

THE WITNESS: Lapaglia then said to me, "You are the fault that I am left out", because in that game there had been made a padrone or a master, and submaster. I had been made the master and he said that I was the fault that he had received no drinks.

Q Go on? A Then he started insulting me atrociously, telling all these dishonorable things against me. He had also grasped hold of a chair and was trying to strike me, and then the barkeeper said to me, "Please go away to avoid any quarrel."

Q Now, from that time on-- A And the barkeeper, for my safety, accompanied me from that barroom to the place of my work.

THE COURT: When was this game of tucco played?

MR. TRAIN: December, 1905.

THE COURT: Where was it played?

THE INTERPRETER: In a bar room on Elizabeth street.

THE COURT: When did the shooting take place?

MR. TRAIN: On the 1st of June, 1906.

BY MR. TRAIN:

Q Now, was that the first time in your life that you two had had hard words pass between you? A The first time, yes, sir.

Q Had you ever played in any game with him before that? A No, sir.

Q Had you ever taken a drink with him or sat in the same company with him? A No, sir; if I entered ever a bar room

to have a glass I never had any occasion to approach him.

Q Now, did Lapaglia's people come to America? A Yes, sir; his relatives are here in America.

Q How many of them came to America? A I do not know all his relations.

Q Have you ever been to his house here? A (No answer.)

Q Did you ever call? A No, sir.

Q Did you ever speak to or talk ^{to} any of his relatives here? A I was at work where there was also a brother of his.

Q Where was this? A Uptown.

Q Where? A Amsterdam avenue.

Q What was the brother's name? A Salvatore.

Q How long did you work with him? A Some three months.

Q Did you belong to the same trade union with him?

A No, sir.

Q Did you ever have a quarrel with him? A With whom?

Q With the brother? A Never.

Q After this quarrel that you had with Lapaglia himself, did the brother ever say anything to you about what had occurred?

A No, sir; he never made any mention because he knew that his brother was an insulting man and he did not remember anything-- did not remark anything.

Q Now, did Lapaglia ever come to your house? A Never.

Q He never did? A No, sir.

Q How often would you see Lapaglia, how many times have

CASE # 600

you seen him since you came to America? A I could not remember exactly all the times that I have seen him.

Q Now, tell us frankly, isn't it a fact that you and Lapaglia were intimate friends? A I never had frequency with him.

Q Was he or was he not a friend?

MR. KEIR: I object to that. He has already answered that question twice or three times by stating that they were not friends.

Q Now, I want to know what he means by "Not having frequency with him"? A Because I had much to mind my own business and work, being the son of a family.

Q Would you see Lapaglia once a week? A I can't remember how many times I might have seen him.

Q Isn't it a fact that you used to see him every day?

A How could I see him every day; I was going to work for my boss, and I, therefore, could not see him every day; in the evening I was with my father and my mother.

Q Now, from the time that you had this quarrel with him over the game in December, did you remain at odds up to the time of the killing? A I had no bad feeling at all.

Q Did he continue to have bad feelings towards you?

A Well, when, without any reasons he insulted me that way and threatened me to kill me--

Q Did he ever see you without insulting you after that

occasion? A Well, whenever he met me he always insulted me.

Q Precisely? A Yes, sir.

Q Now, how often would he meet you and insult you?

A Some four or five times.

Q Now, on each of those occasions did he call you a cornuto? and say that you were dishonored and that your family were all a bad lot and your sister a whore? A I always one patient because owing to the respectability of my family I did not want to compromise the tranquility of my family.

Q Now, you never accused him of being a cornuto, or having a mother who was no good or a sister who was a whore, or anything of that sort? A I can swear before the majesty of God and the light of the Son that I never insulted him.

Q When he called you all these names on these different occasions, what did you do? A I was thinking of my father and my mother.

Q Well, what did you do? A I turned away from the street.

Q You never did a thing? A No, sir; never.

Q On the night when he met you in front of 216 Christie street, although he called your mother and sister and father and uncle all these things, you simply turned away and went in another direction? A I always tried to avoid him.

Q Now, at the time that he said these things to you, did you have a pistol in your pocket? A When?

Q At that time, June 1st, 1906? A Yes, sir.

Q Is this the pistol (showing witness the revolver in evidence)? A I wish to see it nearer.

Q Yes. A Yes, sir; that is the pistol.

Q When did you put that pistol in your pocket? A In the morning.

Q Where did you get it? A (No answer.)

THE COURT: Does he identify this pistol?

MR. TRAIN: Yes, sir.

BY MR. TRAIN:

Q Where did you keep it in your home? A Under the bed.

Q Whose pistol is it? A It is mine.

Q When did you get it? A Last year, on the Fourth of July.

Q At the time you bought it did you buy any ammunition?

A It was not yet the Fourth, it was the day before the Fourth of July.

Q Did you ever carry it before the 3rd of July? A Never.

Q Never carried it at all until the 1st of June, 1906?

A No, sir; never.

THE COURT: That is the date of the shooting?

MR. TRAIN: Yes, sir.

BY MR. TRAIN:

Q Where under the bed did you keep it? A Under the mattress.

Q When did you put it under the bed? A It was as soon as

CASE # 600

that day that I bought it.

Q From the 3rd day of July, 1905? A Yes, sir; it was on the day of the peace of the Fourth of July.

Q On that day did you discharge the pistol? A Yes, sir; I fired it on the peace of the Fourth of July.

Q Then after you had fired it, gotten through with it, did you then put it under the mattress or did you leave it there and not remove it from that time until the 1st of June, 1906?

A On the Fourth of July I discharged it two or three times and then I put it down where I said.

Q In between the mattresses? A Under the mattress, under the bed.

Q Now, did you leave it there until the following 1st of June? A Yes, sir; I left it there.

Q Didn't you take it out at any time? A Never.

Q Well, when you put it away on the Fourth of July, between the mattresses was it loaded or unloaded? A It was loaded.

Q It was loaded? A Yes, sir.

Q Why did you put it between the mattresses? A I would not leave it exposed because I have nephews and I put it by.

Q You bought it merely to use on the Fourth of July?

A Yes, sir.

Q Did you intend to keep it until the next Fourth of July?

A Well, no, sir, I had a mind to sell it.

Q To sell it? A Yes, sir; because I disliked to have it.

CASE # 600

Q Why did you load it if you merely meant to put it away until you got a chance to sell it? A No, sir; because I did not know how to unload it; I was afraid I might hurt myself in trying to take away the bullets.

Q You did not know how to unload the pistol? A No, sir.

Q When you bought it was it loaded? A Yes, sir; it was sold to me already loaded.

Q Where did you buy it? A In a pawn shop, and in the pawnshop the pawnshop keeper loaded it himself.

Q How much did you pay for it? A (No answer.)

Q Did you ask him to load it before he sold it to you?

A No, sir; he did it as a bargain.

Q Just threw in the cartridges, gave you the cartridges?

A Yes, sir, just as a present, a compliment.

Q A present? A Yes, sir.

Q Now, did you know how to load a pistol? A No, sir; I did not; if I had known I would have taken away the bullet.

Q Now, did you buy any other bullets or cartridges except the ones which you say you had-- in addition to the ones which you say the pawnbroker gave to you for nothing? A No, sir; the pawnbroker gave me ten cartridges.

Q Did he give you five in addition to the ones that he put into the chambers? A Yes, sir.

Q Now, what did you do with those five bullets, five cartridges? A I left them-- I had them in the house.

Q Well, on the Fourth of July how many times did you fire your pistol? A Two or three times and then I noticed that it did not revolve more than that.

Q Well, did you stop shooting your pistol on the Fourth of July because it would not work? A Yes, sir; it did not work and then I did not care to shoot any more.

Q Now, after you found out that the revolver would not work did you reload it? A Then I left it at home and one day that I was fixing the bed I saw it there and I found that it had been reloaded, I didn't know who did it.

Q What did you do with the five cartridges that the pawn broker gave you? A I had them in a drawer at home.

Q Were they in a box or an envelope? A I had them in a drawer of a sort of a bureau.

Q Were they loose or were they in wrapping paper?
A It was wrapped in paper and left in the drawer.

Q Now, whose bureau was that? A The bureau of my brother and it also belonged to my father because we live together.

Q Now, who owned the contents of the drawer in which you placed these cartridges? A Well, it belonged to the whole family, we all used it.

Q Now, weren't they in a newspaper or something like that?
A Yes, sir; it was placed in a common newspaper that was easily torn so we could get it around--

CASE # 600

Q Now, let us understand whether the reason that he did not unload that pistol or reload it before he put it between the mattresses was because he didn't know how to either take the cartridges out or put them in? A I, in the first place, I did not load it because I did not know how to do it and then I had no mind to do it.

Q Now, then, he asserts positively that the reason that he did not unload that pistol before he put it under the mattress or reload it before he put it between the mattresses was because he did not know how to do either, unload or reload? A Yes, sir.

Q Now, did you tell any person that the pistol was there? A Well, my father and my mother knew that it was there.

Q Did you tell your brother about the cartridges? A I only said to him that I had a revolver under the mattress, that was all.

Q You didn't tell him anything about the cartridges? A Yes, sir; I had told them that there was some cartridges in the drawer.

Q How long after the Fourth of July was it that you found that somebody that you did not know had loaded the pistol?

A It may have been a month or a month and a half or so.

Q Now, from the time you found that it had been loaded up to the 1st of June, 1906, did you see the pistol again?

A I always left it there.

Q Did you see it again? A Yes, sir; I saw it whenever

I fixed the bed.

Q Well, how often would you see it, every day? A In the evening when I was retiring.

Q Did you see it every day? A Yes, sir; I saw it every evening, I always fixed the bed.

Q Did you have any occasion to use it prior to the 1st of June, 1906? A No, sir; I had never any use of it.

Q What occasion had you to use it on the 1st of June, 1906? A On Thursday I had met a certain Ignazzio Maggio and I told him of the revolver. I said to him, "You might clean it and then when it is nice, we may sell it and if you clean it for that purpose we will then divide the proceeds."

The Court then admonished the jury, calling their attention to Section 415 of the Code of Criminal Procedure and took a recess.)

CASE # 600

AFTER RECESS.

LEONARDO BRONCATO, the Defendant, resumes the stand.

CROSS EXAMINATION CONTINUED BY MR. TRAIN:

Q Where did you discharge your revolver on the Fourth of July, 1905? A On the roof.

Q Was anybody with you? A How can I remember that, after a year.

Q Well, if you can remember where you discharged the revolver, why can't you remember under what circumstances you discharged it? A I just cannot remember.

Q Did you tell the pawn broker that you wanted to fire it off on the Fourth of July? A I said to him, "I want to have a revolver in order to amuse myself on the day, just as all the other Americans do."

Q Did you tell him that you would like loaded cartridges with bullets in them or blank cartridges? A I don't say to him anything. It was he who gave me the revolver just as it was, and besides that I couldn't have very much talk with him, because I don't know thoroughly English.

Q Well, did you want to fire off a revolver loaded with ball, or did you want to fire off a revolver loaded with blank cartridges on the Fourth of July? A Well, I fired it just as

CASE # 600

it had been given to me.

Q Do you know the wife of Lapaglia? A Yes, I know her.

Q Have you ever visited at her house? A No.

Q Did you ever play games at the house of Lapaglia?

A Never.

Q Did you ever play any game in which Lapaglia took part except the game that you have described in December, 1905, when the quarrel arose? A No other occasion; and I was not inclined-- I didn't like much going against him.

Q Now, at the hospital, did you find that you had any scars or marks from the kick that you had received? A It was a physician who caused me to undress and look.

Q Well, did you see any marks on your person? A I was not caring, and I was bewildered, and I didn't see whether there was a sign or not.

Q Afterwards did you look to see? A No, I felt during the night-- I felt the pain of the kick, but I didn't look at it.

Q Well, did you, at any time, find any mark on your body where you had been kicked or struck? Just answer that yes or no.

A Well, I have a pain on the bone.

Q When you fired the pistol at the deceased, did he at that time have a knife in his hand? A He had one in his sleeve while he was pounding at me, and I was afraid of that knife.

Q Did you see a knife in his sleeve at the time that you

CASE # 600

shot him? A Well, when I received the kick I doubled up, crying for pain, and saying, "Now he kills me."

Q Did he strike you before he kicked you? A He was pounding with the fist.

Q How many times? A Two or three; I cannot remember.

Q Did he have a knife in his hand when he struck you?

A He had put it into the sleeve, in order that it might not be seen.

Q Did you see it in the sleeve? A Sure. He had it this way.

THE INTERPRETER: Indicating the hole of the hand.

Q Well, if he had a knife and wanted to kill you, do you know why he did not use the knife?

MR. TOWNSEND: That is objected to.

Objection overruled. Exception.

A Because while he had inflicted upon me that kick, and I was pounded up, and he had the knife, he was in a good position to kill me.

Q What is the name of the game that you played with the deceased in December, 1905? A Tocco.

Q How do you play tocco? A There are five or six or any number of persons, and they throw with the fingers the number.

Q Well, kindly explain to the jury exactly how the game is played, from beginning to end, so that the jury could play them-

CASE # 600

selves if they cared to do so. A Well, there is a number of five or six persons, and it depends upon the number of the participants in the game of the throwing of the fingers, and then the number of the fingers thrown by the different persons are counted up, and the man who comes out by this reckoning of the number of fingers, he gets the first glass and drinks it.

Q Well, now, there is a padrone, is there not? A And the man who was the first to drink the glass, having come out as the man for it by this reckoning of fingers, that man is the master and he appoints the submaster.

Q Well, now, is not the object of the game to determine who shall pay for a bottle of wine? A No; everyone pays his five cents.

Q His five cents, before any throwing is done? A After the drinks, the collection of this five cents is made.

Q Who determines who may drink and who may not drink?

A The submaster.

Q Now, what is the object of the game? A Pasttime and entertainment.

Q No; but who wins and who loses? A Neither of the participants wins or loses, except that even those who do not drink have to pay their contribution.

Q Now, is it not a fact that each player contributes a certain sum of money towards the purchase of drinks? A Everybody pays his five cents.

CASE # 600

Q Now, before anybody drinks, do you not throw down the fingers? A Yes.

Q Then does not the master or the submaster, say what persons have answered or played correctly? A No. Nothing is said about the correctness of the game.

Q Well, why are the fingers thrown down? A In order to see who is the man that gets out and drinks the first.

Q Well, is the object of playing this game of fingers to determine who shall drink or who shall not drink?

THE INTERPRETER: Who drinks first, he said.

Q Yes. A The object of the throwing of the fingers is to find the man who has the first drink.

Q Yes. Now, who determines which man shall drink first, the padrone? A It is determined by the game, who succeeds after the reckoning of the fingers.

Q Yes. Now, who decides who is to go out? Who is the umpire? A There is no appointment of the man who is to reckon up the fingers and decide who is the first to drink. Anyone may do it, it is just a question of who first does it.

Q Well, what did you do next? A The man who gets a drink first is the man who appoints the submaster then.

Q Now, on this day when you played with Lapaglia, who became the padrone? A I go out as master.

Q Who did you appoint as submaster? A But I was not the man who appointed, because the man who drinks first was the man

who had to make the submaster.

Q Well, were you submaster or master? A Master.

Q Then were you not the man who drank the first? A No. It is not I who had drank first. The man who got out on the basis of reckoning up fingers.

Q Well, who was submaster? A I don't remember who was submaster.

Q Well, who played in the game? A I cannot after a year remember all those participants in the game.

Q Can you mention a single person? A I cannot remember anything.

Q Why can you not remember? A How can I remember after a year.

Q Who asked you to play in the game? A When I entered, the owner of the bar room offered me a glass, and then I treated myself and then the bar keeper says, "Oh, let us have a tocco."

Q What is the name of the barkeeper? A Salvatore Ringa.

Q Did he play? A Yes.

Q Can you remember anyone else? A No, I don't remember. They were mostly Calabrese people.

Q Now, what was the next thing that happened after you had become master of the game? A The submaster then said, "Invite."

Q Invite. To whom did he say Invite? A To me who was

CASE # 600

the master.

Q Yes. Then what did you do? A I said to the submaster, "You may yourself give drinks to whomsoever you like."

Q What happened next? A Well, then, he distributed the glasses among the people who had taken part in the game of tocco.

Q Now, did you yourself designate who should drink and who should not drink? A No. I said, "I leave it to your pleasure."

Q And you cannot tell us who the submaster was? A I cannot remember.

Q Now, did he ask Francesco Lapaglia to drink? A He didn't give him drinks.

Q Now, in the game of tocco, there is always one person, is there not, who is not asked to drink? A Well, it depends upon the pleasure of the submaster to give to all or to exclude some.

Q Now, did the submaster exclude this Lapaglia? A Yes.

Q Why did he exclude him? A This I couldn't imagine.

BY THE COURT:

Q Was he the only one excluded? A Two remained without drinks.

BY MR. TRAIN:

Q Who was the other person? A I cannot remember up to so long a time.

CASE # 600

BY THE COURT:

Q But if you can remember that Francesco was excluded from drinking, why can you not remember who the other was that was excluded? A Because Lapaglia was a fellow countryman of mine from the same place, and the other one was not.

BY MR. TRAIN:

Q Did Lapaglia resent being excluded? A Yes.

Q Did the other person that you say was excluded resent it? A No. The other one didn't say anything.

Q Are you able to say why Lapaglia resented not being asked to drink when the other person did not? A Well, there are people who are more or less impressionable and more or less liable to the influence of drink.

Q Well, was the slight to one any more than the slight to the other? A Well, there is some men who are more resentful from drink than another man is.

Q Is it not regarded as an indignity not to be invited to drink? A There was people who when I got out considered it an outrage.

BY THE COURT:

Q Considered it an outrage? A An outrage.

BY MR. TRAIN:

Q Do not most persons in those circumstances consider it an outrage? A Well, I cannot read the mind of everybody. There are people who are more impressionable and people who are

0576
CASE # 600

less.

Q Would a man not be an object of derision to his fellows if he did not resent not being asked to drink?

Objected to as calling for an opinion.

Objection overruled; exception.

THE COURT: I would put the question, Mr. Train, would he not be regarded with derision and contempt if he did not resent the slight put upon him.

BY MR. TRAIN:

Q Would he not be regarded with derision and contempt did he not resent the slight that is thus put upon him? A How can I know about the intentions of the other fellow-- the minds of the other people? I know it was the first tocco, and I don't know anything else.

Q (Question repeated.) A How can I know?

Q Is not the game frequently played for the purpose of putting a slight upon one particular man?

MR. TOWNSEND: That is objected to, as calling for an opinion.

THE COURT: I overrule the objection.

MR. TOWNSEND: He is not an expert. He said he only played the game once.

THE COURT: Objection overruled.

MR. TOWNSEND: Exception.

A I only told you how the game is done.

CASE # 600

Q Has not the game frequently the ulterior purpose of provoking some person?

Objected to. Objection overruled. Exception.

A No. There is no spite at all involved.

Q Do you say there is no spite? A In this game there is no spite at all involved.

Q Did you never hear of the game being played for the purpose of placing a slight upon one of the players, involving him in a quarrel and then killing him?

Objected to; overruled; exception.

A I never knew of such a thing.

Q Do you not know that in Italy, and particularly in Sicily, a man who is thus asked to play and upon whom the slight is put is regarded as a marked man? A No, because I never used to go in the drinking places.

Q Did you ever play this game on any other occasion?

A Never; and I didn't even know how to play it.

Q Then it is not a common game? A What do you mean by a usual game?

Q It was not a game with which you were familiar?

A No. I could not know, because I never in Italy frequented places where they played that game.

BY THE COURT:

Q Had you ever played it before? A That only time I play it.

CASE # 600

THE COURT: I would like you, Mr. District Attorney, to inquire of the witness again, why it is that his memory fails to name the other man, the Calabrese, who was excluded from drink, when he can remember Francesco.

BY MR. TRAIN:

Q How is it, that if you can remember Francesco Lapaglia was excluded, that you cannot remember the name of the Calabrese?

A Because I had seen that other man that only time and didn't know him and his name.

Q When did you first think of the revolver which you had in your pocket? A In the moment that I received the kick.

Q You didn't think of it when you were standing in front of the saloon and he insulted you and all your family? A Well, I knew that I had it, but I didnot want to accept the provocation.

Q When you were in the hallway, and the knife was raised over your head, did you think of the revolver then? A I remembered before that I had the pistol, but I had in mind my father and my mother and the tradey that would follow, and the unfortunate condition in which I would have thrown my father and my mother if I had used it.

Q Was your life in danger in the hallway? A It was a miracle of God that I did not get hurt.

Q Was your life in danger in the hallway? A Sure, it was in danger.

CASE # 600

Q Why did you not then draw your revolver and shoot your assailant?

MR. TOWNSEND: Objected to as already answered.

A Because I had in my mind my father and my mother, who are old people, unable to work.

Q Now, in the street, he didn't have a knife in his hand, and yet you did draw your revolver?

MR. TOWNSEND: I object to the form of the question.

MR. TRAIN: I will withdraw the question.

Q Did you tell Joseph La Barbara that you intended to shoot any person? A To whom?

Q No, I have the wrong name. Did you tell Salvatore Damma that evening when you came into the saloon that you meant to shoot somebody? A No, sir.

Q Did you later tell him that you would not shoot this person out of respect for him, Salvatore Damma? A No, sir, I didn't say. I went out humiliated to eat.

Q Did you hear Salvatore Damma testify before this jury that you so spoke? A He may say what he likes. I didn't say.

Q Do you know of any reason why Salvatore Damma should swear falsely against you?

Objected to; objection sustained;

Q Did you tell Messino, the boy who interpreted at the hospital, that you did not care whether you were put in the electric chair or not, as long as Lapaglia died? A No, sir.

CASE # 600

He spoke Calabrese, and I did not even well understand what he said.

Q Well, did you say that you did not care, so long as Lapaglia died, whether you got to the electric chair or not?

A No, sir. When I spoke to him, sometimes I said one thing and he understood another.

Q What did you say that he misunderstood in that way?

A I said, "I have been dishonored, and I am here alive by the grace of God merely."

Q Well, did you use the words, "Sedia elettrica," or whatever it is? A (Continuing) "And now I may go to the electric chair without any reason."

Q Did you use the words to Massino that night, "Sedia elettrica"? A Oh, I didn't say the word electrical chair. I said, "I will sit in a chair before the jurymen and give my reasons-- and tell my reasons."

Q Didn't you tell Massino that you would sit in a chair before the jurymen and explain why you killed Lapaglia?

A Yes, and I asked him also, "When will the trial be made?" What for have I now to suffer while I am right?"

Q Did you tell to Guiseppe Frangipani on that night, "To night I want to shoot him?" A No, sir; I didn't say that at all.

Q Did Frangipani then take your arm and walk down to the

CASE # 600

corner with you to the grocery store? A I didn't say grocery. What grocery?

Q (To the Interpreter) He evidently did not understand your question. Put it again. A No, sir; I did not.

Q Did he say to you, "You have a bad idea. It is better for you to go home and go to sleep"? A No, sir. If he had said that to me I would have gone home.

Q Did you see Joseph Frangipani in front of the saloon? A I didn't notice who was there and who wasn't.

Q Now, did you tell any person that night that you wanted or intended to shoot Lapaglia or any other person? A No. How could I have had the idea of shooting at him? How could I have liked to bring into misfortune my family, my father and mother.

Q Did you tell him that you would shoot Lapaglia?

A No, sir.

Q Did you tell him you had a pistol? A No, sir, I did not.

Q Did he at any time say he was not afraid of your leaden pistol? A Yes, he said so.

Q Do you know how he came to say he was not afraid of your pistol if you had not told him you had a pistol? A Well, as he said many unreasonable words to me, how can I know what for he said this?

Q Are any of the men who have testified here to-day those

CASE # 600

who played in the game of tacco in the month of December, 1905?

A I cannot remember any one.

Q Did you tell Giovanni Pasentino on that night, June 1st, that you wanted to kill Lapaglia? A That fellow? I didn't see him at all on that night.

THE COURT: Has he stated the time that he took the pistol from under the bed?

BY MR. TRAIN:

Q What was the time that you took the pistol from under your bed? A In the morning.

Q What time? A At 7 o'clock, at the time that I was going to work, in order to give it to the man whom I wanted to clean and then sell it.

Q Were you working at that time? A Yes.

Q Where? A Well, now in the four months that I am locked up how can I remember all?

Q Do you remember? A I don't remember absolutely.

Q What is the name of the man who was going to clean the pistol? A Ignazio Maggio.

Q Well, why didn't you give him the pistol to clean?

A Well, I went to the door of the store and I knocked hard enough on the door, but the door didn't open. Then I waited there for nearly half an hour, and then I bethought myself that I would lose time from work and went to my work.

Q Where does that man live? A 14 Stanton street.

Q Is that where you went and knocked on the door? A Yes.

Q When you fired the shot, did you see Lapaglia fall?

A Well, I fired the pistol, and don't recollect exactly having seen him fall.

Q Did you make any outcry, when the deceased had hold of you in the hallway? A No. I got scared so much that I let urine out and I wettened all my pants.

Q The Foreman wishes me to ask this question: Did the deceased at any time choke you? A Yes, in the hall on that night.

Q When Lapaglia had hold of you by the throat, did you then have your revolver? A Yes, I had the pistol at that time.
BY THE FIRST JUROR:

Q Didn't you feel like shooting him at that time already? A Well, I was trying to get loose of him and not to expose my liberty and my freedom.

Q Well, did he have his knife while he was choking you with both hands on your neck? A He didn't choke me with both hands; with one hand only.

THE FIRST JUROR: Well, I refer to the witness' testimony. I understood him to say that he choked him with both hands and I wondered where he could have the knife at that time.

BY MR. TRAIN:

Q When the deceased grabbed you by the neck, did he use

both hands or one hand? A With one hand, and in the other hand he had the knife.

Q What prevented him from stabbing you to death? A Because I was beseeching him, and telling him, "What for do you want to dishonor me and to kill me without any reason?"

BY THE FIRST JUROR:

Q Was that knife found after Lapaglia fell down dead and this witness says he had the knife here in his sleeve? Was this knife found after?

MR. TRAIN: Well, this witness cannot answer that. I will call some witness on that point.

THE FIRST JUROR: Well, I would like to know that.

RE DIRECT EXAMINATION BY MR. TOWNSEND:

Q You know the man to whom you were going to sell that pistol or have the pistol fixed and who was going to sell it for you, do you?

THE COURT: Wait. Mr. Townsend, he has given his name; Ignazio Maggio.

BY MR. TOWNSEND:

Q Do you know that man (referring to a man who has arisen in the court room)? A Yes; that is the fellow.

Q Was that the man that you spoke of? A Yes.

W I N C E N Z O G U T I L L A , a witness called on behalf
of the Defendant, being duly sworn, his testimony
taken through Official Interpreter Moressi, testi-
fied as follows:

DIRECT EXAMINATION BY MR. TOWNSEND:

Q Where do you live? A 228 Christie street.

Q And what is your business? A I work in a metal factory.

Q Do you know the defendant at the bar, Broncado?

A Yes, sir.

Q How long have you known him? A Since his birth.

He comes from the same town; lived at the same place.

Q Did you know one Lapaglia? A Lapaglia, yes.

Q How long have you known him? A Since a long time
also, because he is also a countryman of mine.

Q Would you see him often? How often would you see him
during the past year? A I saw him quite frequently, because
we were good friends and walked often together.

Q And as to Broncado, the defendant, did you see him as
frequently? A No.

Q Do you recollect the night of the 1st of June, between
8 and 9 o'clock? A Yes, sir.

Q Did you see the defendant Broncado and Lapaglia that
night? A Yes. First I saw Broncado at the corner of Stanton
street.

Q Corner of Stanton and what street? A The corner of

CASE # 600

Stanton and the other side that goes towards Christie street.

Q What was he doing at the time you first saw Broncado?

A I was passing just in order to retire to my home.

Q What was Broncado doing? A Well, I passed by and asked Broncado, "Well, what you do?" and he said nothing.

Q You spoke to Broncado, did you? A yes; these two words.

Q Now, state if you will what happened next after that?

A I continued my way home. I reached the vicinity of my house, and when I arrived at a certain spot, I entered a tobacco store and bought some cigars, and then proceeded again towards home. At a certain moment, I saw Lapaglia and Broncado in a quarrel together, and as both were countrymen of mine I went up to them with the intention to make peace, to eliminate the trouble, in order to make peace, as they were both countrymen of mine. And I took hold of Lapaglia in order to get him with me, to go away with me. In that moment that I had put my hand on his person, he freed himself from my holding, and went to kick Broncado. And after having been struck, I noticed that Broncado was about taking the pistol, and so I approached Broncado in order to get him away, and was just taking him away with me. In this moment, Lapaglia came back again in front and struck again in the face Broncado. At that moment, I was indignant at both, and I say, "Well, you go ahead on your

CASE # 600

business and I go away," and I moved away.

CROSSEXAMINATION BY MR. TRAIN:

Q Did you see the shot fired? A After I had gone a distance of some thirty steps, I heard thereport.

Q And then you turned around, I suppose? A Yes.

Q (To the Interpreter) Well, now, explain to the gentleman that we wish to go over his testimony a little more in detail, to go back. A Well, you may ask anything that you please, and I shall answer.

Q Ask him if he understands this map (showing witness the diagram, People's Exhibit 1)? A Yes.

Q This (indicating on diagram) is Christie street; this is Houston. A And this is Stanton.

Q No, Houston, Houston? A Houston, yes.

Q That (indicating on diagram) is Stanton street?

A Stanton, yes. Then let me turn it over this way, Stanton is below and Houston is up above.

Q Now, here is the shoemaker's shop, 209? A That is the shoemaker's shop.

Q And that (indicating on diagram) is 211? A I know the shoemaker's place; I don't know 211.

Q Now, which way were you going? A From the corner of Stanton I was going towards Houston.

Q Now, where were you when you saw these two men engaged

CASE # 600

in a quarrel? A I was just a little further above the shoe-maker's, and we just moved up and down this place, according to the moment that I was pushing one or pushing the others.

Q Now, you pushed both of them, trying to get them both, each one to leave the other alone? A Yes, and even I wanted to take them to the bar to have a drink, in order to quell all the disturbance.

Q Now, was each one calling the other names? A Both were uttering bad words against each other.

Q Now, were any blows struck by either one while you were trying to separate them? A Yes. While I was pushing the one, the other struck, and while I was pushing the other the other one struck. Broncado was struck first in the face, and Broncado made then a movement by which he uncovered the pistol, and it was then that Lapaglia said, "Oh, I am not afraid of your lead pistol," and I said to Lapaglia, "You leave him alone; leave Broncado alone, because you may not know whether it is a lead pistol or another pistol."

Q Well, by lead pistol did you mean a toy pistol?

A Yes.

Q Is that the expression used in that neighborhood for an imitation pistol? A Yes, a toy pistol; and I just said to Lapaglia, "Look out; it may not be a lead pistol."

Q Now, after this movement of Broncado's, did you see towards his pocket, what did you do with the two men or try to do?

A I grabbed hold of Broncado this way (illustrating) because he had his hand on the side where the revolver was, and I grabbed hold of him by the arm and meant to take him away. But it was then that Lapaglia lurched against Broncado and struck him in the face again.

Q Yes; then what happened? A Broncado freed himself from me, and I then left and went away.

Q Now, at any time, did you see any knife in the hands or on the person of Lapaglia? A I didn't see knife.

Q The motion towards the pocket on the part of Broncado was made before you attempted to pull him away? A It was when Lapaglia had struck him in the face that he made that movement.

Q But that was before you had attempted to pull Broncado away? A Well, I had already before held Broncado and the other one.

Q At any time did you see Lapaglia make any motion towards his pocket as if to draw a pistol or to get a knife? A No.

RE DIRECT EXAMINATION BY MR. TOWNSEND:

Q Did I understand you to say that you saw Lapaglia kick the defendant in the stomach? A No. I had already gone away before the delivery of the kick.

Q Then the kick in the stomach and the kick in the shin, if it took place, took place after you left there?

MR. TRAIN: Well, that is conceded.

CASE # 600

Q He didn't take his pistol out of his pocket when you had him by the arm, did he? Broncado? A No. He motions with the hand towards taking it out.

Q How long would you say it was after you left Broncado that you heard the shot fired? A I said that I had walked some twenty steps.

RE CROSS EXAMINATION BY MR. TRAIN:

Q Did you go back to the place where the shooting had occurred? A No. There was too much crowd and policemen there, and I didn't want to get mixed up.

Q What is your business; your occupation? A I have already stated, I am in a metal factory.

Q And your address? A It is in front of Pier 27.

Q Where do you live? A 228 Christie street.

Q Are you a native of Cimima? A yes.

Q How long have you been in this country? A Four years.

Q Was Lapaglia a friend of Broncado's? Were the two men friends? A I don't know that.

Q Have you served in the Italian army? A No.

CASE # 600

IGNATIUS MAGGIO, a witness called on behalf of the Defendant, having been duly sworn, testified as follows, his testimony having been taken through Official Interpreter Morressi:

DIRECT EXAMINATION BY MR. TOWNSEND:

Q Where do you live? A 14 Stanton street.

Q What is your business? A Electric master.

Q Electric machinist? A yes, electric machinist.

Q Where do you work? Where is your place of doing business? A 14 Stanton street; I got my own shop there.

Q Do you recollect hearing of the shooting of Lapaglia by Broncado? A I didn't hear the report, but I know that he had came to my shop a day before and wanted me to have a revolver cleaned.

Q Who had, Broncado? A Broncado, yes, and that he wanted to sell it.

Q That was the day before the shooting? A Yes.

Q You saw Broncado the day before and talked with him?
A Sure.

CROSS EXAMINATION BY MR. TRAIN:

Q You say you saw Broncado on Thursday the last day of May?

A Well, in the morning.

Q What time in the morning? A About a seven o'clock in the morning.

Q Are you related to the defendant? A No.

Q Connected with him by marriage? A No.

Q Do you come from Cimima? A I have been born in Cafalu, but I have lived some twenty years in Cimima.

Q Well, did you know the defendant in his home in Cimima?

A Yes.

Q Know his family? A Yes.

Q Were you a friend of the family? A Well, we were just acquaintances.

Q What did the defendant say to you on the morning that he came to your shop? A He said to me, "I have a pistol and I want to have you clean it and sell it when it is nice, and tomorrow I will bring it to you and if you do that job-- if you could have an occasion to sell it yourself we may divide the profits."

Q What do you do at your shop? A Italian locks and alterations and cleanings of revolvers, and whatever different kind of machinery work comes in. I am an expert.

Q Well, you do your work right there in 14 Stanton street?

A (IN English) Sure.

Q That is your shop? A yes.

Q And you live there too? A Sure., I got a key in my pocket.

Q What is that? A I got now the key in my pocket.

Q Oh, you have got the key in your pocket? A Yes.

CASE # 600

Q Did you work all that week? A (Through the Interpreter) Always. I just go out when I have a job to do, and then I return to my place for the performance of work.

Q What time do you open up the shop in the morning?

A Do you mean what time I open the shop?

Q yes, in the morning. A The day of the quarrel or what day?

Q I am talking about the day he came to see you. A He came about seven o'clock, just at the time of the opening of my shop.

Q Was your shop open when he came? A yes, it was.

Q When did he bring the pistol? A He talked to me about the bringing of the pistol, but he didn't come with the pistol.

Q He didn't come. How do you know he didn't come?

A Because oftentimes I am compelled to close my store, and he might have come in some of these intervals.

Q Well, where did you go Friday morning? A I don't know exactly what day, but I am always accustomed to leave my shop to do work.

Q You don't remember about that? A Or to go after some job.

Q You don't remember about the day of the shooting, whether you went out or not? A I remember the day of the misfortune, when the misfortune happened, and it was exactly the day before

CASE # 600

that day that he came to me, telling me that he had to do this.

RE DIRECT EXAMINATION BY MR. TOWNSEND:

Q What time do you generally close your place of business?

A As I am the owner, I close sometimes eight, sometime nine, and later, according to my convenience.

THE COURT: Before the next witness is called, recall the defendant.

LEONARDO BRONCA TO, the defendant, recalled.

BY THE COURT:

Q What time in the morning was it on the day of the shooting that you took the pistol and put it in your pocket?

A Seven o'clock in the morning.

Q What time did the shooting take place? A In the evening.

Q What time in the evening? A I have no watch. I didn't notice exactly the time.

Q Was it five or six o'clock, as nearly as you can tell?

A Well, I had no watch and had no notion of the time.

Q I know, but you have given the specific time for the morning, seven o'clock. Now, can you not tell about what time it was in the evening when the shooting took place; about?

A Because, when I go out for work I look at the clock or watch

CASE # 600

or timepiece in the house.

Q Did you get to work that day? A yes.

Q Did you go to look for work? A Yes.

Q Where did you get work? A It was uptown.

Q Did you go to work? A yes.

Q How long did you work? A I started work at eight o'clock in the morning.

Q How long did you work? A At twelve o'clock I had intermission for eating.

Q Then, when did you go to work again? There is no need of all this detail. How long did you work that day? A About five o'clock in the evening we stopped working.

Q How long after that was it that the shooting took place?

A I don't know whether three or four hours elapsed between--

Q That is enough. Now, did you have the revolver in your pocket all the time from seven o'clock in the morning, during the hours you were working up to the time of the shooting?

A I took away the jacket and put it by.

Q Yes, but it was in your pocket all the time, was it?

A It was in the jacket, the jacket which I removed during the day.

Q While you were working you took off your jacket?

A Yes, sir.

Q Now, did you go to Ignatio Maggio's that day? A yes, on Friday morning after the Thursday that I had arranged about

the pistol with him, I went and knocked upon the door often and hard.

Q What time did you go there? A At seven o'clock I was there.

Q Did you go after that on the same day? A No, because I went to work.

Q After you had finished your day's work, did you go home again? A No, I didn't go home.

Q Where did you have your supper? A Well, we had supper towards eleven o'clock when my brother comes back from work.

Q Where did you spend the time after five o'clock when your work ceased? A I went around the Bowery there, where there are things to be seen, and saw them.

BY MR. TRAIN:

Q Is it not a fact that the deceased Lapaglia secured work for you with his cousin? A What Lapaglia?

Q The deceased? A No. He never procured work for me.

Q Well, did you not work for a relative of the deceased?

A Yes, in the last summer.

Q Well, what is the man's name for whom you worked?

A Salvatore Lapaglia.

Q Now, was not Salvatore a cousin or brother of Francesco?

A He was a brother.

Q A brother. Now, did not Francesco get his brother

CASE # 600

Salvatore to employ you? A Never. It was the brother-in-law of Lapaglia who said, "Come work with me--" the brother-in-law of Salvatore Lapaglia.

Q Well, why did you leave the employment of Salvatore Lapaglia? A Because the business was slack.

Q Didn't he discharge you? A Well, no. There was no business at all. He could hardly make out his own expenses, so he couldn't pay me.

Q Weren't you accused of stealing his money?

MR. TOWNSEND: No, I object.

Q Weren't you accused of stealing something from this brother?

MR. TOWNSEND: I object.

Q Was that not the reason that you were discharged?

THE COURT: I will sustain the objection.

MR. TRAIN: I do not know how material it may be--

THE COURT: It might go to the question of motive.

MR. TRAIN: Yes.

THE COURT: But I think it is too remote.

BY THE COURT:

Q Ask him why he did not take the pistol to Ignatio Maggio on the day that he went to tell him he would take it? Why did he not take it then to have it fixed? A Because I was uncertain whether he would or would not take the job to clean it.

CASE # 600

PROFESSOR ANTONY PALIASI, a witness
called on behalf of the Defendant, having been duly
sworn, testified as follows, his testimony being
taken through Official Interpreter Monressi.

DIRECT EXAMINATION BY MR. TOWNSEND:

Q You live where, Father? A St. Andrew's Church, 20
City Hall Place.

Q And you are a priest of the Catholic Church? A Of the
Catholic Roman Apostolic Church.

Q Do you know Bronsado, the defendant? A I know him.

Q Do you know other people who know him in the vicinity in
which he lives? A Yes.

Q Do you know what his reputation for peace and quiet is
in that community? A Well, he--

Q Do you know it? A I know.

Q Is it good or bad? A Good in the superlative degree.

CROSSEXAMINATION BY MR. TRAIN:

Q Did you know Lapaglia? A No.

Q Did you know his reputation by any chance? A No; I
neither knew him by name or by actions.

REV. GIUSEPPE MILLITELLO, a witness
called on behalf of the Defendant, having been duly

CASE # 600

sworn, testified as follows, his testimony taken through Official Interpreter Morressi.

DIRECT EXAMINATION BY MR. TOWNSEND:

Q You live, where, Father? A 314 East 14th street.

Q Have you charge of a parish there? A Yes.

Q Do you know the defendant Broncado? A I know Leonardo Broncado and the family and relatives.

Q Do you know others who know him in the vicinity in which he lives? A Yes.

Q Do you know what his reputation for peace and quiet was in that community? A From all that I heard--

Q I ask whether you know what it was, yes or no.

A Yes.

Q Is it good or bad? A Well, from all that I heard it is good.

NO CROSS EXAMINATION.

FRANCESCO JACOPINO, duly called and sworn as a witness on behalf of the defendant.

MR. TOWNSEND: I have concluded, if the Court will permit me, to withdraw this witness.

That will conclude the case of the defense.

THE COURT: Have you any witnesses in rebuttal,

Mr. Train?

CASE # 600

MR. TRAIN: Well, I have two witnesses of whom I would like to ask one or two questions about the knife.

THE COURT: Are they in the court room?

MR. TRAIN: They are right here.

THE COURT: Call them.

REBUTTAL TESTIMONY.

JOSEPH L E BARBARA , recalled.

DIRECT EXAMINATION BY MR. TRAIN:

Q You were one of the first to reach the body of the deceased, if not the first, were you not? A I was present.

Q Were you not one of the first persons to reach the body of Lapaglia? A Well, I was present the moment that he fell, shot.

Q Yes. Now, did you assist him to get to some other spot? Did you help carry him anywhere? A No, nothing at all.

Q Well, didn't you go and get a chair for him and put him in the chair? A After I went into the basement I took a chair and delivered the chair to the policeman.

Q When Lapaglia fell, was there any knife or other weapon on the ground? A No; a pipe; that is all.

CASE # 600

GIUSEPPE FRANGIPANI, recalled.

DIRECT EXAMINATION BY MR. TRAIN:

Q You were one of the first people to come up to where Lapaglia was lying on the ground, weren't you? A Yes, sir.

Q Were you the first person? A How?

Q Were you the first person to get there? A Yes.

Q The first one? A The first one.

Q Il primo? A Yes.

Q Now, was there any weapon on the ground, any knife?

A No, didn't see one.

BY THE COURT:

Q Did you see any knife on Francesco's body? A No.

BY MR. TRAIN:

Q Did you take him to the hospital? A No.

Q Who took him to the hospital? A The ambulance.

NO CROSS EXAMINATION.

THE COURT: Now, is that the case on both sides, gentlemen?

MR. TRAIN: Well, if your Honor please, I assume there is no contention on the part of the defense that a knife was used by the deceased. I don't think Mr. Townsend desires to make any concession of that sort, but with your Honor's permission I may call one witness in the morning

CASE # 600

in regard to that.

THE COURT: Very well. There is no contention on the part of the defendant, as I understand his testimony, that the deceased struck at him with the knife.

MR. TRAIN: None whatever, except that in the hallway they say he had a knife.

THE COURT: That he had a knife in his possession.

MR. TRAIN: In his hand in the hallway.

THE COURT: In his hand.

MR. TRAIN: And that he had a knife in his sleeve on the street.

THE COURT: In his sleeve outside.

The Court admonishes the jury as required by the Code of Criminal Procedure and orders an adjournment of this trial until tomorrow morning at half past 10 o'clock.

CASE # 600

New York, October 18th, 1906.

TRIAL RESUMED.

CHARLES A. NEITNER, a witness called on behalf of the People, in rebuttal, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. TRAIN:

Q Did you arrest the defendant in this case? A Yes, sir; it was on my post it happened and I took him, sent him to the station house.

Q Did you arrest him? A Well, I got there and took charge of the case, yes, sir.

Q Keep your voice up and address the jury? A Yes, sir.

Q Did you go to the scene of the homicide? A Yes, sir.

Q Were you the first officer there? A Yes, sir.

Q When you got there do you remember how many people there were there? A Yes, sir; there was a couple of hundred people.

Q Where was the deceased? A Lying on the sidewalk in front of No. 209 Christie street.

Q Was anyone beside him? A Well, a lot of people around him and nobody seemed to--

Q Did you take charge? A I took charge of it, yes, sir.

CASE # 600

Q Did you examine the place where he was lying for any weapon or anything of that sort? A No, sir; there was such a crowd around. I seen he was hurt pretty badly and I sent for the ambulance.

MR. TRAIN: The People rest.

THE COURT: If that is the case on both sides you may go to the jury gentlemen.

MR. TOWNSEND: I ask the Court to take the case from the consideration of the jury on the ground that the People have failed to make out a case.

Motion denied. Exception.

Mr. Townsend then closed the case on behalf of the Defendant.

CASE # 600

Mr. Train closed the case on behalf of the People as follows:

If the Court please, Mr. Foreman and each of you, gentlemen:

You are now called upon, under your oaths as jurymen to determine out of the evidence submitted to you what were the real circumstances surrounding the taking of the life of Francesco Lapaglia. You are the only persons who will ever pass upon that state of facts and you are the only persons, unless there were to be a mistrial or a disagreement, who will ever apply those facts to the law, and determine whether, under the facts which you find to be true, the defendant is innocent or guilty, and if guilty of what degree of crime.

It behooves you, therefore, to consider with great care the significance of each and every bit of evidence that has been brought out before you.

I have rarely tried a case where the evidence itself presented so little contradiction; I have rarely tried a case where all the evidence, as presented, was susceptible of such a far reaching inference.

Bear in mind, gentlemen, that the deceased in this case is not a witness, and that in reaching your conclusion you are first confronted by the fact that the most important witness in the case is gone, the man who could take the stand

CASE # 600

if he were alive, and outline to you precisely what occurred-- that man is absent, and it is plain you have a man whom other persons accuse and who is animated, very naturally, by a desire that you should place a favorable construction upon the case for him, and who is subject to all the emotions and motives which any one accused of a crime always is.

Now, those are the first two salient things for you to consider, first, that the People have lost their best witness and there is no one to contradict the defendant, no matter what he says or no matter what words he puts in the mouth of the deceased, no matter what motives he ascribes to the deceased, and you must search out what possible motive exists for this act, and having determined what the facts are you must then apply the other facts to the defendant's story and determine for yourself how far he is telling the truth.

Now, as I said, so far as the circumstances surrounding the killing are concerned, there seems to be very little contradiction. There is no doubt but at the time of the shooting the two men were engaged in some sort of a scuffle. The severity of that, and its real significance is for you to determine. There is equally no doubt, upon the evidence in this case, but that the defendant had, prior to the discharge of his pistol, prior to the

CASE # 600

taking the life of the deceased, repeatedly threatened to do that very act. . . There cannot be any doubt of that on this evidence, because there has hardly been a witness called-- and that is very extraordinary in an Italian case-- there has hardly been a witness called that did not give the impression of desiring to tell the truth. Even the witnesses for the defense say that the deceased repeatedly said, "I am not afraid of his pistol", which establishes, conclusively, that the defendant must have said something about a pistol, else the deceased would not have made use of those words. A man to whom no possible motive can be ascribed, for wishing to distort the truth, has said that just as the lamps were lighted, I suppose five or six o'clock, the defendant, on the street, says that he intended to take the life of Lapaglia, and three or four witnesses have testified that just preceding the homicide he says that he intended to kill him, and that he intended to kill him that night. To one he said that he would refrain from killing him out of respect to the person to whom he spoke and so forth. When we come to that part of the case I will read you his exact words.

Now, we start with a substantial agreement on matters most of the defendant's threats I think it cannot be contradict that the defendant did make prior threats.

CASE # 600

Now, self defense, gentlemen, is a defense which is very easy to interpose, particularly when the person who has been assaulted is dead, and it is the easiest thing in the world to say that the man that you killed was engaged in an altercation with you or made a motion of going towards his hip pocket. That is a story that is told in most homicide cases. And at the same time that you are ascribing this mysterious motion towards the hip pocket, and this motion of a concealed knife or something which the man that you have killed used, it is equally easy to ascribe to the deceased words which are calculated to inflame the minds of the jury against the deceased.

Now, so far as the use of vulgar, disgusting and insulting expressions is concerned, so far as this case goes, it would seem to me that one man was as bad as the other. A witness for the defense, that very excellent appearing gentleman who took the stand yesterday afternoon, gave you a very clear picture of what he saw. He saw two men engaged in some kind of a scuffle, each man calling the other offensive names and each man trying to strike the other. Now, if this case depended simply and solely upon the evidence immediately surrounding the taking of the life of Lapaglia, that is to say, that two men were seen to be engaged in a scuffle and were each calling each other sons-of-bitches and striking at each other,

and that one of them drew his revolver and shot the other-- if that is all there was in the case and the other evidence merely went to the fact that the blows were with the fists and that one man either kicked or tried to kick the other, no prosecuting attorney would be likely to go to trial, but the whole thing would be resolved by the prosecuting attorney, if the case did go to trial, by asking for a verdict of manslaughter, the killing of a human being in the heat of passion, if the defendant did not interpose that plea himself, and the thing would be disposed of because there would be no evidence that the killing had been carried in the mind of the defendant prior to the actual occurrence, and there would be enough evidence to show that at the time that the pistol was drawn and the shot fired it was in the heat of passion.

But now, gentlemen, that is not what we have in this case. It is the other facts in the case that make this a very striking and a very bad case.

Now, no motive, gentlemen, no motive whatever has been offered to show why this defendant took the life of Lapaglia. According to his own statement the fact that his mother was called a whore, if she was called a whore, and that he was called this, that and the other name, according to his own story, that was nothing which would lead him to kill Lapaglia, because if he tells you, in-

CASE # 600

probable as his statement is, that standing in front of this saloon Lapaglia, without any reason, approached him and heaped indignities upon his head so that he wept. Notice the Sicilian craft, so that he wept. He did not draw any pistol and shoot down the man that had called his mother a whore. If that was the reason that he killed Lapaglia he would have killed him in front of the saloon, and if that was the reason that he killed Lapaglia he would have killed him on some one of these preceding occasions when he tells you that Lapaglia was always calling him a son-of-a-bitch. No, gentlemen, that is not the motive in this case. There is something else. It could not have been the blow struck on the street, if it was struck, or the kick if it was inflicted, because the defendant says himself that but a few minutes before, in the hallway, his adversary had him by the throat and had a knife raised in his hand ready to take his life.

Now, if there was any question of self defense in this case the time that shot would have been fired would have been in the hallway, if they were in the hallway.

Now, gentlemen, there is something in this case that neither you nor I will ever find out; no one will ever find out.

If this were a case of circumstantial evidence, it would make a great difference, because in cases of

circumstantial evidence the question of motive is highly important to show who did the killing, but we know who did the killing here and so the motive makes no difference, but when you, gentlemen, go out in the jury room and consider this defendant's story you can't help coming to the conclusion that there is something behind this case that has not been brought out. Now, I don't know what it is and you don't know what it is and all we can do is to speculate about it. We know certain facts that decide the case apart from that.

Now, I am not going to spend any more amount of time in discussing the prior histories of these men. In point of fact, I cannot call a witness, it would not be competent to call witnesses to prove to you what the game of tucco signifies, what its meaning in the life of a Sicilian is, but I want to call your attention to this, and you may think it has some bearing or you may not: In December, 1905 a game of tocco was played. Now, tucco is a game in which the object of the game, gentlemen, is to place an insult upon one of the players' head. The defendant practically admitted that in his testimony because the object of the game is to slight one of the players by not asking him to drink. Well, now, that is not a very pleasant kind of a game; it is a queer kind of a game anyway, and the defendant never played it but once.

The man upon whose head the insult was placed was the man whose life was eventually taken. Now, let me ask you this: if you had an enemy you wanted to get rid of, and you were the kind of a man that would indulge in that sort of practice, how would you go at it? Why, there is not any question at all as to how you would go at it. You would not try to poison him, you would not try to blow him up with a bomb, you would engage him in a quarrel and take his life openly and then say that you did it because you had no choice, that that God given right of self defense prompted you to it, and you would have yourself surrounded by men who could swear to the same thing, that the man who was killed had attacked you.

Now, supposing in this case the game of tucco that was played in December-- the deceased in this case upon whose head the insult was placed had then and there so far become the victim of his own anger that he made some offensive motion against the padrone or the subpadrone of that game, surrounded by their friends, do you suppose he would have had to wait until the 1st of June, 1906, to get shot? He would have then shot right there in the saloon and the padrone and the sub-padrone and the other players, whom this defendant cannot remember, and the other Calabrese whom this defendant cannot remember, although he remembers Lapaglia, each and every one of them would have sworn that

Lapaglia intended by this indignity by having the padrone raise his glass and say, "I will not drink with you."

Lapaglia attacked one of the others who killed him in self defense.

Now, gentlemen, that does not happen. On the 1st of June, 1906, the defendant shoots him in Christie street. Then he takes the stand, and says, "This man for whom I had no dislike is continuously calling me names which no man could bear. He has called me those names continuously for months and yet I have done nothing, I have controlled myself like a true Christian; I have bowed my head and turned the other ear to his insults and for no reason that I can explain at all on the evening of the 1st of June this man, not content with vomiting forth these vile epithets attacked me with his fist, with a knife and with his foot until I, driven to the wall, took his life."

Now, isn't it an extraordinary coincidence, gentlemen, an extraordinary coincidence, the like of which has never appeared before in the case, that this man, this defendant, should have suddenly conceived the idea of getting a miserable old revolver cleaned and putting it on the market for sale on the very day that this man, for whom he had no dislike, but who for some unaccountable reason hated him, should attack him on Christie street and render it absolutely necessary for him to be shot.

Why, it is the most peculiar, astonishing and extraordinary coincidence I have ever heard of. Now, how far are you going to place any reliance on what this defendant says. Why, take his whole story. Do you believe that this boy, this man, does not know how to take the cartridges out of a revolver and put them back? Why, I don't believe there is a boy or a man in that locality, or I might almost say in the City of New York, who could not take the cartridges out of a revolver and load a revolver. It is just as natural to the small boy to learn to use a gun, as soon as he is able to walk, as it is to read about pirates or play "burglars and police". It is the natural instinct of the small boy, and that instinct does not get in abeyance as a man grows older. Everybody knows how to load and unload a firearm. This man says he did not know how. He says he wanted to use the revolver on the Fourth of July. Well, if he wanted to use it on the Fourth of July, he would have a box of blank cartridges. He says that the pawn broker gives him this loaded revolver, loaded with thirty-two calibre cartridges and gave him five others. Is that likely? Then he says he discharges the revolver two or three times and puts it in the bed between the mattresses.

Now, gentlemen, is this man going to buy a revolver to discharge twice on the Fourth of July? Now, you and

CASE # 600

I, perhaps, who are in a little different station in life, might be better able to afford to buy a revolver for that purpose but I doubt if you or I would go and spend a couple of dollars to buy a revolver to shoot off twice on the top of the house on the Fourth of July. Now, that does not appeal to your own common sense. Then he takes this and puts it between the mattress and forgets all about it, and some man that he does not know, some person that he does not know, comes and loads that revolver without his knowledge. Now, that is a cock and bull story. The revolver stays there loaded, and it stays there all through the month of August, 1905, through September, 1905, October, 1905, November, December, January, February, March, April, May and then on the 1st day of June, almost a whole year after, the revolver which has peacefully laid between the mattresses, loaded in the meantime by some mysterious person whom the defendant does not know, is taken out. On the 1st of June, some strange impulse moves him to have the revolver cleaned, just as if he could not clean it himself. "Now is the time to go ^{to} my friend and get it cleaned and get him to sell it to divide with me the proceeds." On the day that inspired idea comes to him, that is the very day that Lapaglia goes and attacks the defendant and compells the defendant to kill him. Why, it is the most ridiculous, outlandish and absurd story

that has ever been told in a court of justice.

Now, Mr. Pinchot has suggested to me something that did not occur to me. Mr. Pinchot reminds me that the defendant said the gun was out of order. Now, what was the business of this wise man who took the stand and testified to this conversation with the defendant? Why, he was a gunsmith. He told you he was an electrician and also in the business of mending guns and revolvers. What was the defendant going around with this busted revolver for? Was he going to get it cleaned to sell it, or was he going to get it fixed in order to put it in shape so that he could use it?

Now, you are dealing with an Italian, gentlemen. It may be that if you or I were going to take a man's life we would not do it in a braggadocio manner. We might not say we were going to kill him, we might not tell anybody. There is no question in this case whatever but that this defendant told these four men that he intended to take the life of the deceased, and you find that in the Italian character, in the Sicilian character. He has made up his mind to exterminate this man, and he made no bones about it. He told Joseph Frangipani, "To night I want to shoot him." And Joseph Frangipani says, "That's a bad thought, a bad idea, go home and go to bed, that is the thing for you to do." He took hold of him and they walked

down the street.

Now, there is no question in the world but that that man is telling you the truth.

Then there is Pasentino. Several hours before the killing, "Just as the lights were lit " as he said in his picturesque language, "the defendant told him that he had a quarrel or something between him and Lapaglia and that he wanted to shoot him tonight." Two hours or three hours, perhaps four hours before anything was said by the defendant to Frangipani. Salvatore Berman, the man who keeps the saloon and who could have no possible motive for telling you anything that was not the truth, because he is the man who lives right there and whose saloon is patronized by friends of the defendant.

He tells you that Broncado came into his saloon at about 9.30 and said, "I must shoot him." Then he said, a little later on, "Well, I won't shoot him out of respect for you."

Dominico Masseno, that is the boy, the translator, said that the defendant told him that he did not fear the electric chair so long as Lapaglia died.

These four people, Joseph Frangipani, Giovanni Pasentino, Salvatore Damma-- three people-- in addition to their evidence there is this statement to Masseno, "I don't care if I get the chair, so long as Lapaglia dies." What does that mean? It means, that the

CASE # 600

defendant had made up his mind, certainly by six o'clock in the afternoon of that day to kill this deceased and so firmly had he made up his mind that he had told certain persons that he was going to do it and one of them did attempt to dissuade him and even conducted him down the street. Now, in the light of that evidence, what does the evidence about the quarrel, about the scuffle, about the vile language signify? The law of self defense, of course, is a God given right, just as everything in this world is God given. The reason for the doctrine of self defense is that it arises out of the doctrine of necessity, that is, we can not be blamed for killing a man. If one of you attack me in such a way that I cannot escape, except by taking your life, why, of course, I am justified in doing it, but I would not be justified in doing it unless there was nothing else I could do.

I remember that I tried a case last year in which that came up. I don't suppose it is proper for me to recount the circumstances, but that was so plainly brought out in that case that I want to read the rule to you. The rule is, gentlemen, that before a party can be justified in taking the life of another, in self defense, it must appear from the evidence that the killing was necessary for his escape and that no other means were open to him. If a man is attacked and he believes that his life is to

CASE # 600

0620

be taken or that he is to suffer great, actual physical injury, he is justified in taking the life of the aggressor, but it must appear that he was in imminent peril and that he could not do anything else. It is his business to avoid the attack if he can, or having been attacked if he cannot avoid it to do everything in his power first before he takes the life of his assailant.

Let me call your attention to this-- and that is that Joseph Frangipani had taken him by the arm and said, "You have got a bad idea in your head. Go home and go to bed." The defendant came back, he must have come back because we find him in front of the saloon at the time of the killing. And, moreover, you remember that there was a man between them, and you have seen the man, at the time the shooting was done. There was a man between them at this time the shooting was done and in order to do the shooting he had to shoot past the other man.

Now, the great point in the law of self defense is this: If a man who was in imminent danger of bodily harm, irrespective of anything else, could take the life of the aggressor and if that was all the law there was on the subject, all you would have to do, if you wanted to kill a man, would be to involve him in a quarrel and then when he was on the point of doing something to you, shoot him. Now, of course, you see that would not be right. That is

CASE # 600

not sense to say that I can get into an argument with you, attack you, get you in a rage and then when you attack me shoot you. Why, that would be nonsense and so the law of self defense is that to establish the defense of justifiable homicide it must be shown that the deceased did not provoke the quarrel. A man who provokes another man into a quarrel and then claims self defense-- such a defense is not recognized. I cannot pick a quarrel with you and then shoot you, and the Court will charge you that so plainly that no jury can get away from it. This defendant engaged Lapaglia in a quarrel, Lapaglia attacked him, and I don't care what Lapaglia did after he had been provoked into a quarrel, the man killing him could not invoke the doctrine of self defense and say, "I shot because Lapaglia attacked me."

Now, that brings me to this simple question, that the defendant had his revolver in his pocket loaded with cartridges and ball. If that was in his pocket at six o'clock in the afternoon and if he went to Joseph Frangipani and Pasentino and these other men and told them that he was going to kill Lapaglia that night, is there any doubt in the world but that this quarrel that we hear so much about, and this abusive language that you hear so much about, was the very thing that this man wanted to cover the purpose expressed earlier in the evening. There is not any doubt

about it in the world, and if that is so, gentlemen, you have the clearest case of premeditation and deliberation that I have ever heard of, outside of a case of poison. Why, you cannot usually get evidence like this. It is the only Italian case that I have ever tried where the witnesses did not seem to be trying on the one hand to swear the defendant into the chair and on the other hand to swear him out of it. Every single witness in this case, with the possible exception of that cooney, old electrician, appealed to me as trying to tell the truth. Damma struck me very much that way. "I tell the truth", that was his attitude, "although I hate to do it."

If you find that these threats were made by the defendant, and you cannot find anything else, every bit of evidence in the case sinks into insignificance besides it.

Now, there is the whole case in a nutshell. I suppose I could go on and talk for an hour, but my time is up as my friend so pertinently informs me.

This is not a case, gentlemen, where I can afford to exchange jokes with counsel for the defendant. It is not that kind of a case. It is a case where the jury are under an extremely solemn obligation, an obligation which cannot be faced with a smile.

You are sworn absolutely to render a verdict in

accordance with the evidence.

The charge against this man is murder in the first degree. It is not murder in the second degree. It is not manslaughter, it is not anything but murder in the first degree. That is the charge against this defendant. If you find he killed the deceased and that is conceded-- if you find that he intended to kill him, which is practically conceded, and find that he did not have what the law calls legal justification (which you now can find), you will then be asked to say how the man can be guilty of anything but murder in the first degree who admits he has the pistol and three or four hours before the killing predicts the act that is going to take place.

Now, compromises, gentlemen, are violations of your oaths. There is no question about that and the Court will charge you that, I haven't a doubt of it, if I asked the Court to charge-- that a compromised verdict is a violation of your oaths. The Court will do so if I ask it.

You are sworn to render the precise verdict that your minds tell you is right and if the defendant did premeditate this act of killing and strove to take the life of Lapaglia, and did take his life, he is guilty of only one crime and that is murder in the first degree, and for that verdict I ask you on this evidence.

CASE # 600

- THE COURT'S CHARGE -

GOFF, R.:

An indictment was presented by the Grand Jury of this County against the defendant Leonardo Brancato charging him with the crime of murder in the first degree for the killing of one Francesco Lapaglio on the 1st of June, 1906, in this County.

There are some questions here at the threshold of your inquiry that I wish to impress upon you as rules for the government of your conduct as jurors.

The law presumes the defendant to be innocent until he be proven guilty, and when the proof of his guilt convinces your minds beyond a reasonable doubt, then the presumption of innocence is destroyed.

The burden of proving the defendant's guilt rests with the prosecution throughout the case, and at no time during the trial is the defendant bound to prove his innocence.

CASE # 600

Upon all the evidence and lack of evidence, the defendant is entitled to the benefit of a reasonable doubt upon every material question necessary to his conviction.

You are the exclusive judges of all questions of fact in the case. You must accept the instructions that I give you upon the law of the case and you must accept those instructions without question and obey them, so that when you are in possession of the knowledge of the law applicable to the case, you are then in a position to apply that law to the facts in the case and determine on those facts whether the defendant committed the crime charged against him.

It is the law that where a crime consists of several degrees and a jury be in doubt as to which of the degrees of crime the defendant is guilty of, he is entitled to the benefit of a reasonable doubt as to each degree, and the jury in such case are bound to give him the benefit of the reasonable doubt as to any particular degree of crime and go on and consider the next degree of crime, as to his

CASE # 600

guilt or innocence of that degree.

Now these are general rules which you will remember and you must be guided by them in your consideration of the evidence in this case.

There are some conceded facts in this case which will enable you to proceed to your inquiry with facility.

It is conceded by the learned counsel for the defense that Francesco Lapaglio was on the 1st day of June shot by the defendant by means of a revolving pistol held in his, the defendant's hands at the time, and that from that shot Francesco Lapaglio died. So that on the question of the death of Francesco Lapaglio and that his death was caused by the defendant, who fired at him with a pistol, there is no question. That will enable you to proceed to a consideration of the evidence and a determination, on that evidence, of the questions of fact which will be submitted to you by me under the rules of law applicable to those questions of fact.

"The killing of a human being is homicide,

and homicide is either murder, manslaughter, justifiable or excusable homicide."

"Murder in the first degree, is the killing of a human being when committed from a deliberate and premeditated design to effect the death of the person killed".

"Murder in the second degree is the killing of a human being when committed with a design to effect the death of the person killed, but without deliberation and premeditation."

"Manslaughter in the first degree is when such homicide is committed without a design to effect death in the heat of passion, by means of a dangerous weapon."

Mr. Townsend, do you request the Court to charge manslaughter in the second degree?

MR. TOWNSEND: No, sir.

THE COURT: Then by consent of counsel, I

will not charge you manslaughter in the second degree. I find that the simpler the instructions of law are to a jury the less likely they are to be confused. It is a difficult thing for gentlemen called

from their various vocations in life to serve upon a jury in a court, without any legal training or experience to, at the first blush, clearly understand the rules of law and the application of those rules of law to the case before them. In reading you the statutory definitions of the crime of murder in its various degrees, I have eliminated all the language that is not absolutely necessary to the essence of the statute, and it shall be my purpose to present to you the rules of law in as plain and simple a manner as the language of the statute permits me to do.

I have read you the definitions of the statute defining murder in the first degree, murder in the second degree, and manslaughter in the first degree.

The definition of murder in the first degree contains those essentials. They are the killing of a human being with a design to kill as a result of premeditation and deliberation. I think you will find it not difficult to understand that in order to convict an ac-

CASE # 600

cused person of murder in the first degree it must be shown to your satisfaction beyond a reasonable doubt that he killed a human being with a premeditated and deliberate design to effect his death.

Murder in the second degree is the killing of a human being with a design to kill a person, but without premeditation and deliberation.

Manslaughter in the first degree is the killing of a human being without a design to kill, but in the heat of passion and by means of a dangerous weapon.

I have reiterated the statutory definitions in order to impress upon your minds by the clear and concise statements contained in those definitions a clear conception of what constitutes murder in the first and second degrees and manslaughter in the first degree, and I will endeavor, if it be necessary to make it even more clear by pointing out to you the distinguishing features between those three degrees of crime. First, as you remember, murder in the first degree is that the killing must be done with a premeditated and deliberate design to

CASE # 600

7

effect the death of the person killed. Murder in the second degree is that there be a design to kill without deliberation and premeditation. So that the difference between murder in the first degree and murder in the second degree is the absence of premeditation and deliberation. A design to kill must be present in both degrees of crime.

Manslaughter in the first degree is killing without a design to kill, in the heat of passion, by means of a dangerous weapon.

So that in manslaughter there are eliminated the design to kill and premeditation and deliberation upon that design to kill; but the sudden killing of a human being in the heat of passion and by means of a dangerous weapon is manslaughter in the first degree.

I cannot convey to you by my own words as clear a statement of the elements necessary for the crime of murder in the first degree as that which is contained in the decision of our Court of Appeals, the highest court in our State, the court that interprets and lays down the law, the court that illumines the law by

0630
CASE # 600

its interpretation and which must bind judges and juries . In the case of the People against Leighton, Judge Danforth says:

"If the killing is not the instant effect of impulse, if there is hesitation or doubt to overcome a choice made as the result of thought, however short the struggle between the intention and the act, it is sufficient to characterize the crime as deliberate and premeditated murder."

Remember that language. The learned Judge there says, in speaking for the court:

"No matter how short the struggle between the intention formed and the act of the carrying out of the intention, it is sufficient to characterize the crime as deliberate and premeditated murder."

In the case of the People against Majone, Judge Earl speaking for the Court, said:

"Under the statute there must be not only an intention to kill, but there must also be a deliberate and premeditated design to kill."

CASE # 600

Such design must precede the killing

by some appreciable space of time, but the time need not be long. It must be sufficient for some reflection and consideration upon the matter, for choice to kill or not to kill and for the formation of a definite purpose to kill."

"The human mind acts with celerity which it is sometimes impossible to measure, and whether a deliberate and premeditated design to kill was formed, must be determined from all the circumstances of the case."

Now, in those two excerpts from the opinions of the learned judges that I have read to you, is contained the whole law, so far as the Jury is concerned, of murder in the first degree.

So that the jury may find, if evidence be submitted to them, that a man who had a loaded revolver in his pocket and who knew it was loaded, and who drew the revolver out from his pocket with an intent to kill, and from the time he seized the revolver, during the process

CASE # 600

of his taking it from his pocket and raising it to a point at which he would fire and pulling the trigger, that in that short space of time there was sufficient opportunity and time for a person so using the revolver to reflect upon his act and to choose whether to pull that trigger or not to kill his intended victim. The jury may find whether or not there was time for him to reflect, and in the words of the Court of Appeals, to choose whether to fire the fatal shot or not. If there was time for him to do that and he elected to fire the fatal shot, under the rules of the Court of Appeals there was sufficient time for deliberation and premeditation and design to kill, and the jury may so find.

The jury may also consider the opportunity of the defendant on trial. I use again the words of Judge Earl: "The human mind acts with celerity which it is sometimes impossible to measure." Some men are quick of thought as well as quick of action; other men are slow and sluggish of thought. Each man must be judged on his own merits. Some men are slow

to think and slow to act; other men are quick to think and quick to act, and the jury must determine from the circumstances of each particular case.

In your inquiry as to whether or not there was deliberation and premeditation here, you have a right, and it is your duty to consider, so far as the evidence in this case discloses the relations between the defendant and the deceased before the time of the shooting. The prosecution contends here before you that as early as December in 1905 trouble arose between the defendant and the deceased and that that trouble arose out of the playing of a game called tucce.

The learned District Attorney contends that even if accepted as true what the defendant himself states, that he had the pistol, that he fired two shots out of it on the 4th of July, 1905, that then he put it under his bed, and he let it remain there until the 1st of June, 1906, the day when the killing was done by him; that he took the pistol from his bed that day with the intention of killing the de-

ceased, and that there was no other reason for his taking that pistol out but to kill the deceased; that he declared to some witnesses, whose names I now forget but I am sure that you will remember them, that he intended to shoot Francesco. While I am speaking on this matter, I might say to you that if at any time during my charge I fall into error regarding the testimony of any witness in the case, you must correct the error and rely upon your own memories and good judgment as to the testimony.

The District Attorney contends that these acts show that the defendant conceived a design to kill and that he premeditated and deliberated upon that design to kill before carrying it into execution. On the point of the pistol, the defendant says that on the day before the shooting he thought that he would have it cleaned, and that he went to Maggio, this Italian gunmaker, to ask him if he would clean the pistol and put it in order, and that he, Maggio, told him that he could do the job. That the next day the defendant put the pistol in his coat pocket at seven o'clock in the morning; that he went to Maggio's shop and found Maggio's shop closed, and

could not give him the pistol for repairing or cleaning, and that he kept the pistol all day in his pocket.

The District Attorney meets that statement of the defendant by his contention that that was a pretence, even if true, that it was part of a deliberate and premeditated design on the part of the defendant to kill the deceased, and that in order to prepare the defense for such killing that he said he would take out this pistol for the purpose of having it cleaned, when in reality his purpose was to kill the deceased. Whether or not, as I said before, that argument be founded upon good reason and evidence, is for you to determine. I simply submit to you the salient points of the contention of both sides on that point.

I will not advert to other matters of testimony in the case, because I am sure you have a clear recollection of that testimony, and I simply refer to these few points in order to impress upon your minds those features of the case on which stress is laid by both the prosecution and the defense.

If you should not be convinced beyond a reasonable doubt that the defendant did kill Francesco Lapaglio from a deliberate and premeditated design,

you should give him the benefit of that reasonable doubt upon that degree of crime and consider then whether or not he is guilty of the crime of murder in the second degree, and upon that I need only say to you, in the words of the statute, that if the defendant drew the pistol and then formed a design to kill, even if he had not premeditated and deliberated upon that design, he would commit the crime of murder in the second degree.

Now, there is an element with regard to the presence of deliberation and premeditation which I should have called your attention to, and I will revert to that subject for the purpose of doing so, and that is, that the Jury may take into consideration the nature of the weapon used in forming their conclusion as to whether or not murder in the first degree was committed. As an illustration: A man who carries a loaded revolver when he knows it is loaded, the Jury may inquire where did he carry that loaded revolver; did he carry it in an inside pocket or an outside pocket of his coat. If he carries it in an inside pocket, would it be an indication of his desire to have it for ready use. If he carried it

CASE # 600

in an outside pocket, would it be an indication of his desire to have it convenient to his hand to use immediately; and then you may take into consideration what did this man carry a loaded revolver for? Did he carry it for protection or self-defense, or did he carry it for the purpose of assault upon some other man?

On the other hand, in an altercation, for instance, a man might suddenly seize a weapon at hand, a knife or a hammer or an iron bar, or something at hand, and strike the other man with it and kill him instantly. There a jury might very well say that the use of the weapon in killing was not an indication of premeditation and deliberation or preparation for the commission of the crime, but that it was simply the use of a weapon found ready at hand and possibly under the influence of passion, without either design to kill or without premeditation and deliberation. I simply draw this illustration not as applicable to this case but to aid you, gentlemen, as much as possible to have a clear understanding of the conditions which confront a jury and upon which they must pass in determining the guilt,

CASE # 600

1
or the innocence, or degree of guilt of an accused person.

If you should find that the defendant killed the deceased and that at the time he killed him he had not a design to kill him, or that he did not premeditate or deliberate on that design, you will have to acquit him of murder in the first and second degrees of and come to the consideration whether or not he committed the crime of manslaughter in the first degree. The commission of that crime would depend upon your finding upon this evidence that the defendant in the heat of passion shot Francesco Lapaglio, but without a design to kill him.

In my instruction to you that it is your duty to give to the defendant the benefit of a doubt on the different degrees of crime, I will say to you that the law vests great discretion in the jury. They are the absolute judges of the facts, and in the exercise of that discretion no power can interfere with them. Each Juror is a judge of the facts, and he should be bound by those obligations which rest upon all judges, to render his judgment in the form of a verdict after carefully deliberating and justly

CASE # 600

considering all of the evidence and when that evidence forces a conclusion upon his mind, whatever that conclusion may be, he then should render his verdict in accordance with the evidence, without fear or hesitancy. It becomes a sacred and bounden duty upon him to do so. In applying the rule of a reasonable doubt to the different degrees of crime, the law does not contemplate that the jury, with all its wide discretion, should act capriciously or frivolously in using this great power. The law contemplates that the jury shall in all respects act in conformity with the evidence and according to the dictates of their own consciences. Should the Jury be satisfied that the accused on trial committed the highest degree of crime of which he is charged, they should unhesitatingly so declare by their verdict, and they should not consider any lesser degree of crime for the purpose of exhibiting or expressing any sympathy to the accused or from feelings of delicacy or hesitancy of doing what may be an unpleasant duty.

The defendant has taken the witness stand in his own behalf. He had a right to do that, and he becomes a witness the same as any other witness in the

CASE # 600

case. If a witness has not testified truly, the Jury can disregard his testimony. They can give such weight to the testimony of any witness as they think it is entitled to.

The defendant, having become a witness in his own behalf, submits himself to the tests which may be applied to every other witness in the case. Has he told the truth, is he actuated by a motive to testify untruly? These are questions that you may ask yourselves. Is the fact that he is here accused of crime a sufficient motive for him to testify untruly to escape the situation in which he finds himself? You must determine that question.

Without narrating the defendant's testimony at all, I may briefly sum it up by saying that from his testimony there is interposed the defense here known as self-defense. He admits the killing by shooting the deceased, but in effect he says, "I did it in self-defense."

Upon that point I wish to instruct you at the outset that the law of self-defense is the law of necessity and the law of the state simply embodies that law of necessity that is implanted in every human heart, that is, self-preservation in the pro-

4

tection of life. In recognizing that law of necessity, the law of the state surrounds its exercise with rules that have been found conducive to an eliciting of truth and to the protection of human life. The man who kills another cannot say before a jury, "I killed him in self-defense" and be acquitted because he says so. That is not the law. If such were the law, every man would be justified in taking the law into his own hands and becoming his own judge and executioner of his enemy. Of course, you can very well understand that chaos would be the result if such action was to be tolerated, but that is not the law. The law says that where the killing of a human being is claimed to have been done in self-defense, that all the facts and circumstances relating to the killing must be subject to judicial review, and that means to the review of a jury upon the question of fact, under the instructions of the Court as to the law constituting self-defense.

The statute upon that point is as follows:

"Homicide is justifiable when committed in the lawful defense of the slayer, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or

CASE # 600

to do some great personal injury to the slayer and there is imminent danger of such design being accomplished."

You do not require excusable homicide read to the jury?

MR. TOWNSEND: You ask me whether I require it charged or not?

THE COURT: Yes.

MR. TOWNSEND: I dare say the Court should charge that.

THE COURT: I will read it to you:

"Homicide is excusable when committed by accident and misfortune in lawfully correcting a child or servant or in doing any other lawful act by lawful means with ordinary caution and without any unlawful intent."

Gentlemen, you can see whether that has any application to the evidence in this case or not. It is for you to determine.

I revert again to the contention of the defense of self-defense and to the words of the statute that homicide is justifiable when committed in the lawful defense of the slayer, when there is reasonable ground

CASE # 600

to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer and there is imminent danger of such design being accomplished." That is, the danger of such design being accomplished must be actually present at the time, is not to be determined upon what may take place in the future but it must be actually present at the time a human life is taken in self-defense.

Our Court of Appeals in an early case in this State, the People against Shorter, laid down the rules which have been followed without departure and are recognized as the law of this State regarding self-defense. The learned Court there said:

"When

one who is without fault himself is attacked by another in such a manner, or under such circumstances as to furnish reasonable ground for apprehending a design to take away his life or to do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, I think he may safely act upon appearances and kill his assailant if that be necessary,

CASE # 600

to avoid the apprehended danger and the killing will be justifiable, although it may afterwards turn out that the appearances were false and that there was in fact neither design to do him serious injury nor danger that it would be done. The accused must decide at his peril upon the force of the circumstances in which he is placed, for that is a matter which will be subject to judicial review."

In the case of the People against Sullivan, the same Court said:

"If the defendant believed himself about to be attacked, his duty was to avoid the attack if in his power to do so, and the right to defend himself would not arise until he had done everything in his power to avoid the necessity of defending himself."

In the case of the People against Constantine, the Court says:

"The question whether the defendant was acting in self-defense when he shot the deceased was manifestly a question of fact for the jury. When one believes himself about to be attacked by another and to receive great bodily injury, it is his duty to avoid the attack if in his power to do so,

CASE # 600

and the right to attack for the purpose of self-defense does not arise until he has done everything in his power to avoid the necessity."

In the case of the People against Johnson, it was said in the same Court that

"Before one can justify the taking of life in self-defense, he must show that there was reasonable ground for believing that he was in great peril and that the killing was necessary for his escape from the peril, and that no other safe means of escape was open to him."

FIRST JUROR: Is the attacked one bound to run away? Is he obliged to run away if he is attacked by some one and he cannot help himself, is he bound to run away and not to shoot?

THE COURT: Mr. Foreman, I will read from one of the opinions of the Court of Appeals that I have

CASE # 600

already read to you:

"When one believes himself about to be attacked by another and to receive great bodily injury, it is his duty to avoid the attack if in his power to do so, and the right to attack for the purpose of self-defense does not arise until he has done everything in his power to avoid the necessity."

If a man be attacked or about to be attacked, and if it is in his power to do so with safety, he is bound to avoid the necessity of using a deadly weapon and taking human life, and it is for the Jury to say that if the defendant here was attacked or about to be attacked, and if he had it in his power with safety to himself to avoid the necessity of using the pistol and taking human life. Does that answer your question?

FIRST JUROR: That satisfies me, your Honor.

THE COURT: The defendant says that the deceased kicked him in the groin. There was a person between the deceased and the defendant trying to separate them. A witness for the prosecution has testified that the

CASE # 600

deceased did kick at the defendant around the person of the man who stood between them. If I recollect the testimony correctly, he did not say that the kick reached the person of the defendant. Am I correct, Mr. District Attorney?

MR. TRAIN: My impression is that he said that it did not reach.

SECOND JUROR: I think he said he did not know.

THE COURT: It is my impression that he did not know whether it reached or not. The defendant says it did reach him and it struck him in the groin. The defendant says that thereupon he seized the pistol from his pocket and shot the deceased in the neck over the person of the man who stood between them.

It is for you to say, gentlemen, under the rules which I have laid down to you, whether or not there was imminent danger of great bodily harm to this defendant in that situation and whether or not it was in the defendant's power to avoid the necessity of shooting that pistol.

CASE # 600

The defendant claims that the deceased used
approbrious language to him, and on that question,
gentlemen, I have to charge you that no matter how
opprobrious the language is that may be used or how
aggravating it may be, the law will not justify the
killing of a person on that ground. It is exceed-
ingly reprehensible, if true, that the deceased should
have used such words, if he did use them, but no mat-
ter what words are used, they do not furnish ground
for justification on the part of a man who kills
another, simply because of the use of abusive or
aggravating language. Self-defense can only be
sustained when under the rules of law that I have
read to you there is reasonable ground on the part
of the defendant to apprehend great bodily peril
from the danger that is imminent to him, not
from the use of language vile or otherwise, but
there must be danger of great bodily peril or
harm from which danger he cannot escape with
safety to himself and the only way for his protec-
tion is to have recourse to the supreme act of
killing another in self-defense.

It is for you to treat the contentions as you

CASE # 600

do the contentions of the learned Counsel for the defendant, that is, to treat it in accordance with the evidence before you, and if such contentions be not sustained you may disregard them.

The defendant has introduced testimony of good character for peace and quiet. Such evidence is proper to be submitted to a jury. It is the law that evidence of good character may of itself create a reasonable doubt where otherwise it would not exist, no matter how conclusive the evidence of guilt may be. Evidence of good character, like all other evidence submitted to you, is purely for your consideration, and you can give to it that weight that you think it entitled to. If, after a consideration of all the evidence before you, including that of good character, you come to the conclusion beyond a reasonable doubt that the defendant unjustifiably killed Francesco Lapaglio, it would be your bounden duty to render a verdict of guilty of such degree of crime as you are convinced he committed.

I have instructed you as to the reasonable doubt. A reasonable doubt is a difficult thing to define.

Each Juror must be his own judge under the light of his own conscience as to what is a reasonable doubt. Indeed, definitions of what is a reasonable doubt sometimes tend more to confuse than to enlighten the minds of jurors. Our highest Court has stated that a reasonable doubt must be a substantial doubt, based upon the evidence or want of evidence, and not a mere surmise or conjecture that the defendant may not be guilty. If after a fair review and consideration of the evidence you entertain a reasonable doubt upon the whole case or upon any material fact in the case necessary to establish the defendant's guilt, it is your duty to give him the benefit of that doubt and to acquit him, but if upon a consideration of all the evidence, with such inferences as fair minded intelligent men have a right to draw from the facts which have been established, you have such a conviction of the defendant's guilt, that a prudent man would feel safe to act upon, in matters of the highest concern and importance to himself, you may fairly and safely say that the case is established beyond a reasonable doubt, for when the law says a reasonable doubt, gentlemen, it does not mean that

the guilt of a defendant must be proven and demonstrated to a mathematical certainty. That is not within the power of the human mind to do in all cases. Few things of human inquiry are susceptible of proof or demonstration to a mathematical certainty, but such demonstration or proof is not required in a court of law. This is a human tribunal and it must deal with human implements and means to ascertain the truth, and in doing so, all that is required is that the jury shall be satisfied to a moral certainty, not to an absolute certainty but to a moral certainty, beyond a reasonable doubt, that the defendant committed the crime charged.

The learned counsel for the defendant has handed me up some requests to charge. I will read those requests that I will charge and not read those that I refuse to charge. I may say, Mr. Townsend, that it is my impression that in my main charge I have included, I think, all of your requests.

MR. TOWNSEND: I think you have as far as the second and third request is concerned. I will ask your Honor to read the first request.

THE COURT: "First: If the Jury should find that the defendant was in no danger from the deceased of bodily

CASE # 600

harm, but defendant believed himself to be in danger, although no danger may have existed, defendant was justified in shooting deceased."

I so charge.

The Fourth Request is "The burden of proof rests on the Prosecution, and if in the whole evidence, including that of the defense, as well as that of the Prosecution, the jury entertain a reasonable doubt of the guilt of the accused he is entitled to the benefit of that doubt and must be acquitted."

I so charge.

The Fifth Request is "That when the Prosecution has made out a prima facie case, the burden of proof is not on the defense to satisfy the jury of his innocence, but the burden of proof is all the time on the Prosecution."

I charge that, although I think I have already charged it.

The Sixth Request has been repeatedly charged. I refuse to recharge it.

The Seventh Request is "In order to prove the justification which the law contemplates, it is not necessary for the defendant to establish that, in fact, great personal injury would have been actually

CASE # 600

inflicted."

I so charge.

The Eighth Request is "The defendant had a right to act upon appearances, and if they were of such a character as to furnish a reasonable ground for believing such danger to be imminent, he was justified in acting upon such appearances, and should be acquitted."

That is charged.

The Ninth Request is already charged.

The Tenth Request is already charged.

The Eleventh Request is already charged.

The Twelfth Request is "If upon the whole testimony there is a reasonable doubt raised in the minds of the jury as to whether the defendant was justified or not, he was entitled to the benefit of such doubt, and, if it existed, to an acquittal."

I will charge that, though it has been charged before.

MR. TOWNSEND: If the Court will turn over the page and charge as requested?

THE COURT: "I ask your Honor to charge that the presumption which arises as to the defendant's good character, from the testimony given, may of itself be

CASE # 600

sufficient to raise a reasonable doubt as to the defendant's guilt."

"I ask your Honor to charge that the guilt of the defendant must not depend upon the result of the pistol shot but upon the condition that existed at the time the shot was fired."

I charge those requests, and remind the jury that I have already instructed them that it is for them to consider what weight and importance they will give to the testimony as to good character.

I think those are all the charges.

Now, gentlemen, I will submit this case to you. I am sure that you will treat it justly and impartially and courageously. In determining the questions before you, you must not, in the exercise of your good judgment, be swayed from the performance of your plain duty, whatever that duty may appear to you to be, by any vague or conjectural making of a possible mistake. All that the law requires of you is to decide now on the evidence before you according to your best judgment, guided by your own consciences. When you do that, you perform your duty as jurors. If you do not do that, you fail to perform your duty as jurors.

Your verdict will be either guilty of murder

CASE # 600

in the first degree, or guilty of murder in the second degree, or guilty of manslaughter in the first degree or not guilty.

You may retire.

The following is a copy of defendant's requests to charge:

FIRST: If the jury should find that the defendant was in no danger from the deceased of bodily harm, but defendant believed himself to be in danger, although no danger may have existed, defendant was justified in shooting deceased.

SECOND: One who is without fault himself, when attacked by another, may kill his assailant, if the circumstances be such as to furnish reasonable grounds for apprehending a design to take away his life, or to do him some great bodily harm, and there is also reasonable ground for believing the danger imminent that such design will be accomplished, although it may afterward turn out that the appearances were false and there was in fact no such design nor any danger that it would be accomplished.

THIRD: Homicide is justifiable when committed in the lawful defense of the slayer and there is reasonable ground to apprehend a design on the part of

the person slain to commit felony or to do some great personal injury to the slayer and there is imminent danger of such design being accomplished.

FOURTH: The burden of proof rests on the prosecution, and if in the whole evidence, including that of the defense, as well as that of the prosecution, the jury entertain a reasonable doubt of the guilt of the accused he is entitled to the benefit of that doubt and must be acquitted.

FIFTH: That when the prosecution has made out a prima facie case, the burden of proof is not on the defense to satisfy the jury of his innocence, but the burden of proof is all the time on the prosecution.

SIXTH: If the circumstances were such that the defendant had reasonable ground to apprehend some great injury to his person by the deceased at the time he committed the act resulting in death, it is your duty to acquit the defendant.

SEVENTH: In order to prove the justification which the law contemplates, it is not necessary for the defendant to establish that, in fact, great personal injury would have been actually inflicted.

EIGHTH: The defendant had a right to act upon appearances, and if they were of such a character as to furnish a reasonable ground for believing such

danger to be imminent, he was justified in acting upon such appearances, and should be acquitted.

NINTH: If upon all the testimony a reasonable doubt is presented of the defendant's right to believe that he was in great danger of bodily harm, he is entitled to the benefit of such doubt and should be acquitted.

TENTH: The burden is upon the prosecution throughout the trial to establish the crime charged beyond a reasonable doubt, and if upon the whole case, considering all the testimony given by the prosecution and by the defendant, there arises a reasonable doubt of the defendant's guilt, he becomes entitled to an acquittal; and this doubt applies to the question of justification as well as to every other question which is essential to be proven in order to establish the commission of the crime charged, the burden of establishing the guilt of the defendant in every essential aspect rests upon the prosecution even as to proving the want of justification.

ELEVENTH: The burden of justifying or excusing the shooting does not rest upon the defendant, but the want of justification, as well as every essential element in the case rests upon the prosecution, and must be proved by them beyond a reasonable doubt.

TWELFTH: If upon the whole testimony there is a reasonable doubt raised in the minds of the jury as to whether the defendant was justified or not, he was entitled to the benefit of such doubt, and, if it existed, to an acquittal.

People vs. Bonier, 179 N. Y., 315:

I ask your Honor to charge that the presumption which arises as to the defendant's good character, from the testimony given, may of itself be sufficient to raise a reasonable doubt as to the defendant's guilt.

People vs. Dankberg, 91 App. Div., 70:

I ask your Honor to charge that the guilt of the defendant must not depend upon the result of the pistol shot but upon the condition that existed at the time the shot was fired.

CASE # 600

New York, October 30, 1906.

(The defendant being arraigned for sentence.)

MR. TRAIN: If the Court please, in the case of the People against Leonardo Broncado, the defendant having received a full and fair trial by a jury of his peers and a verdict against him having been rendered of murder in the first degree, I move that the Court now impose a sentence of death upon him.

MR. TOWNSEND: If the Court please, the defendant moves for a new trial upon the following grounds.

First. Because the verdict convicting the defendant of murder in the first degree is contrary to law, against the evidence and against the weight of evidence.

Second: Because the Court erred in denying the defendant's motion to recommend a verdict of acquittal.

Third. Because at the trial the Court admitted illegal and improper evidence against the defendant's objection.

Fourth. Because at the trial the Court refused to admit legal and proper evidence offered

by the defendant.

Fifth. Because the case of the defendant was tried and submitted to the jury upon an unfounded and erroneous theory, namely of deliberation and premeditation on the part of the accused, which was prejudicial to him and which exercised a controlling influence upon the mind of the jury in reaching the verdict of murder in the first degree.

Sixth. Because such erroneous theory of deliberation and premeditation on the part of the defendant is manifest in and throughout the whole charge of the Court herein, when in fact such erroneous theory is fully answered by the evidence and is directly against and contrary thereto and to the weight thereof.

The defendant moves in arrest of judgment upon the following grounds:

First. Because the evidence at the trial did not make out a case justifying a verdict of murder in the first degree.

Second. Because the evidence at the trial failed to sustain the indictment, or to show that the defendant was guilty of the crime charged or

of any crime whatever.

Third. Upon all the evidence in the case it was clearly shown that the defendant acted in self-defense and under great provocation and therefore should have been acquitted or if found guilty should have been convicted of a lesser offense than murder in the first degree.

THE COURT: The motion for a new trial and the motion in ~~the~~ arrest of judgment is denied.

Exception.

THE COURT: Leonardo Broncado, the judgment of the Court is that you, Leonardo Broncado, for the murder in the first degree upon Francesco Lapaglia, whereof you are convicted be and you are hereby sentenced to the punishment of death.

And it is ordered that within ten days after this days session of the Court the Sheriff of the County of New York deliver you, together with the warrant of this Court to the Agent or Warden of the State Prison of the State of New York at Sing-Sing where you shall be kept in solitary confinement until the final execution of this sentence and that upon some day in the week beginning Monday, the 10th

CASE # 600

day of December, 1906, the said Agent or Warden
of the State Prison of the State of New York at
Sing-Sing is commanded to do execution upon you,
Leonardo Broncado, in the mode and manner prescribed
by the law of the State of New York.

CASE # 600