of their testimony could not be doubted from that standpoint. One of the other witnesses produced by the defendants was the witness Mr. Friend who saw something of the shooting, but testified that he could not say one way or the other whether the defendants were the men or not. Thus on the matter of identification of the defendants, the weight of the evidence would seem to be that the men participating in the holdup did not include the defendants.

The defense introduced evidence, in addition to the eye-witnesses' testimony consisting of an alibi by each of the defendants and each of the defendants took the stand in his defense.

The witness Capozzi proved that on July 19th, the date of the holdup, he was at the St. Francis Hotel, where he had been living for several weeks, and that he made several 'phone calls, which were corroborated by the recipients of

the messages, during the morning of that date; that he was aroused about nine thirty o'clock by one Max Silverman, who brought to him and had him sign in his room certain documents relating to a new automobile that was to be delivered that day. If this were true, he could not have been a participant in the crime which happened about ten o'clock, as those who participated, according to Boudreau's testimony, were with him from about eight o'clock in the morning. Witness Silverman corroborated Capozzi's testimony in this regard and testified that he saw him in his room and had him sign the documents at that time. The documents were produced and introduced in evidence. The witness Shelters, employed by the Packard Motor Company of Newark, corroborated Silverman and testified that he went with him at that hour to the St. Francis Hotel and waited in his car outside the hotel while Silverman went into the Hotel and that when Silverman came out, he gave Shelters the document that was signed by Capozzi. Capozzi then related all of his movements for the day which showed that he did not leave the Hotel until nearly two o'clock in the afternoon, when he met Silverman at Silverman's brother's restaurant and later went with Silverman and several other persons, who corroborate the story on the stand, to a bank in Belleville. Capozzi testified that he never met or saw Boudreau in his life before he was arrested and this was not contradicted except by Boudreau.

The defendant Joseph Juliano, called "Big Joe," proved that he was in the Berwick Hotel with a girl the night before the holdup and remained in his room with the girl until about eleven fifteen the morning of July 19th. He was corroborated as to his presence there by the

girl, Catherin D'Amato. He also testified to telephone calls that he made to his Mother's home and to a friend's saloon, both of which telephone calls were corroborated not only by the recipients but by the record sheets of the Hotel, which are in evidence and show a telephone call at nine fifty-five and another at a later hour in the morning. The murder occurred about ten o'clock. He was also corroborated as to his arrival at the Hotel by employees of the Hotel and corroborated by an employee of the Hotel regarding his departure with Miss D'Amato and as to the hour of his departure by the bellboy of the Hotel and the witness, Frank C. Amore, who was in front of the Armour Beef Company, where he was employed as manager, almost across the street from the Berwick Hotel when he spoke with Juliano and Miss D'Amato, as they were going by. He testified further as to his subsequent movements on the day in question, for the entire day, and was corroborated by various witnesses with whom he came in contact.

The defendant Barone showed that he was at home on the night before the morning of the holdup and left his house after eleven o'clock to keep an appointment that he had with Joseph Juliano at Childs' Restaurant in Market street, Newark. With him was Charles Massucci, who accompanied him from his home to the place of appointment. He was corroborated by members of his family and by the witness Caffazzo, who visited Barone's home before he left there on the morning of the crime and verified the testimony of Barone and other witnesses as to the time of his departure. In addition thereto, the witness, Joseph Scaglione, who was employed by Barone and who was greasing Barone's car across from his house, corroborated Barone and told of buying grease at McDonald's gar-

age from Mr. McDonald, the proprietor, which fixed the date in the mind of the witness, as well as in the mind of Barone. The salesslip showing the purchase of this grease was introduced in evidence and although McDonald did not remember how many persons got into the car and did not remember seeing Barone on that occasion, it will be recalled that the trial took place approximately four months after the date of the alleged crime and the mere failure of this witness to remember seeing Barone is in nowise contradictory of Barone's testimony. The fact that grease was bought only occasionally, when the car was greased, and that some was bought on that day as testified by Barone and Mazzucci and Scaglione and Joseph Barone, brother of the defendant, corroborates their testimony. They said it was bought and used and put in the car on the morning when Barone accompanied them in the car from his home, and this is strongly corroborative of the testimony of Barone and other witnesses that he was home at the time of the commission of the crime.

In addition to the foregoing, the three defendants testified that they never associated with or went out with the other defendant Nicholas Joseph Juliano and never knew the State's witness Boudreau. None of this was contradicted except by Boudreau's story, except that one policeman testified that in 1920, six years before the crime, he had once seen the defendant Nicholas Joseph Juliano, in the back room of a cafe where the defendant Big Joe Juliano was at the same time. The force of this proof comes from the improbability that these defendants committed a crime with one man whom they knew not at all and another whom they did not associate with and only one of them knew.

It is respectfully urged, because of the discrepancies in the testimony of the State, the improbable and suspicious story told by the witness Boudreau, a man who admitted that he deliberately and purposely perjured himself in this very case, the contradictory nature of the State's identifying witnesses' testimony, the psychological effect of the suspicious circumstances under which they made their original identification, the contradiction of the State's identifying witnesses by the numerous eye-witnesses produced by the defense, and the completeness of the proof of the alibis of each of the defendants, none of which was destroyed by the cross examination or evidence of the State, and the evidence indicating that other persons perpetrated this crime, that the evidence is against the greater weight of the evidence so as to justify and require a reversal of the convictions of the defendants as against the weight of the evidence.

JOHN W. McGEEHAN, JR.,
Attorney for and of Counsel with defendants, Joseph Juliano, alias "Big Joe," Christopher Barone and Louis Capozzi, alias "Kid Ruff."

New Jersey Court of Errors and Appeals

State of New Jersey, Defendant-in-Error, *vs.* Nicholas Joseph Juliano, *et als.*, Plaintiffs-in-Error.	On Indictment for Murder. On Writ of Error to Essex Oyer and Terminer.

BRIEF FOR PLAINTIFFS-IN-ERROR.

Joseph Juliano, alias "Big Joe", together with Nick Joseph Juliano, alias "Little Joe", Christopher Barone, Louis Capozzi, alias "Kid Ruff" and Robert W. Boudreau, were indicted for murder by the Essex County Grand Jury. The said indictment against said four defendants read as follows:

> "The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that Joseph Juliano, alias "Big Joe", Nicholas Joseph Juliano, alias "Little Joe", Christopher Barone, Louis Capozzi, alias "Kid Ruff" and Robert W. Boudreau, on the nineteenth day of July, in the year of Our Lord, One Thousand Nine Hundred and Twenty-six, at the City of Newark, in the County of Essex, aforesaid, did wilfully, feloniously, and of their malice aforethought, kill and murder, George Condit, contrary to the form and Statute in such case made and provided, and against the Peace of this State, the Government and dignity of the same".

Four of the said defendants, viz., Nicholas Joseph Juliano, Joseph Juliano, Christopher Barone

and Louis Capozzi, were found guilty of murder in the first degree and sentenced to be electrocuted. The defendant Robert W. Boudreau was not brought to trial, he having become a witness for the State.

Writs of Error have been issued out of the New Jersey Court of Errors and Appeals, and the case is before this Court on Assignments of Error and Specifications of Causes for reversal, the entire record having been certified and returned pursuant to Section 136 of our Criminal Procedure Act.

There are ninety-five Assignments of Error (S. C. 1592 to 1621) and one hundred and three Specifications of Causes for reversal (S. C. 1622 to 1652), which Assignments of Error and Causes for reversal are practically the same, as nearly all of the Assignments of Error are directed to errors of the Trial Court in overruling the challenge of the defendants to the Array of Jurors, and to the sustaining of certain challenges for cause made by the State against certain talesmen satisfactory to defendants; to certain errors of the Trial Court in the admission and rejection of evidence; to the failure of the Trial Court to charge the requests of the defendants, and to alleged injurious error appearing in the Charge of the Court; and also the fact that the verdict was against the weight of the evidence.

At the trial, which began on Monday, November 15, 1926, counsel for the defendants made a motion before the Trial Court for a postponement of said trial of said defendants on the ground that only three weeks had intervened from the time of the arrest and indictment of said defendants, and that said short space of time was not sufficient and adequate a length of time for the defendants to properly and adequately prepare their defense to such a serious charge as that of murder; said motion for a further postponement of the trial

was denied by the Trial Court and defendant's counsel ordered to proceed to trial over objection.

Counsel for the defense also at the beginning of the trial challenged the Array of Jurors drawn for the trial of the indictment and moved to quash the said Array upon the grounds that their Array was not drawn upon the special panel of Jurors served upon the defendants, and was not drawn legally, because said Special Panel served upon the defendants was not drawn in the presence of the Judge or the Clerk of the Court of Quarter Sessions of Oyer and Terminer, as required by law, and also because said Special Panel was not drawn from the panel of Jurors that "may have been drawn and summoned to attend as jurors at the term for which such defendants are to be tried", but instead was drawn from a box containing only the names of a portion of this General Panel. Said motions were also denied by the Trial Court over objection.

Counsel for the defense also at the beginning of the trial moved to quash the indictment on the ground that according to the Bill of Particulars served upon the Defendants by the State, the State was unable to specify with certainty which one of the defendants fired the fatal shot, and that consequently in the indictment found against the defendants in its present form was fatally defective, inasmuch as, under the law each defendant was entitled to know whether he was charged with having committed the murder as a principal, by firing a shot, or as an accessory to the alleged crime, the indictment itself being the ordinary form of indictment for murder and not containing or specifically setting forth the statutory form of an indictment for murder alleged to have been committed in the perpetration or the attempting to perpetrate a robbery, etc. The motion to quash said indictment on the above ground

was also denied by the Trial Court over the objection of Counsel.

Facts.

Briefly, the occurrences developed at the trial were:

That a Chevrolet automobile of the Reid Ice Cream Co. was standing in front of the Reid Ice Cream Company Factory, at Mt. Pleasant Avenue, Newark, about ten o'clock or thereabouts on the morning of July 19, 1926, when another automobile containing three men with two men running beside the said automobile drew up alongside of said Reid Ice Cream Company's automobile parked in front of the said company's factory on Mt. Pleasant Avenue. In the Chevrolet automobile was a young man by the name of Duff, an employee of the Reid Ice Cream Company. The deceased, George Condit, an employee of the Reid Ice Cream Company was about to board the Chevrolet car with bags containing money and checks belonging to the Reid Ice Cream Company when shots were fired by someone and Mr. Condit fell fatally wounded. The bags were taken by someone from the side of the Chevrolet car where Mr. Condit fell and were thrown into the other car, which immediately drove away, another shot being fired at or about the time of its departure.

It was claimed by the State that the defendant Nicholas Joseph Juliano, together with the other three defendants Joseph Juliano, Christopher Barone and Louis Capozzi, was in some way implicated in the aforesaid shooting and robbery of the said George Condit.

The defense consisted of a complete alibi. It is contended here that the conviction of the plaintiffs-in-error, defendants below, was the result of

prejudice and passion coupled with incorrect, mistaken and unsatisfactory indentification of all of the said defendants as the persons in, near or at the automobile that was used in perpetration of said robbery and murder.

POINT ONE.

Assignment 1. Specification 1.

The Trial Court should have granted the motion of the defendants for a continuance of the case in order to give the defendants more time to properly and adequately prepare their defense, three weeks not having been sufficient time for the proper preparation of the defense on so serious a charge of murder.

It is contended that there was an abuse of discretion on the part of the Trial Court in refusing to grant defendants a longer period of time for the proper preparation of their defense.

> "Application for a continuance is a prerequisite to the right to complain for the lack of preparation as ground for a new trial. The proper practice is first to apply for the continuance, setting forth specifically the reasons for the lack of preparation, and if on such application it appears that defendant has been diligent in attempting to prepare for trial, the refusal of the continuance may be assigned as ground for a new trial."

16 Corpus Juris, p. 1130.

POINT TWO.

Assignment 2. Specification 2.

The names of all the jurors of the general panel of jurors that were drawn and summoned to attend as jurors for the term at which said defendants were tried were not placed in the box together at the time the jury for this case was drawn, in violation of sections 82 and 83 of the Criminal Procedure Act, 2 Compiled Statutes, page 1847, and section 27 of the Jury Act.

It is respectfully contended that in this case there was prejudicial error in not complying with the statutory mandate and this question was raised by timely objection.

The Statute requires giving the steps, such as drawing from the box, etc., and also requires that the jury shall be drawn from the general panel of jurors that may have been drawn and summoned to attend as jurors at the term at which said defendant is to be tried. Inasmuch as there were four defendants on trial and each defendant was entitled to twenty peremptory challenges, the entire list of jurors who were summoned for the term at which the defendants were tried, viz., for the September Term, should have been placed in the box at the time the jury was drawn. In other words there were only 150 names in the box when the jury was drawn and according to the law as set forth in sections 82 and 83 of the Criminal Procedure Act and section 27 of the Jury Act, the entire list of the names of the jurors summoned for the September Term, approximately five to six hundred names, should have been placed in the box before the jury was drawn.

It also appeared from the testimony of Under-Sheriff Walker (S. C. 37, 38 and39) that a number

of the jurors drawn on the special panel for the trial of these defendants had been excused by the Court for various causes, yet, notwithstanding that fact their names were still in the box.

It is respectfully contended that the challenge to the array should have been sustained for the aforesaid reasons and that said challenge being overruled the defendants suffered manifest wrong and injury and the action of the trial court constitutes reversible error.

Said Mr. Justice Kalisch in a dissenting opinion in the case of the *State* v. *Martin,* 132 Atl. 93, at pages 96 and 97:

> "There can be no question that a judge has the right to excuse jurors from the general panel for cause, but it is an entirely different matter, however, in excusing jurors for a sufficient cause, and having done so, nevertheless, to have them placed, as jurors, on the special panel after they have ceased to be jurors.
>
> "Chief Justice Beasley, in Aaronson *v.* State, 56 N. J. Law 10, 27 At. 937, very wisely says this:
>
> > 'There seems to be no reason why the procedure touching the general list and that touching the special list would not stand on the same footing. If one or more of the persons on the general list can be discharged from service, why not one or more be similarly discharged from the special list?'
> >
> > This learned jurist continued:
> >
> > 'Nor do we think there is any substance in the suggestion that the power thus conceded will be liable to be abused, for it is certain that the court cannot arbitrarily and of its own motion excuse any of these jurors from serving in the given case; for, if no ground for the dispensation existed, the judicial action would be erroneous and could be reviewed by means of a writ of error.'

> "The farsightedness and wisdom of these remarks had in view that it would be an arbitrary act on the part of the judge to excuse jurors without cause and to decimate the number of jurors of a special panel, from which the law entitled a defendant to select a jury, and this to practically nullify the statutory right of a special panel of 48 jurors. For, if 10 of 48 jurors of the special panel may be excused out of the general panel or special panel, then there seems to be no obstacle in the way of excusing the entire general panel. If 10 may be excused, why not 48? And thus the defendant be compelled to select a jury from the general panel, contrary to the express mandate of the statute. Sections 82 and 83 were enacted for the purpose of guarding the rights of a defendant by acquainting him with the names of those persons who are to sit in judgment in his case and to give him an opportunity to inquire into an important feature necessary to secure to a defendant a fair and impartial trial; that is, to inquire into the jurors' competency, fairness and impartiality. I therefore think that the challenge should have been sustained."

Challenge to the array or panel is based upon the ground that the statutory requirements have not been complied with in selecting and summoning the jury.

A prolific source of objections to the array is the bias, partiality or irregular action of the summoning officer. A challenge on this ground is properly sustained when such summoning officer is guilty of any irregularity, or misconduct, in selecting or summoning the jurors or talesmen. Hyatt on Trials. Volume 1. Pages 562 and 563.

Similar erroneous procedure led to reversals in two reported cases. See cases of *State* v. *Rombolo,* 89 N. J. L. 545 (C. E. & A.); *State* v. *Lapp,* 84 N. J. L. 19 (Supreme Court).

POINT THREE.

Assignment 3. Specification 3.

The Trial Court erred in refusing to quash the indictment filed against the said defendants for the reason that said indictment did not apprise the defendants or any one of them whether he or they were charged as principals or accesories in the murder which is alleged to have arisen out of the robbery, and also that the indictment was in the ordinary statutory form and did not refer to the robbery upon which it was based.

It is contended that the indictment was defective in that it should have alleged the commission of the robbery as a basis for the murder charge.

The indictment was in the statutory form and did not refer to the robbery upon which it was based. It is contended that since this defendant was not proven to have fired the fatal shot that the indictment should have set forth the commission of the alleged robbery by this defendant and the other defendants as the basis of the murder charge. It may be that when the defendant is also the actual slayer that no allegations of the lesser crime out of which the murder sprang need be pleaded in the indictment.

State v. *Titus,* 49 N. J. Law, 36, seems to hold to this view, but it can hardly be said that in a situation like the one at bar that the defendants are apprised of the nature of the accusations against them, if a similar indictment for murder without stating the facts upon which the state intends to rely to prove the murder.

This point was raised by motion to quash (S. C., pages 44, 45, 46 and 47), (Assignment 3, page 1593 —Specification 3, page 1623).

In the case of the *State* vs. *Schmid,* 57 N. J. Law, 625, at page 626, the learned Justice said: "This method of pleading likewise ignores those provisions of the Constitution of this state by force of which every person held for a criminal offense is guaranteed not only that he shall be accused of such an offense by a Grand Jury, but also that he shall be informed of the nature and cause of the accusation."

Const., Art. 1, para. 7 and 8.

> "Unless the charge contains a description of the crime of which the Grand Jury accuses the defendant, and *a statement of some circumstances by which it may be identified and its particular nature disclosed,* it is readily conceivable that a true bill may be found for *one offense,* and the defendant be compelled at the trial to meet any offense that happens to fall within the general terms of the indictment."

And again (on p. 627), the Learned Jurist continues:

> "It is, undoubtedly, a well-settled general rule that in an indictment for an offense created by Statute, it is sufficient to describe the offense in the words in which the Statute describes it. This rule, however, is based upon and implies only to those cases in which the Statute describes the offense with which it has to do. Unless this is so, the mere recital of non-descriptive words from the Statute will not constitute in reasonable completeness a statement of the offense, so as to relieve the pleader from *averring the Acts* that go to make it up."

See to same effect,

State v. *Solomon,* 96 N. J. L., 124.

> "*The function of a Bill of Particulars* is not to remedy defects in indictments, or to supply essential averments omitted or neces-

sary to charge an indictable offense. No such legal effect can be given to it, without controvening, Article 1, Paragraph 7, 8, of the Constitution of this State."

"A Bill of Particulars is no part of the Indictment or judgment record."

State vs. *Lehigh Valley R. R.*, 92 N. J. Law, 261; 94 N. J. Law, 171.

In *State* vs. *Solomon,* 117 Atl. 260 (Ct. Er. & Ap.) in the opinion of the Court by Mr. Justice Kalisch, it is said:

"The fragile theory that a presumption may be raised in aid of an indictment which omits a constituent element of the statutory crime is shattered by the force of the familiar inflexible legal rules, that no presumption of guilt arises from the mere finding of an indictment against an accused, and that there is a presumption of innocence which abides with an accused until his guilt is established by proof beyond a reasonable doubt.

"Before concluding it may be well to advert here to an unbendable and substantial rule of pleading, essential to the validity of an indictment whether founded on the Common Law or Statute, which rule, though simple and familiar seems by reason of its universality often to escape attention. This rule is cogently stated by Bishop in Volume 1, on Cr. Proc. 81, 2-d. Ed. as follows:

'This principle that *the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted pervades the entire system* of the adjudged law of criminal proceedings. It is not made apparent to our understandings by a single case only.'

"Wherever we move in this department of our jurisprudence, we come in contact with it. We can no more escape from it than from the atmosphere which surrounds us.

"The same learned author in his valuable treaties on Statutory Crimes, #166, says:

'In the work on Criminal Procedure we saw that the fundamental doctrine relating to the indictment, whether at common law or under a statute, the allegations must cover every particular element of crime entering into the punishment to be inflicted'.

"And in volume 1, Cr. Proc. 521, to which above reference is made, the author says:

'And that he knows certainly what each thing is wherewith he is charged, *all the facts which enter into his defense must, especially in felony, be set down by expressed averment, nothing to be left to intendment.*'

'The legal rule is tersely and accurately expressed in Mears *vs.* Com. 2 Grant case (Pa.) 385-387, as follows:

"The general rule of pleading is that every fact or circumstance which is a necessary ingredient in the offense must be set forth in the indictment; otherwise it is defective."

'This doctrine is lucidly stated and discussed by Mr. Justice Garrison in State *v.* Schmid, 57 N. J. Law, 626, 31 Atl., 280. From what has been said it follows that no valid judgment could have been pronounced on the defendant in the present case on the indictment in question, and for this additional reason the verdict must be reversed.' "

In the present case the indictment contains no allegations of fact whatsoever. It contains mere conclusions. It fails to apprise the defendants, in any respect, of the nature of whether they are charged as principals or accessories. It does not

allege all of the facts which entered into the offense, nor does it set down by expressed averment that the alleged crime grew out of a robbery in which the said defendants are alleged to have participated.

POINT FOUR.

Assignments 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16. Specifications 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16.

The Trial Court erred in sustaining the challenges for cause interposed by the State to the serving on the jury on the trial of these defendants of the talesmen Fred. W. Lyon, William H. Billings, Frank Farley, Charles S. Weiss, Herbert A. Gries, John F. Moore, John Christiansen, Edgar C. Desch, Harry H. Gimbel, Henry M. Beckman (S. C. 49-89). All of the above talesmen being sworn on their *voir dire* testified that they would decide the case upon a consideration of the evidence and on the evidence only. There were no peremptory challenges interposed by the State against the selection of any of the above talesmen, and they were dismissed by the Trial Court from service on the jury for alleged cause, when as a matter of fact no legal causes or reasons were set forth or advanced by the Prosecutor against any or all of them, which would in law warrant the Court in discharging them or any of them from service on the jury for the trial of these defendants, to whom they were satisfactory.

POINT FIVE.

Assignment 18. Specification 18.

The court erroneously overruled the objection of the defendants (Case pps. 116-117) to the admission of a photograph in evidence, showing the locus of the alleged crime and certain movable objects therein which were not proven to have existed and to have been in the same position at the time of the commission of the alleged crime, said photograph having been taken some weeks thereafter.

It is contended that the admission of this photograph in evidence constitutes reversible error and was clearly prejudicial to the legal interests of the defendants, inasmuch as it did not show the conditions as they really existed at the time of the commission of the alleged crime, but contained matters and things which by any stretch of the imagination could not be evidential against the said defendants.

In the case of the *State* v. *Strong,* 83 N. J. Law, page 177, a series of photographs taken some time after the murder were offered by the state in evidence over the objections of the defendant. The objection was that they did not show conditions as they existed at the time of the murder and were misleading . They were admitted for the purpose of showing the conditions as they existed on the day they were taken, and there was no proof showing what changes had taken place, and under such circumstances the court said they should have been excluded as irrelevant.

Under the doctrine laid down in the aforesaid case, it is respectfully submitted that the defendants suffered manifest wrong and injury from the admission of this photograph.

POINT SIX.

Assignments 19 and 22. Specifications 19 and 22.

The Trial Court erred in sustaining the objection of the Prosecutor to the following questions asked by Counsel for the defendants on cross-examination of the State's witness Boudreau, who was also one of the defendants named in the indictment.

> "Q. Who did you go around with about the time this holdup occurred, who were your friends?" (S. C. 144).
>
> "Q. And they committed crimes with you, did they not?" S. C. 199).

It is submitted that this question was a proper question on cross-examination to test the credibility of the witness for the State, Boudreau, who was one of the defendants named in the indictment, inasmuch as the testimony of Boudreau was that he only had met the defendant, Nick Joseph Juliano ten days before the hold-up, and the refusal of the Court to permit Boudreau to name his friends and associates about the time the hold-up occurred was prejudicial and harmful to the legal interests of the defendants and constitutes reversible error.

The above questions had a vital and direct bearing on the matter in issue, the answers might have been of inestimable benefit to the accused in their defense, and did not come within the doctrine laid down by the Supreme Court in the case of the *State* vs. *Fisher,* 110 Atl. 124, where the Court said:

> "Sustaining objection to cross-examination to questions which show no direct bearing on

> the matter in issue is within the discretion of the trial court, and sustaining objections to cross-questions is harmless, and does not justify a reversal, even if technically improper, even though the answer no matter what it may have been could not have benefited accused in his defense''.

The defense is entitled to great latitude in the cross-examination of an accomplice for the purpose of testing the credit due to him as a witness.

> *Abbot's Crim. Trial Brief;* pp. 495-496;
> *State* v. *Young,* 93 N. J. L. 396.

POINT SEVEN.

Assignments 20, 21. Specifications 20, 21.

The Court erred in sustaining the objections of the Prosecutor to the following questions put by defendants' counsel on cross-examination of the State's witness Boudreau, who was one of the defendants named in the indictment. Said questions referring to statements that said witness Boudreau admitted signing for the police. (Case, p. 170, line 15).

> ''Q. How long after that was the next one signed?'' (S. C. pp. 170).
> ''Q. Two statements you made before and which you signed differ from each other and differ from the testimony given by you at this trial?'' (S. C. p. 171).

It is contended that these questions were proper questions on cross-examination to test the credibility of the witness Boudreau, inasmuch as he swore that he had signed two statements for the

police, which statements were complete statements of all the facts that he knew surrounding the case, and it was proper for the defendants to propound these questions to Boudreau, the state's witness, who was an accomplice and a co-defendant with the other defendants, to affect his credibility as to an alleged prior inconsistent statement and not for the purpose of attempting to impeach him.

The refusal of the Trial Court to permit the witness, Boudreau, to answer the above very vital questions for the purpose of testing his credibility was prejudicial to the legal rights of the defendants and constituted harmful error.

The defense is entitled to great latitude in the cross-examination of an accomplice for the purpose of testing the credit due to him as a witness.

Abbott's Criminal Trial Brief, pp. 495-496;
State v. *Young,* 93 Law, 396.

It is permissible to ask a witness if his testimony did not vary from another statement made by him to a prosecutor.

State v. *D'Adame,* 84 N. J. L. 386;
State v. *Harris,* 1 Misc. 526;
State v. *Kubaszewski,* 86 N. J. L. 250.

Said Chief Justice Gummere in the case of the *State* v. *Black,* 118 Atl. 103:

> "As a general rule, any fact that bears against the credibility of a witness is relevant to the issue being tried; and the party against whom the witness is called has a right to have that fact laid before the jury in order to aid them in determining what credit should be given to the person testifying."

Prout v. *Bernards Land, etc. Co.,* 77 N. J. L. 917, 73 Atl. 486, 25 L. R. A. (N. S.) 683.

POINT EIGHT.

Assignment 25. Specification 25.

The Trial Court erred in limiting cross-examination of the witness Boudreau (S. C. 204).

The Trial Court erroneously limited the cross-examination of Counsel for defendant Nicholas Joseph Juliano, to an examination upon the direct examination only of the witness for the state, Boudreau, when as a matter of fact said counsel was legally entitled to cross-examine the said witness Boudreau not only upon his direct examination, but also upon other matters, answers and statements elicited from him under the questioning and cross-examination of the said witness for the state, Boudreau, by counsel for the other three defendants.

It is contended that the action of the Trial Court in this respect foreclosed counsel for the defendant Nicholas Joseph Juliano from eliciting facts and testimony on cross-examination upon the cross-examination of counsel for the other three defendants, which would have been beneficial to the legal interests of the Defendant Nicholas Joseph Juliano on his defense. Said erroneous ruling on the part of the Trial Court was highly prejudicial to the legal interests of the said defendant Nicholas Joseph Juliano on his defense in the aforesaid trial and constitutes reversible error (S. C. 204).

> "Where the examination in chief elicits part of a conversation the other side is entitled on cross-examination to find out whether that was all of the conversation, and, in general, to have other relevant parts thereof."
>
> "Where the statement that is testified to in chief admits of two inferences, it is the

proper function of cross-examination to eliminate, if possible, that inference or impression that was unfavorable to the party against whom the testimony in chief was given."

State v. *Glatzmayer,* 79 N. J. L. 238.

See also

State v. *Engsberg,* 110 Atl. 918.

POINT NINE.

Assignments 27, 28 and 29. Specifications 27, 28 and 29.

The Trial Court erred in sustaining the objections of the prosecutor to the following questions put by counsel for defendants on cross-examination of the State's witness Seigel.

"Q. Did you tell the officer that came to your store, the detective, that one of the persons you saw was a young man about 35 years old, 5-11, and thin face and light complexion?" (S. C. 308).

"Q. Who was that officer, did you know what his name was?" (S. C. 309).

"Q. Didn't you tell the detectives who came to your store a couple of days after the holdup, that there were four men and not five men in the holdup,"

and to the question:

"Q. You know what detective I mean without giving his name?" (S. C. 322).

The Trial Court erred in sustaining the different objections of the prosecutor to the long line of questions set forth above propounded by counsel for the defendants to the very important witness for the State, Philip Seigel, and particularly

erred in refusing to permit the said witness Seigel to give answer to the aforesaid questions, which questions were absolutely proper and pertinent questions from a legal standpoint, and said questions constituted the plainest sort of cross-examination, not only for the purpose of contradiction, but also to test the veracity and credibility of the said witness Seigel as to whether he had or had not made conflicting statements to certain officers and identified other persons than the said defendants.

It is permissible to ask a witness if his testimony did not vary from another statement made by him to a prosecutor.

State v. *D'Adame,* 84 N. J. L. 386;
State v. *Harris,* 1 Mics. 526;
State v. *Kubaszewski,* 86 N. J. L. 250.

POINT TEN.

Assignments 34, 35 and 36. Specifications 34, 35 and 36.

The Trial Court erred in permitting the witness Joseph Kenny, for the State to answer the following questions objected to by defendants, the answer to which question was highly prejudicial to the legal rights of the defendants, and the court also erred in overruling the motion of defendant's counsel to expunge from the record the answer to said question and also in overruling defendants' motion for a mis-trial by reason of said illegal testimony.

"Q. What case was he present in connection with?"

"A. He was brought in reference to the Ward Case." (S. C. 468, 469, 470).

It is contended that the said question propounded by the Prosecutor and the answer to the same created, or had a tendency to create in the minds of the Jury a detrimental opinion of said defendants, and the inuendo contained in said answer amounted to an implied accusation or insinuation that said defendants were charged with the commission of some other hold-up or crime in some way closely allied or connected with the charge on which they were being tried.

Said illegal testimony was introduced for the purpose of prejudicing the jury against the defendants, and it cannot be said that it did no harm, for the obvious answer to this is that it was harmful or it would not have been introduced. All evidence introduced by the State in a capital case is harmful; that is exactly why it was put in in this case.

It is submitted that the aforesaid answer should have been expunged from the record, as its admission served to create great prejudice in the mind of the Jury towards these defendants, and constituted harmful error.

State v. *Sprague,* 64 N. J. L. 419;
Clark v. *State,* 18 Vroom, 556;
Meyer v. *State,* 30 N. J. L. 310;
Parks v. *State,* 30 N. J. L. 573;
Ryan v. *State,* 31 Vroom, 552;
State v. *Ricardo,* 71 N. J. L. 35;
State v. *Roop,* 58 N. J. L. 479.

It is contended here that it was the design of the State to impute to the defendants by insinuation the commission or attempt at commission of like offenses at other times and upon other persons.

Said the Court in the above case of the *State* vs. *Sprague* (p. 426):

"Such evidence was entirely inadmissible."

Clark vs. *State,* 18 Vroom, 556;
Myer vs. *State,* 30 *Id.* 310;
Parks vs. *State, Id.* 573;
Leonard vs. *State,* 31 *Id.* 8.

"This evidence was highly prejudicial to the defendant. It was a denial to him of a fair trial upon the issue presented by the indictment, and that it was not erroneous cannot for a moment be contended. In fact, all that need be said in a case of this kind is that it 'may have been harmful'. Ruchman *vs.* Burgholtz, 8 Vroom, 437-441."

POINT ELEVEN.

Assignment 58. Specification 59.

The Trial Court erroneously charged the jury in part as follows:

"* * * if reasonable doubt of guilt is raised even by inconclusive evidence of an alibi, defendants are entitled to the benefit of it. In that event a defense, which otherwise would overcome and put at naught the State's evidence, would simply be put out of the case. Now this refers or rather the application applies to all the defendants in this case, because all have offered proof and testimony of their presence elsewhere at the time when this crime was committed" (S. C. 1506, line 12).

This statement involves the application of the law of alibi and it is respectfully submitted that the court did not give the proper instruction on the question of alibi and incorrectly stated the legal situation applicable to the evidence adduced at the trial.

In the case of the *State* v. *Sahazian et al,* 119 Atl, 780 (at page 781), Mr. Justice Katzenbach said:

> "The proper instruction to be given by the trial judge on the question of alibi has been stated in this court recently by Mr. Justice Parker in the case of State *vs.* Parks, 96 N. J. Law 360, 115 Atl. 305, in these words:
>
> "'The law is entirely settled in this state that where the presence of the defendant at the place of the alleged crime is an essential link in the chain of proof, such presence, like in any essential fact must be established beyond a reasonable doubt.'"
>
> *Sherlock* vs. *State,* 60 N. J. L. 31.

In that case, it was said that:—

> "Upon the interposition of an alibi any one of three conclusions might be reached by the jury * * * (a) That defendant was present, notwithstanding such evidence; (b) That he was absent in which case he is said to have proved his alibi; or (c) That the testimony may create such a degree of uncertainty as to his whereabouts that the jury are not satisfied beyond a reasonable doubt of his guilt of the crime in question; and that by putting the burden on him to prove his absence by preponderance of evidence, he is deprived of the benefit of that reasonable doubt".

POINT TWELVE.

Assignment 68. Specification 69.

The Trial Court erroneously charged the jury in part as follows:

> "* * * at that time he saw 'Big Joe' get out of the car with another man, who he now says is 'Little Joe'. He says the reason

> why he fixes the time at five minutes to eleven is because he made his pull at a signal box. Yesterday, Lieut. Rowe, of Police Headquarters, testified that Officer Manning made this pull at eleven o'clock at the box which Officer Manning testified he pulled from." (S. C. 1517, line 20).

It is contended that this portion of the charge of the trial judge was an erroneous, inaccurate and incorrect statement of the testimony of Officer Manning, a witness for the State, as will be seen from an inspection of his testimony on cross-examination by the defendants (S. C. 1461), where the aforesaid witness Officer Manning distinctly and unqualifiedly testified that he was not sure that the person whom he saw getting out of an automobile on Drift Street on the morning after the holdup took place was Little Joe Juliano. It is a matter of great significance also how it came to pass that after thirteen days had intervened during which time this case had been on trial and after all of the State's case had been presented and the defense had rested that in the closing hours of the trial this witness Manning was brought forward by the State to attempt to show something which in point of fact was absolutely untrue, that is, to attempt to show that Big Joe Juliano and Little Joe Juliano were seen together on Drift Street an hour or so after the holdup. It is therefore respectfully submitted that this misstatement of fact on the part of the trial court to the jury was prejudicial and harmful error to the defendants wherein and whereby they suffered manifest wrong and injury.

> "It is reversible error for a trial judge to make in his charge a misstatement with relation to a fact of moment; that is, that it is proved when there was no testimony to support it".
>
> *State* vs. *Noel,* 133 Atl. 375.

"A direction of the trial court which states as a fact proven in the case a condition of affairs which is not in the case, and not properly inferable from the testimony is not judicial comment and presents grounds for reversal".

State vs. *Lovell*, 92 Atl. 376;
State vs. *Sandore*, 124 Atl. 528.

POINT THIRTEEN.

Assignment 71. Specification 72.

There was error in the charge of the Court.

In the charge of the Court to the jury the Court, after emphasizing the important character of the case, spoke as follows (S. C., page 1525):

> "* * * When I read to you the statute in this case, I pointed out the crime these men are charged with is murder, and that the statute makes a murder in the participation of a robbery, to be murder in the first degree. *I charge you that in this case your verdict ought to be, if you believe the defendants or any of them, guilty of murder in the first degree.*"

It is respectfully contended that this instruction of the Trial Court to the jury was absolutely and unqualifiedly erroneous, contradictory to and in conflict with the laws of evidence of this State and erroneous in fact and in law, and highly prejudicial and harmful to defendants.

It is an instruction in which the Trial Judge categorically and without reservation told the jury that they ought to convict the defendants of murder in the first degree even if the jury believed their testimony.

It is most respectfully submitted to this Honorable Court that this one statement of the Trial Court reading as it does was highly prejudicial to the legal rights of the defendants, and as a matter of fact and of law vitiates the entire charge, and is the strongest and most patent kind of reversible error.

This excerpt is particularly important, not only on account of the phraseology employed, but also on account of the position which it occupies in the charge, that is, two sentences from the end. The defendants-in-error concede the propriety of the rule that it is improper, both as a matter of law and logic, to isolate an excerpt of the charge from the whole body of the same, and without inspecting the whole contents of the charge and endeavoring to rely on an error on one particular paragraph or circumstance, nevertheless, it is the ultimate word of the Court to the jury and the recognition of general consent of the importance of the last words of judicial admonition and instruction makes this particular part of the charge, if incorrect and untrue both in point of fact and in point of law, a matter of the greatest importance in this case.

The words of the Trial Judge in the above instruction was a categorical declaration, without any reservation whatsoever, *that the jury ought to convict the defendants of murder in the first degree even if the jury believed the testimony of the defendants* on their defense. Certainly it cannot be said that this most erroneous, prejudicial and harmful instruction in the closing sentences of the Trial Judge in his charge to the jury must not have influenced their minds and worked irreparable injury to the case of all of the defendants, to the extent that even if the jury had a reasonable doubt of the guilt of the defendants in respect to the evidence presented against them by

the State's witnesses and in respect to the testimony of all of the defendants corroborated by their numerous witnesses that they were not present at the place of the crime nor did they participate in it, nevertheless all the aforesaid evidence adduced on the part of the defendants and their witnesses establishing the innocence of the defendants of the charge of robbery and murder, surely must have found no weight with the jury and must not have been considered in any wise by them when they were advised to convict the defendants even if they *believed their testimony.*

> "A direction of the trial court which states as a fact proven in the case a condition of affairs which is not in the case, and not properly inferrable from the testimony, is not judicial comment and presents grounds for reversal."
>
> *State* v. *Lovell,* 92 Atl. 376.
>
> "An erroneous instruction is not cured by the existence of correct instruction elsewhere in the charge, unless the illegal one is withdrawn."
>
> *State* v. *Parks,* 115 Atl. 305.

It is also contended here that material evidence was withdrawn from the consideration of the jury by the aforesaid instruction of the Trial Court, and the charge considered as a whole is incorrect, conflicting and misleading.

> See case of *State* vs. *Fuerstein,* 135 Atl. 894.
>
> "It is reversible error for a trial judge to make in his charge a misstatement with relation to a fact of moment."
>
> *State* vs. *Noel,* 133 Atl. 275.
>
> "An erroneous instruction is not cured by a correct instruction upon the same point."
>
> *State* vs. *Erie R. R. Co.,* 87 Atl. 141.

"A charge depriving defendant of the benefit of reasonable doubt cured by testimony to establish an alibi is not cured by applying the correct rule to a part only of such testimony."

"It is reversible error to charge that an incriminating fact has been proved where there is neither testimony or color of testimony to support it."

State vs. *Diamond,* 86 Atl. 57;
State vs. *Sandore,* 124 Atl. 528.
See also the case of the *State* v. *Deliso,* 75 N. J. Law 808.

The defendants contend that the charge as made was confusing, that even though portions thereof, segregated from the rest, might be deemed correct, taken as a whole it was clearly erroneous. In this respect all of the defendants suffered manifest wrong and injury. No alternative was given to the jury to find the defendants not guilty inasmuch as the Court said that, even if they *believed the testimony of the defendants,* the jury ought to find them guilty of murder in the first degree.

In the case of the *State* v. *Lang,* 94 Atl. 631, at page 634 (Court of Errors and Appeals), Mr. Chancellor Walker in delivering the opinion of the Court said:

"Certainly, when sentences, that is to say, parts of a charge, are erroneous and no proper qualification of them is to be found in the context or in the entire charge, then there is error; and this is so when, as in this case, the part of the charge pointed out as erroneous is, in and of itself, a particular qualification and limitation of language which, without such qualification and limitation, is unobjectionable."

POINT FOURTEEN.

Assignments 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, and Specifications 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90 and 91.

The Court refused to charge certain requests to charge.

These requests to charge contained certain principles of law which the court refused to charge. It is contended that this is error.

These requests to charge were handed to the Trial Judge after counsel for this defendant had finished his summation to the jury at approximately 12:00 noon, on the 14th and last day of the trial. An adjournment was then taken by the court until one o'clock, P. M., when counsel for the other three defendants began his summation to the jury finishing the same at approximately 3:15 P. M. The Trial Court then began its charge to the jury.

It is respectfully submitted that the Trial Court erred in the exercise of its discretion inasmuch as although said requests to charge had been submitted after the summation of counsel for this defendant, nevertheless over three hours had intervened between the time when said requests to charge were presented to the Court before the Court began its charge to the jury.

Certainly in view of the aforesaid facts and circumstances it cannot be said that a timely presentation of such requests had not been made. It is respectfully submitted that in view of this ruling on the part of the Trial Court and the refusal of the said Court to charge the aforesaid requests the said defendant suffered manifest wrong and injury.

It is respectfully submitted in view of the aforesaid facts and circumstances the doctrine laid down by Mr. Justice Trenchard in the case of the *State* v. *Littman et al.*, 86 N. J. Law, 453, does not apply here.

In the case of the *State* v. *Degeralmo*, 83 N. J. L. R. 135, the Court said:

> "Where a request to charge calls for the application of a correct legal principle, is applied to the testimony, and clearly material to defendants case, he is entitled to have it distinctly charged in such a way as not to leave room for misapprehension or mistake by the jury."

The requests in the present case contained a correct statement of the law, were applicable to the testimony and clearly material to the defendant's case, which he was entitled to have distinctly charged, and in its refusal he suffered a manifest wrong and injury.

> "One of the most important duties of the Court is to declare the law applicable to a case to the jury when requested to do so. This should be done in such a way as not to leave room for misapprehension or mistake."

Citing (*Roe* v. *State*, 16 Vroom, 49).

> "We are of the opinion that the defendant was entitled to have the legal propositions requested distinctly charged, and that this was not complied with by the court, unless the legal effect was sufficiently covered by its charge to the jury. (*Aldrich* v. *Beckman*, 45 Vroom 711; *Mellow* v. *Victor Talking Machine Company*, 48 Vroom 670), and a careful examination of it shows that the precise point raised by the request was not adverted to by the court in any part of its charge. Therefore the defendant is entitled to have this judgment reversed and a new trial granted, and it is so ordered."

16 *Corpus Juris,* 1069, in respect to Proper Requests refused.

> "Where proper request is made for an instruction which correctly propounds the law and is warranted by the evidence and pleadings in the case and which has not already been covered in other instructions, it is the duty of the court to give it, and the refusal thereof will constitute error. The refusal of a concrete instruction is error, although an abstract instruction on the same point has been given".

12 Cyc., 666, in respect to Proper Requests refused.

> "It is reversible error to refuse to give a proper instruction which is requested and justified by the evidence and which has not already been given".

State v. *Tanzarello,* 1 Misc. Reports 375. Before Chief Justice Gummere and Justices Swayze and Trenchard. It is *per Curiam.*

> "At the trial the plaintiff in error took, among others, exception to the refusal of the court to charge certain requests to charge, and took also a general exception to the charge".
>
> "The main insistence here is that the court wrongfully refused to instruct the jury on the law of alibi, notwithstanding he was expressly requested so to do and notwithstanding alibi was the defense set up by the defendant, and notwithstanding that in this case there was overwhelming evidence tending to support the alibi of the defense."

POINT FIFTEEN.

Assignment 91. Specification 92.

Because manifest injustice was done to the defendants by the whole charge to the jury.

POINT SIXTEEN.

Assignment 92. Specification 93.

That it was impossible for the jury to learn from the charge of the Court what facts, if proved to their satisfaction beyond a reasonable doubt, would warrant the jury in convicting the defendants.

POINT SEVENTEEN.

Assignment 93. Specification 94.

The Court is most respectfully and earnestly urged to consider the whole case and the strength of the defendant's case as compared with that of the State, pursuant to P. L. 1921, p. 951.

Finally, we most respectfully submit that for the errors assigned and for the specifications for reversal set forth in our brief, and also from a careful reading of the testimony contained in the entire record, it will be disclosed to this Honorable Court that the defendants have suffered manifest wrong and injury, and therefore that the conviction of these defendants ought to be set aside and a new trial granted.

Respectfully submitted,

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