

the nature of cross-examining his own witness. He says he was in bed.

THE COURT: It is already answered. Go on, please.

BY MR. LE BARBIER:

Q Were you in bed when you called out these words to your wife? A Yes, sir.

Q "No, no, don't open"? A Yes, sir.

Q Was that the only bed in those premises? A Yes, sir.

Q What happened next? A My wife opened the door, and he come in. He come right on me, and he says, "You villia-co"(Illustrating).

MR. ELY: No, no. I object to this method of testifying. We are not having a pantomime here, sir. I suggest that he should keep his seat, and keep cool.

THE COURT: I will receive it. He may rise from his seat, and illustrate, if he wishes to do so, at this point.

MR. LE BARBIER: Your Honor says you will receive it; do you?

THE COURT: Yes.

THE WITNESS: May I proceed?

THE COURT: Yes.

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BY MR. LE BARBIER:

Q Go on. His Honor says that you may state that?

A He says, "You villiaco, you told your wife that I am drunk. I am not a drunkard. I am going to have a finish with you, to-night, and I am not afraid of you or your revolver," and he took me and swung me towards the closet there (Illustrating).

MR. ELY: Now, I object to this pantomime.

THE COURT: He has the right to illustrate, at this point.

BY MR. LE BARBIER:

Q Where were you? A Right in my bed room. And he comes right in as far as the door, and he caught me, and swung me to the closet, and I said, "Joe, I thought you were going home. What do you want to come back for? Didn't we say we were going to settle this matter to-morrow?" And he said, "How are you going to settle it? By discharging me?" And he said, "Well, you won't discharge me," and he went to swipe me. (Illustrating).

Q When he swiped you or struck you what did you do?

A I cowered (Illustrating).

Q What? A I dodged him (Illustrating).

Q Now then what next took place? A I looked at him, and I seen he was rushing for my revolver. I rushed for

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it, too, and we get there the same instant.

Q Both got there at the same instant? A Yes, sir, the same minute. I got my hand on the revolver (Illustrating).

He had his hand right on the top of it (Illustrating).

Q Where was this? In the bed room? A In the bed room.

Q Now proceed. State what followed? A He get a hold of me, and pulled me right off (Illustrating).

Q Pulled you where? A He pulled me from the bed room into the kitchen. And, after he pulled me in the kitchen, he twisted me around, and tried to push me, and I says, "Joe, why don't you go. Let me alone. Go away", and he said, "No, I won't go away. I'll kill you with your own revolver," and I said, "Joe, what you want to kill me? I never done nothing to yo u."

I was trembling (The witness weeps). And he said, "No. You want to discharge me, and I am going to kill you before you discharge me."

And he banged me, and banged me towards the closet, and always I cry for help, and I put all the strength I had in that right hand (Illustrating), and he was trying to snatch the revolver out of my hand, and never in my life had I so much strength in that hand, because I knew my life depended upon that hand.

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MR. ELY: I object to that, to the latter part of the answer, that he knew his life depended on that hand, and I move to strike it out.

THE COURT: Strike it out.

MR. LE BARBIER: Exception.

BY MR. LE BARBIER:

Q And did you fear then for your life? A I did.

Q And where were you when this struggle was going on, at this time? A I was near the window, with my back to the window.

Q And did he do anything? A He banged me to that window, and he tried to snatch the revolver away, and he got a hold of my wrist, and twisted my arm, this way, and he bit it (Illustrating).

Q And what happened to the window? A He broke it.

Q Did he seize hold of your arm, do you say?

MR. ELY: Objected to, as a repetition of the witness's testimony.

THE COURT: Objection sustained. Don't repeat. He has said so.

A (Answer continued). He twisted my arm, and bite it, and I pulled it, and the shots went off.

BY MR. LE BARBIER:

Q How many? A I don't know how many ring out. I

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couldn't swear to it.

Q And then what happened? A Then what happened?

Q Yes? A He reeled back, and he has got the revolver, and he has shot at me (Illustrating).

Q Got the revolver away from you? A Yes, sir.

Q, And shot at you? A Yes. From my hand he get the revolver.

Q And then what happened? A Well, my strength was gone, I was exhausted; I was wet with perspiration, and I fall in a chair.

Q Could you get away from him before you shot those shots?

A Pardon me?

Q Could you get away from him, before you fired those shots? A I couldn't get away from him.

Q Did you try to get away from him? A I try if I could, but I can't.

Q Did you have any wrong against Ciofolo?

MR. ELY: I object.

A Any what?

MR. ELY: Objected to.

THE COURT: Sustained.

MR. LE BARBIER: Exception.

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BY MR. LE BARBIER:

Q Did you have any ill feeling against Ciofolo?

MR. ELY: objected to.

A No, sir.

MR. ELY: Now, if your Honor please, that is a perfectly improper question.

THE COURT: Sustained.

MR. ELY: And I ask your Honor to strike out the answer, and direct the jury to disregard it.

THE COURT: yes; strike it out. And the jury will disregard it.

BY MR. LE BARBIER:

Q Do you know Officer Tarpey? A Yes.

Q Did you see him that night? A (No answer)

Q (Question repeated) A Well, if you show me where he is, I'll tell you. I see an officer.

Q No. Did you see him on the night of July 20th?

MR. ELY: he says that, if you show him the officer, he will tell you whether he saw him that night or not.

BY MR. LE BARBIER:

Q Did you see that officer, that night (indicating Officer Tarpey)? A Yes, sir.

Q Did you see him at your house? A I don't remember;

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I don't think so; I don't remember all.

THE THIRD JUROR: If your Honor please, can I ask the witness a question?

THE COURT: Yes.

BY THE THIRD JUROR:

Q I heard you say that, when Joe Ciofola left, the first time, you say he went out, and the door closed, and there was a Yale lock on the door? A Yes, sir.

Q And the attorney asked you, "And then what?" And you started to say, "My wife upbraided me"? A My wife start to speak to me, sir.

Q Well, you said upbraided you? A Yes, sir.

THE COURT: Put the question.

THE JUROR: Well, I just wanted to see if I heard it right.

THE FOREMAN: Well, wasn't that stricken out, if your Honor please?

THE COURT: Well it seems to come in now, by consent. The juror asked the question, and I heard no objection from counsel for the defendant.

MR. LE BARBIER: No, sir, I don't object.

THE THIRDJUROR: No, your Honor, it wasn't stricken out. It was the end of an answer.

THE COURT: Well, it is given now, without ob-

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jection, and you may consider it.

BY MR. LE BARBIER:

Q Now, with that in, I ask what the wife said?

MR. ELY: Objected to.

THE COURT: Sustained.

MR. ELY: However, I don't care. Let it in by consent.

THE COURT: Then you may tell it by consent.

A She said, "Well, I don't see why, one thing or another, there is always some kind of a trouble in this house," and I said, "Angelina, I don't do no trouble. It is your own brother, and he come to the house, and he raises trouble. What's the use of blaming me, when your own brother does raise trouble? It isn't I." Then there was a knock on the door.

MR. LE BARBIER: That's all. He's your witness.

CROSS EXAMINATION BY MR. ELY:

Q Now, Calandra, when you said that, that the brother, Ciofolo, was always coming to the house drunk, your wife answered, "No, he isn't drunk;" didn't she? A I think so; yes.

Q Now, do you remember -- did you hear Tarpey testify at the Coroner's Court? A I think he testified, but I didn't hear what he said, on account of being a little deaf, sir.

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Q Now, I don't want to talk in a loud tone of voice to you, or any louder than I can help. A Yes, sir.

Q And, if you don't hear me, just say you don't, because I am going to talk just in this tone of voice. You understand? A Yes, sir.

Q Now, do you remember that Tarpey said, that, on the night in question, that is, the 20th of July, 1906, he asked who did the shooting? Did you hear him say that, in the Coroner's Court? A Who asked me?

Q This officer, Tarpey. Do you remember that? A Well, on the night of the 20th of July --

Q Do you understand my question? A Yes.

Q Well then answer my question. A Well, after all that --

THE COURT: No, just answer the question, briefly.

BY MR. ELY:

Q All that I asked you is whether you remembered Tarpey testifying, as I asked you, in the Coroner's Court? A Well, I want to explain to you.

Q No, I don't want any explanation. If you don't know, say no; and if you do, say yes. A Well, I don't recollect, sir.

Q Well, that's all right, then. You don't recollect?

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A No, sir.

Q Now you remember Tarpey coming into your house, 309 East 90th Street, on the 20th of July, 1906, after you shot Ciofolo; don't you? A Yes.

Q And who was there when Tarpey came in? A I don't remember who was there. I think my wife was there. I don't know.

Q Well, now, don't you remember, when Tarpey came in, he said -- asked who did the shooting? A Well, he may have done it.

Q Now please, if you don't remember, say so. A I don't recollect, sir.

Q I don't want you to say anything that you don't remember, at all. A All right, sir. I don't recollect, at all.

Q And you won't say that he didn't, though you don't recollect? A I don't recollect.

Q Now, don't you remember his asking your wife who did the shooting, and she going into the bed room, and pointing at you? A No, sir.

Q Well, now, as a matter of fact, when Tarpey came in, you were in the bed room; weren't you? A May be.

Q No, no. If you don't remember, say you don't remember?

A I don't remember, sir.

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Q All right. You don't remember? A No.

Q Now you remember that Tarpey had a conversation with you, that night; don't you? A My dear sir, I don't --

Q No, no, just answer the question. A My dear sir, I don't remember, sir.

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

MR. ELY: Now, come right up to the rail,
there, Tarpey.

BY MR. ELY:

Q Now, do you see this man (indicating the officer at the rail)? A Yes, sir.

Q And you remember seeing him on the night of the 20th of July; don't you? A Yes, sir.

Q And you remember seeing him in your rooms there?

A He was in my room, yes.

Q And don't you remember his having a talk with you?

A I might have a talk, but I don't remember the conversation.

Q Now please. I am not asking you now for the conversation at all. But you don't you remember having a talk with this man, in your room? A Well, I remember I had some talk with him; yes.

Q Now that's it. Now don't you remember Tarpey asked you who did the shooting? A I don't recollect.

Q You don't recollect? A No, sir.

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Q Don't you recollect that he asked you who the injured man was? A He might have done it.

Q No, no. I don't want what he might have done. He might have done a great many things. I am asking you about certain things that the People say happened, and I am asking you whether they did happen?

MR. ELY: Now, repeat the question to him, Mr. Stenographer.

(The stenographer repeats the question)

A (No answer)

Q Now don't you recollect that? A I don't recollect anything after the shooting. My head was in a twirl (illustrating) was in confusion.

Q What did you say your head was in?

MR. LE BARBIER: In a twirl he said; going around, I suppose.

MR. ELY: now, if your Honor please, isn't this entirely improper, this suggestion to the witness?

THE WITNESS: Going around.

MR. ELY: Now, then, Mr. Le Barbier should not suggest with such a witness as this.

THE COURT: No, do not interrupt, Mr. Le Barbier.

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BY MR. ELY:

Q Well how do you know that you were all wet with perspiration, if your head was all in a swirl and in confusion? A Explain me that, please.

Q You have stated that you were all wet with perspiration. Now how did you know that? A Well, I have strained my memory to remember all that happened, that night.

Q Yes. A And I remember so far as the shooting, and I remember I fall in the chair; and, after, I tried to recollect all I could, but I can't recollect anything, because I was excited, and I was all my head in confusion.

Q Well, now, don't you remember that you were taken around to the Police Precinct Station?

A Yes, I guess I was.

Q Well, don't you know that?

A I was in the Police Station; yes.

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Q Don't you know that you were taken around there?

A Yes, sir.

Q Well you recollect that; don't you? A I recollect I was in the Police Station; yes.

Q Now don't you recollect seeing your revolver around in the Police Station (Indicating People's Exhibit 3)?

A I don't remember if they show me the revolver or not, but I guess they done it.

Q Well I don't want your guessing, and I don't want you to say that you remember anything if you don't? A Well I think they showed me the revolver.

Q Now don't you remember seeing this revolver around at the Station House? A Yes, sir.

Q And don't you remember telling them that that was your revolver? A Yes, sir.

Q And don't you remember, now that we have talked about it, that Tarpey showed you that revolver in the Station House, and asked you whose revolver that was? A I don't recollect, sir.

Q Why, you heard Tarpey testify here, on the stand here; didn't you? A Yes, sir.

Q I say, you heard him? A I heard part of it.

Q Well all right. But do you remember hearing him tes-

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tify that ; that when he went in to see you, and talk with you, that you were cool and calm and collected? You remember him saying that? A I remember hearing him say that; yes.

Q But that wasn't the fact? A Well I think my exhaustion he takes for calm. My exhaustion he takes for calm; but I was without any strength.

Q You were without any what? A Any strength. I had no more strength on me. I was strengthless.

Q Now do you remember that he testified that your wife was walking up and down, and calling out to you, "What for you kill my brother? What for you shoot my brother?" Did you hear him say that? A I heard him say that on the stand.

Q You heard him say that when he was there (Indicating the witness stand)?

MR. LE BARBIER: Now if your Honor please, I protest. He says "I heard him say that on the stand", but Mr. Ely says, "you heard him say that, there, that night, did you?"

THE COURT: No. You misunderstood Mr. Ely. The question he asked was this, "You heard him say that when he was there (Indicating the witness stand)?"

MR. LE BARBIER: Well, if I misunderstood him, that is different.

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BY THE COURT:

Q Now did you hear him say that, on the night in question? A No, sir.

BY MR. ELY:

Q Did your wife say that, on the night in question?

A No, sir. I swear --

Q No, no. You are under oath. Did that happen?

A No, sir.

Q Did you hear it? A No, sir.

Q Well wasn't your wife running up and down there, in front of you? A I don't recollect. I didn't bother with my wife at all.

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

Q All right. Now don't you remember, or didn't you say to Tarpey, when Tarpey came into the premises, 309 East 90th street, on the evening in question, "I am here, officer. I won't run away. I shot him. I shot him in self defense"? A I don't recollect that at all.

Q Well, now, that is your defense here, isn't it? Your defense is self defense? A It might be --

Q Now please. If you don't understand my question you needn't answer it? A All right.

Q And, if the question is improper, if your counsel deems it improper, an objection will be made? A Yes, sir.

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Q And so don't argue with me, and just listen to the question, and try to answer it? A Yes, sir.

Q And your defense here is self defense; isn't it?

MR. LE BARBIER: Objected to, on the ground that it is the defense that the attorneys put in.

He is here as a witness, not to characterize his defense.

MR. ELY: I object to the question.

THE COURT: He may answer.

MR. LE BARBIER: Exception.

A I told my facts. I don't know what you call it.

Q Now, now, please. Isn't it? A I told my facts, and I don't know what you call it.

Q Now do you swear that, on the night of the 20th of July, 1906, you didn't tell Tarpey that you had shot him, referring to your brother-in-law, in self defense? A I will not swear, because I don't recollect.

Q And will you swear that you didn't tell him, at the same time, "This man is my brother-in-law, and he came to my home, and was drunk, and started a fight with me"? A I don't swear, because I don't recollect.

Q You don't recollect anything about that? A No, sir.

Q Your mind on that subject is an entire blank? A Yes, sir.

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Q And do you swear that you didn't tell him, that night, "He started to quarrel with me, and I seen him coming for me, and what chance would a small man like me have with a big man like him, and I reached for the pistol, and shot him".

A I don't recollect anything about that conversation at all.

Q You don't recollect anything about that conversation at all? A No, sir.

Q And do you remember Tarpey's asking you how many pistol shots you shot at him, and you replied, "Two or three." Do you remember that? A No, sir.

Q Wasn't it the fact? A I don't know if it is a fact or not, because I don't recollect.

Q Now when was it that you came to the opinion that you have stated there as a fact, that you shot two shots, and that he shot one shot, that the deceased shot one shot?

A Well, as soon as I remember it.

Q Well, now, how long after the occurrence did it take you to remember that? A I think, next day.

Q Oh, you remembered that, the next day? A Yes, sir.

Q Now you did go to the Police Station, of course, on the night of the 20th of July? A I did went to the Police Station. I remember that.

Q I beg your pardon? Eh? A I did went to the police

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station.

Q And, when you got to the Police Station, why, you were conscious; weren 't you? A Yes; I was kind of conscious.

Q Weren 't you conscious when Tarpey came into the house? A Well I think I was; yes.

Q And, when you got to the Police Station, you made a statement there, didn't you, before the desk? A I don't think I did.

Q Why, don't you remember telling Tarpey at any time that you would not run away? A Well I might have done it.

Q No, no. A But I don't recollect.

Q And that's the best answer you can make? A I don't recollect.

Q (Question repeated). A Yes, sir.

Q All right. Well, now, didn 't you tell Tarpey, on that night, that you saw him, referring to your brother-in-law, "coming for me, and I put my hand on the bureau, and got the revolver and fired"? A I don't recollect.

Q You don't remember whether you told him that, that night? A No, sir.

Q At any time? A No, sir.

Q Well isn't that what you told here, to-day? A What I told what? I don't understand the question.

Q Didn't you tell that here, to-day, "I seen him coming

for me, and I put my hand on the bureau, and got the revolver, and fired"? A I don't think I said that, to-day; no, sir.

Q You didn't say that? A No, sir.

Q Well but haven 't you told us, to-day, that you saw him coming for you? A He come at me, but I don't see him coming to me. He did come.

Q Well but didn 't you say that you saw him coming to you? Didn't you say, to-day, in your testimony, on the direct, that you saw the deceased coming for you? A I did not.

Q You didn't? A No, sir.

Q Now you say you were in the bed room; do you? A Yes.

Q And you were in bed? A Yes, sir.

Q And you had nothing on but your shirt and your underdrawers? A Undershirt and underdrawers.

Q They were the underdrawers? A Yes, the underdrawers.

I understand.

Q Yes. You understand, but I want to be sure? A Yes.

Q And how long had you been in bed? A How long I been in bed?

Q Yes; before you heard this knocking on the door?

A Well, say about five minutes.

Q And you were there, prepared to go to sleep? A Yes; I was prepared to go to sleep.

Q Had you the light out in the bed room? A No; there was no light in the bed room, at all.

Q That's what I asked you. There was no light at all in the bed room? A No; no light at all.

Q And then you say that your brother-in-law came in, while

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you were lying there in this dark bed room? A Yes, sir.

Q And he came into the kitchen; did he?

MR. LE BARBIER: Well, I object to that question. It doesn't appear that it was a dark bed room at all. He has characterized it, qualifying the light.

MR. ELY: He has just said that there was no light in the bed room, so it must have been dark.

THE COURT: Objection overruled.

MR. LE BARBIER: Exception. Now I move, may it please your Honor, to strike out the word "dark" in that question.

THE COURT: Objection overruled. Motion denied.

MR. LE BARBIER: Exception.

BY MR. ELY:

Q Well, there was no light in the bed room, was there?

A Well, I beg your pardon. There was no gas lit. But, if you mean a light from the kitchen, there was a light, has-light from the kitchen.

Q Well, I didn't ask you anything about that, about any gas light in the kitchen. A Well, if you don't give me a chance to explain --

Q (Question repeated). A There was a light from the kitchen.

Q But other than the light that came from the kitchen --
A Yes.

Q There was no light? A There was a gas light in the kitchen.

Q Well now, if you know what I am going to ask you, you can answer it, or, otherwise, you had better wait for the question.
A All right, sir.

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Q But, except the light that came through the door from the kitchen, there was no light in the bed room? A No, sir.

Q And there was only one jet lighted in the kitchen, one gas jet, wasn't there? A There was a light in the kitchen; two lights.

Q There were two? A Yes, sir.

Q And then the deceased came into the kitchen; did he? A Yes, sir.

Q And he said "Villain, I'm not drunk," or words to that effect; did he? A Yes, sir.

Q Well now when you heard those words, "Villain, I'm not drunk," or words to that effect, where were you?

A I got up from the bed (illustrating).

Q Now, don't please, don't act it, but just tell me. You can do that, can't you? A I got up from the bed, and stood in the doorway from the bed room.

Q Yes. You got up from the bed and stood in the doorway? A Yes, sir.

Q That is, on the threshold between your bed room and the kitchen; were you? A Yes; and the kitchen.

Q Then how far away from you was the deceased, at that time? A Well, he come from --

Q Now please, please, won't you just answer my question? When you stood therein front of -- on the threshold, between

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the kitchen and the bed room, how far away from you, at that time, when you first stood there, was the deceased?

A About two steps far.

Q Now what do you mean by two steps? Do you mean two paces or just -- A No, I don't mean two paces. About this far and I stood there (illustrating).

Q Now just wait a minute. Just take that railing as the threshold, and just put yourself back even with this; will you please (indicating). A Yes, sir.

Q Thank you very much. Now we will say that that is the threshold (indicating). A What do you mean? Threshold?

Q Well, the threshold of the door? Do you understand? A Yes.

Q Now how far away was the defendant? A Where this gentleman is standing (indicating the Crier) and he come rushing from the kitchen.

Q Now, now please. I am asking you something else, and you say that, when you were standing there on the threshold of the door, between the bed room and the kitchen that the deceased, when you first observed him, was as far away from you as this court attendant is? A When I first saw him, he was rushing from the kitchen door to the door of the bed room.

Q He was walking toward you? A Well, he was rushing.

Q Well, while he was rushing -- by that do you mean that

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he was running? A No; he was coming (illustrating).

Q Well, was he walking or running? A Well, he wasn't walking or running, but he was rushing; he was walking fast. I don't know what you call that (illustrating) when a man is coming fast. I don't know what explanation you give to it.

Q Well he was walking fast then, was he? A Well, if you want to give that explanation that way, if you put the explanation that way.

Q No, I want you to do it. And you say when you were standing there on the threshold he came walking fast from the door of the kitchen? A Yes, sir.

Q Is that right? A Yes, sir.

Q And how far from the door of the kitchen was he when you first saw him? A How far away the kitchen door was?

Q No; how far away from your brother-in-law were you, or how far away from the kitchen door was your brother-in-law, at the time you say he rushed towards you? A Well, I stood this way (illustrating) and he come rushing this way, and I back into the bed room, and he come after me.

Q No. We are getting confused. Now, Calandra, I want you to understand this. You may sit down, if you are tired, but we will still assume that you are standing there by that railing (indicating). A No; I only stood there --

Q Now please. You understand what I am getting at?

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And that that support or railing is the threshold of the door between the bed room and the kitchen, in your premises? Do you understand that? A Yes, sir.

Q Now how far from you was your brother-in-law, when you first saw him, as you stood there in the threshold of the door? A I told you about two steps far away.

Q But then you told me, before, that you saw him walking from the door toward you? A Well, if you don't let me explain --

Q Well, I am perfectly willing to have you explain. That's what I want. A Well, I am trying to explain.

Q Well go ahead. A And if you let me explain my own way, you can question me afterwards.

Q Thank you. A Well, as soon as I heard him holler to my wife to open the door --

Q No, no. A Well, as soon as I seen him coming, I backed in, and stood by the bed.

MR. ELY: No, no. I object to this. I must repeat the question.

BY MR. ELY:

Q What I want to know is, how far from the threshold of the door were you standing, when you saw your brother-in-law as he came into the kitchen? A The first time I saw him, when

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he come in the second time, I saw him rushing to me, and I backed back.

Q Did you see him coming from the kitchen door?

A yes, sir; right straight to the bed room door.

Q Well, was he in the kitchen when you first saw him?

A yes, sir.

Q How far away from you was he? A Just about two steps.

Q Well, that's about two feet? A Well, he was more than two feet.

Q Well, about three feet? A Yes, about that (indicating).

Q And then you were standing there on the threshold, and he was three feet away from you? A Yes; but he come rushing.

Q Now you have told us that several times. Resume your seat, if you want to. Now then what happened immediately after that? A After that?

Q Yes. Did he say anything then, other than "Villain, you say I'm drunk"? A "You say I'm drunk. I'm going to finish it with you, to-night"(illustrating).

Q Now you remember those words with great accuracy; you are sure that those are the words that he used? A Yes, sir.

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Q "I'm going to finish with you, to-night"? A Yes; "and I'm not afraid of you, and I'm not afraid of your own revolver".

Q Is that what he said? A As far as I remember, yes.

Q "I'm not afraid of you, and I'm not afraid of your own revolver"? A Yes, sir.

Q And you were standing there, in your night clothes?

A No; I wasn't standing there, at that time.

Q Oh, you were not there? A No, sir.

Q Now, don't get excited. A No, I don't.

Q I don't want to excite you in the least. Now what had you done, if you were not standing there, when he said these words that you have just stated, "I'm going to finish you, to-night. I'm not afraid of you. I'm not afraid of your own revolver"?

A I stepped out, back, and laid on the bed, this way (illustrating), and he come into the threshold.

Q And did he stop there? A He get ahold of me (illustrating).

Q Now please. Did he stop there? A He did not.

Q He didn't stop there? A No, sir.

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Q Now, when you had appeared there, at the threshold of the bed room door, you didn 't have anything in your hands; did you? A No,,sir.

Q Do you know how it was that the defendant -- ^{that} the deceased referred to any revolver? A Well, because I guess he knows that I was in the habit of carrying a revolver.

Q Did you have any permit to carry a revolver?
A No, sir.

MR.LE BARBIER: I move that that answer be stricken out, as incompetent.

THE COURT: Denied. I will let the answer stand.

MR. LE BARBIER: Exception.

BY MR. ELY:

Q Now then you saw the deceased coming towards you, and you got in, and lay down on the bed; did you? A I didn't laid down on the bed.

Q Excuse me; what did you say, a moment ago?

MR. ELY: Please repeat that, Mr. Stenographer.

(The previous testimony of the witness is repeated by the stenographer.)

A Well I beg your pardon. I didn 't mean that. I stood by the bed. (Illustrating).

Q Oh, you stood by the bed? A Yes, sir.

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Q And your memory is better now than it was a few minutes ago on the same subject; is it?

MR. LE BARBIER: I object to the characterization by the District Attorney.

THE COURT: Overruled.

MR. LE BARBIER: Exception.

A No, it isn't. I don't explain, because my English is very bad.

Q Eh? A My English is very bad.

Q No, no, your English is very fine. But that is the explanation that you make of the difference in your testimony, then, that your English is bad? A Yes; I mean to say I am standing by the bed, instead of saying I am laying there.

Q Well what happened after that? A He took a hold of me (Illustrating).

Q Who? The deceased? A Yes; and he shake me and throw me to the closet (Illustrating).

Q To the closet? A Yes, sir.

Q And now you say he took a hold of you, and shook you, and threw you to the closet? Did he let go of you, when he threw you to the closet? A He did.

Q And how far away did he throw you? A (No answer).

Q Eh? A Well, if you will show me (Indicating the

diagram).

Q No. You know. Tell me? A How far he was from me?

(The question is repeated by the stenographer.)

A Just about two steps back.

Q Well did you hit the closet? A I banged against the closet, I fell against the closet. There is a little step there.

Q No; I didn 't ask you about at step. Then you did hit up against the closet? A Yes, sir.

Q And the closet was on the side of the room opposite the bed; was it? A Yes.

Q And he went into the room, and caught you by the bed, did he, as you were standing by the bed? A Yes, as I am standing by the bed.

Q And he caught you, and shook you, and threw you across the room to the closet? A Yes, sir.

Q All the way across the room? A Yes; it ain't very far.

Q And the bed -- look at this diagram, and see if you understand it. Do you understand that? A That 's the --

Q Now this is the bed room, do you say (Indicating)?

A Yes, sir.

Q And the bed was on this side (Indicating)? A No, sir; on this side; further to here (Indicating). There was

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where the bed was (Indicating).

Q Now can you read English? A I do; a little.

Q Now do you see that there, "closet"? A Yes, sir.

Q That is the "closet"? Is it? A Yes.

Q And there is another "closet"? A Yes, sir.

Q And was the bed on the same side as the closet?

A Yes, sir.

Q And was it right up against -- whereabouts was the bed? Where do you say it was? A Right here (Indicating). There is the window, and right there was the bed (Marks the diagram).

Q Well, then, the bed was on this side (Indicating)?

A No, sir; right across the closet.

Q Now, you make the bed as you saw it? A Pardon me?

Q I say, you make the bed as you say it was there?

A That way (Illustrating).

Q Now, mark that "bed"? A Yes, sir.

Q Now all that is "bed", is it? A Yes, sir.

Q Now isn't it a fact that the head of the bed was away up here, at that wall (Indicating)? A No, sir.

Q Now where was the bureau? A Right there (Indicating).

Q Well, put the bureau down, too? A Yes, sir. (The witness marks the diagram).

Q Well, mark it "bureau", now, please? A Yes, sir.

Q Now, thank you. And it was on this bureau that you had the revolver; was it? A Yes, sir.

Q Away back here (Indicating)? A Yes, sir.

Q Now this is your mark; is it? A Yes, sir.

Q This is the bureau (Indicating)? A Yes, sir.

Q And that is in the extreme southerly side of the bed room; in the extreme south-westerly side of the bed room?

A I don't understand what you say, now, sir.

Q All right. Then you needn't answer it. But there the bureau is (Indicating)? A Yes, sir.

Q Just right there? A Yes, sir.

Q And there is where it was, that night? A Yes, sir.

Q And the pistol was on the bureau? A Yes, sir.

Q And here was the bed, right there, as you have marked these four lines? A Yes, sir.

Q And you were standing right here, at the bed (Indicating)? A Yes, sir.

Q And he took you, and fired you, leaving go of you, across the room, up to which closet? A That closet (Indicating).

Q Well, you marked that "closet" yourself? A I did, there (Indicating).

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Q Mark it with a "Y," will you, please? A Yes, sir.

Q That's it. Thank you. And that's where he threw you? A Yes, sir.

Q And when he threw you there, where was he standing?

A About there (Indicating).

Q Well put a "D" there, for "defendant"? A Yes, sir.

MR. ELY: That's right. Thank you. Now, if your Honor please, I'll show you. The defendant says this is a bed (Indicating), and he makes it come right up to this partition, you see. And that was the bed. And then the bureau it is away down here, in this end. That, according to points of the compass, would make it in the southwest corner. And he says that the deceased was here, caught him here (Illustrating), and threw him bodily across to here (Indicating).

THE COURT: Now, let the jury see it.

MR. ELY: Now, gentlemen of the jury, the defendant says that here was the bed, in this end of the room, against this partition, and he has drawn these lines here (Indicating), and has marked them "bed". Do you all see it?

And he says the deceased caught him about here (Indicating), and threw him, the defendant, here, to

the closet, the second closet, letting go of him; and that is where the deceased stood when he caught the defendant, and threw him, the defendant, over to the point "Y".

MR. LE BARBIER: Yes; that's right.

THE FIFTH JUROR: Is that figured out in half inches to the foot?

MR. ELY: No. Not yet. Didn't you just see him mark it?

THE FIFTH JUROR: Then give us an idea of the measurement.

THE COURT: Well, the scale is marked on this diagram. From that you may get a sufficient idea, perhaps.

MR. ELY: And the bureau was over there, and the pistol was on the bureau.

THE JUROR: Well, the bureau may have been nearer than that. I am speaking of the distance.

MR. ELY: He has just marked it himself, Mr. Juror. Here is his mark (Indicating).

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BY MR. ELY:

Q Now, after the deceased, as you say, threw you bodily over to the closet, leaving go of you, what happened?

A I talked to him.

Q Then you talked to him? And how far away from you was he when you were talking to him? A One step back.

Q Just one step back? A Yes, sir.

Q Then had he advanced toward you, after he had thrown you? A He stand still (illustrating).

Q He stood still? A He stood still.

Q And he didn't advance toward you, after he had thrown you there against the closet? A It was a case of a few seconds.

Q Oh, in a few seconds, he advanced again? A No, sir, in a few seconds, I talked to him. I said, "Joe --"

Q No, no. I didn't ask you what your conversation was. But, after he had thrown you, as you say, against this second closet, or the further closet in the room, away from the kitchen, he stood there, and talked to you for a few seconds; is that right? A I talked to him first, and he replied.

Q Now, please. A conversation between you, lasting a few seconds occurred while he was standing there; is that right? A Yes, sir.

Q And did you strike up against the closet? A I did.

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Q What part of your anatomy struck against the closet?

A I don't remember what part of my anatomy.

Q And you don't know whether you hit it with your head or knee or nose or what? A I don't know. I banged against the closet this way (illustrating). I guess my hands went against the closet.

Q Well you don't recollect what part of you did hit the closet? A No, sir.

Q And that part that did hit, didn't render you unconscious at all; did it? A No, sir.

Q Well, after a few seconds, what happened? A I told him --

Q No, I am not asking for any conversation. What happened next, what occurred next? A Well there happened some conversation then.

Q All right. Then skipping the conversation, what happened after that? A He swat me.

Q What do you mean when you say he swat you?

A He didn't catch me. He strike me, but he didn't catch me (illustrating). He strike at me but he didn't catch me.

Q He didn't touch you? A No, sir, not touch.

Q And then what happened? A I turned around, and I seen he was rushing for therevolver.

Q Now wait a minute. How could you see that.

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A As I turned around, he was stand right there (illustrating).

Q Well now, the revolver was on the bureau? A Yes.

Q And there was no light in the room, except that which came from the kitchen? A Yes, sir.

Q There was no light in the room, except that which came from the light in the kitchen? A Yes, sir.

Q It was a reflected light, if you understand what that means? A Reflected light from the kitchen, yes. There was two gas jets in the kitchen, lighted.

Q Yes. Now you saw this deceased running toward the bureau then; did you? A Yes.

Q And what did you do? A What I done?

Q Yes. A I rushed for the revolver, too.

Q Oh, you ran toward the bureau, too, did you? A Yes; I did rush for the bureau.

Q And had the deceased been in your room when you had been undressing, that night? A Yes; when I was undressing, and at the time he was in the room.

Q Then he was in your room when you were undressing?

A What's that question again? I don't understand.

Q (Question repeated) A No, I don't understand. He wasn't in my room when I was undressing.

Q And he didn't see you take the revolver out of your

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clothing, and put it anywhere, that night, did he?

A No, sir.

Q And it was dark in this end of the room here, wasn't it? (Indicating) A There was a light from the kitchen.

Q I know. But that light didn't illuminate the room sufficiently to enable you to see well in the back of the room?

A Yes; because there was a window right there (indicating).

Q Wait a minute. To see well down at the back of your bed room; did it? A Yes, sir.

Q And he ran down there, and you ran down there too?

A We both rushed.

Q When what happened then? A As soon as we both rushed, I got the revolver (illustrating).

Q Show me how you got the revolver? A (Illustrating).

Q And you knew where it was exactly, didn't you; you had put it there? A That's how I got the revolver (illustrating).

Q You had put the revolver on the bureau, and you knew exactly where it was? A Yes; suppose that is the bureau (indicating).

Q Now, I am not asking you anything about that at all. I merely asked you if you knew where the revolver was on the bureau. You had put it there that evening, hadn't you?
A I did put it there, that evening.

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Q And you knew where it was, at the time you were rushing for it? A I did; and I saw it and he saw it.

MR. ELY: I object to that, and move to strike it out.

THE COURT: Strike it out.

MR. LE BARBIER: I except.

BY MR. ELY:

Q And then you grabbed the revolver from a point where you knew it was? A I rushed, and grabbed the revolver (illustrating).

Q You got it first? A No; we got there the same instant.

Q Well, now, you have shown us how you had your hand on it; haven't you? A Like that (illustrating).

Q And how did he have his hand on it, if he had it at all? A That way (illustrating).

Q Now, then, he had his hand on your hand? A And the revolver, too.

Q (Question repeated) A (Answer repeated)

Q (Question repeated)

MR. LE BARBIER: I submit that's an answer.

A And he had his hand on my hand and on the revolver, too (illustrating).

BY MY ELY:

Q And then what happened? A He took me, and pulled me out in the kitchen (illustrating).

Q He pulled you all the way through his room (indicating)? A All the way to the kitchen.

Q To the kitchen? A Yes, sir.

Q And then what happened? A He twisted me around (illustrating).

Q Well wait a moment. Yes, go ahead. He twisted you around? A And pushed me, and pushed me, and pushed me against the window (illustrating).

Q And then what happened? A He banged me through the window glass.

Q What did he bang through the window glass? What part of you? A The back.

Q Yes. And had he hit you at all? A Beg pardon?

Q Had he struck you, at all? A The struggle, yes, sure.

Q Well what hand did he hit you with, Calandra?

A He struggle with me. He didn't swat me.

Q Now, that is striking a blow (illustrating). Did he hit you? A No. While there was a struggle, no.

Q No; did he hit you at any time? A He strike at me,

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and I dodge it (illustrating).

Q Now, that's a blow (illustrating). Now did he hit you at any time? A No, sir.

Q All that he did then was, as you say, to catch you by the hand that held the revolver, and then struggle out into the kitchen, and run you up against the window; is that right?

A Yes; we struggled in the same time.

Q Yes. And, after you got up to the window, what happened?

A He banged me against the window (illustrating).

Q Show that again. A He banged me against the window (illustrating).

Q He banged you against the window?

A Yes.

Q And then what happened?

A He saw I won't let go of the revolver.

MR. ELY: I object to that, and ask to have it stricken out.

THE COURT: Yes. Strike it out.

BY MR. ELY:

Q Then tell us what happened. That's giving a conclusion? A Well, he twisted my wrist.

Q Which wrist? A This wrist (indicating the right wrist); and twisted that arm, too.

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Q Now wait a minute. He had you by the right hand-
did he? A Yes.

Q Now that's the way you had the revolver; is it, (illus-
trating), like that? A Yes, sir.

Q Like that (illustrating)? A Yes, sir; and he had
his hand that way (illustrating).

Q Now then, twist my arm, as he twisted yours? A Yes,
sir; (illustrating).

Q And did he bite it too? A Yes.

Q Now show me. You needn't bite hard? A That way
(illustrating).

Q And what happened then? A I twisted my arm back
(illustrating).

Q Well show me what he did. You have shown me how he
bit. Now how did he twist your arm? A No, I twisted my
arm. He twisted it and bit, and I then twisted my arm this
way (illustrating). I had the revolver this way, and he twisted
my arm, and bit (illustrating).

Q Yes. We've had the bite. A And then I pulled
it (illustrating).

Q And you got it away? A I had the pistol all the
time.

Q No. You got your hand away? A No; he always held
me.

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Q He was holding still? A Yes, sir.

Q And then it was that you shot; was it? A And the other hand is trying to pull the revolver, that way (Illustrating).

Q And then you shot? A And when I twisted my arm around, the shot flew off.

Q And then you shot? A I didn't shot. The shot go off.

Q Well but didn 't you tell us that, when you did shoot, you thought you were in danger of your life? A I was.

Q And then you shot? A No, I didn 't shot. I twisted my hand, and the shots go off (Illustrating).

Q And then it was shot by accident, the pistol? A I don't know.

Q But you pulled the trigger? A I don't know. When I twisted my hand around, the shots went off (Illustrating).

Q How many shots? A I don't remember. I guess two or three; I don't remember.

Q Two or three? A I don't remember. I couldn't recollect. I guess it was two shots, I don't remember.

Q Well, but why did you tell me two or three, a minute ago? A Because I didn't recollect, how many shots went off, that minute.

Q And then what happened. Did he get the revolver away

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from you? A Yes.

Q And then it was that he shot at you? A No; he reeled back (illustrating).

Q No, don't do that. You may lose your balance. He reeled back? A Yes, sir.

Q And then what happened? He shot at you? A Yes, sir.

Q Did you see him standing off there, after reeling back, and taking deliberate aim at you (illustrating)? A No; he didn't take no aim at me; he reeled back, and shot (illustrating).

Q And did he shoot up in the air, like that, or shoot at you (illustrating)? A No. I'll show you. He pulled the revolver away from me, and he reeled back, and shot (illustrating).

Q Well, did he shoot up in the air? A I don't know how he shot. He reeled back, and shot. That's what I saw (illustrating).

Q And you say he didn't take any aim at you? A I don't know if he take aim or not. He reeled back and shot (illustrating).

Q And that 's all you know about it? A Yes.

Q And do you remember your wife asking the deceased about his raiment, which was burning there, at this time, over the stomach? A I don't recollect that, at all.

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Q And her saying, "Is it a cigar"? And he said, "No; I am shot"? A I don't recollect that.

Q You don't recollect that, at all? A No, sir.

Q Now don't you remember when you were taken out -- when Tarpey came and took you out into the hall, where your brother-in-law, the deceased, was lying? A I don't recollect.

Q You don't recollect that at all? A No, sir.

Q Well now, as you have told us, a little while ago, you have owned this revolver for how many years? Nine years?

A What, that revolver?

Q Yes? A No; I only got that revolver about four years.

Q About four years? A Yes, sir.

Q And you knew how many chambers the revolver had; did you? A I think there is five chambers there.

Q But I say, you did know then? A Yes, sir.

Q And do know now? A Yes, sir.

Q And it has five chambers? A I think so.

Q And you knew that, if three chambers only were shot, that would be two left; didn't you? A I heard that, in court.

Q What's that? A I heard that in court.

Q No, no. I am not asking you that, at all. You loaded this revolver yourself; didn't you? A Yes, sir.

Q, And you did put five cartridges in it? A Yes, sir.

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Q And you knew, on the night that you took it from the bureau, that it had five cartridges in it? A Yes, sir.

Q And, after you had heard three shot out of it, you knew that there were two left; didn't you? A Yes.

Q And after you say that the deceased staggered back, and shot one shot -- A He --

Q Excuse me. Which you say you don't know was aimed at any body, why, you knew there were still two shots in the revolver; didn't you? A I didn't know how many shots was left in the revolver, at the time, sir.

Q You didn't know? A No, sir.

Q But you have told us that you shot two or three, and that then you heard another shot? A But I didn't know how many shots I had shot, because I was too excited.

Q Now do you mean to tell me now that you don't remember how many shots you shot? Is that right? A Not that I shot, but the shots, while I had the revolver in my hand, and he had his hand on the top of it.

Q Now, after the one shot that you say the deceased shot, when he was not aiming at you, why, the deceased went out of the room; didn't he? A I don't recollect what he done.

Q Why do you mean to say that? You were there? A I was there, but --

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Q And you have just told the jury, have just given to the jury, a very detailed description of everything that occurred up until the time that, as you say, you saw the deceased fire a shot? A Yes, sir.

Q Then you don't remember anything that followed?

A I remember I fell on the chair.

Q Now please. (Question repeated) A yes; I remember I fall on the chair; I remember that I was exhausted, without any strength, you know, wet with perspiration; and I had no more strength in me than a fly after. Then my mind went all in confusion, and was in a blank, and I don't know what I done afterwards, I don't remember.

Q Well how long did that blank continue? A Understand, not a real blank. I was all in confusion. I didn't know what I done.

Q Now, wait. I am taking your own words. How long did the blank continue? A Well, I don't know. I was all in confusion, until the next morning.

Q Well, what is the next thing that you recollect, after you fell into the chair, and your strength had departed, and your mind was a blank, and you were all wet? A Well, I recollect that I was dressed.

Q That you were dressed? A That I dressed.

Q When do you recollect that? A I recollect I went in

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the bed room, and dressed, and put some kind of clothes on, and then --

Q Wait, wait, please. Did you go in and do that, and recollect that you were doing that, the same night, or remember it, the next day? A I did remember it, the next day.

Q You only remembered that, the next day? A Yes, sir.

Q And, when you got to the station house, where you say you saw the pistol, you didn't recollect whether you were dressed or not? A I couldn't tell if I was dressed or not, that minute, no, sir; and I couldn't tell you what I had on, neither.

Q And you didn't know but that you were still in your undershirt and drawers, without your socks? A I couldn't tell you, in that same minute, what I had on; no, sir.

Q And when did you recollect that you did have your shirt and socks and shoes and other clothing on? A I remembered that, the next morning.

MR. ELY: Well, if your Honor please, I won't be able to conclude with this witness.

THE COURT: very good.

Gentlemen of the jury:

Do not talk about this case, or permit any one to talk with you about it; or form or express

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any opinion thereon, until the case shall be finally submitted to you.

Be here promptly, at 10:30 in the morning, gentlemen.

(The trial was then adjourned until Tuesday morning, October 23rd, 1906, at 10:30).

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TRIAL RESUMED.

New York, October 23rd, 1906.

B I A G G I O C A L A N D R A, the defendant, being recalled for further cross-examination, testified as follows:

CROSS EXAMINATION CONTINUED BY MR. ELY:

Q Now this conversation that you say you had with the deceased, in your bed room, on the night of the shooting, after you had been -- after you had begun to struggle, you and the deceased, was this conversation carried on -- in what language was this conversation between you carried on? A I don't quite recollect, but I think it was in the English language.

Q Why, you told me that you recollected what was said, and you told your counsel, with great detail, just what was stated by this deceased; haven't you? A I did.

Q And do you mean now to tell the jury that you don't recollect what language this conversation was conducted in?

A What? During the struggle?

Q That has been my question all along. I haven't been asking you anything else but that. A I didn't understand when you asked me.

MR. LE BARRIER: I submit that he should be made to understand the question. The question should be plain. He says, does he mean to state?

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That is not a proper question. He should ask for the fact.

THE COURT: I overrule your objection.

MR. LE BARBIER: Exception.

BY MR. ELY:

Q (Question repeated) A I want to know what time of the struggle you mean.

Q Now, just begin again, if you are in doubt tell us everything that was said in Italian, and everything that was said between you and the deceased in English, or in Italian?

A Well, I'll try, to the best of my memory, but I can't say every word that was said in English and in Italian.

BY THE COURT:

Q Did you talk in English or in Italian that night?

A I beg pardon, your Honor; we talked in both languages.

Q In both? A Yes, sir.

BY MR. ELY:

Q Now in what language did you talk when the struggle occurred? A In English.

Q And did you talk in English all through the struggle?

A All through the struggle; yes.

Q You are sure of that now; are you? A Yes, sir.

Q And why is it that you didn't recollect, a minute ago, whether it was in English or in Italian? A Well, I didn't

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understand what time did you mean, sir.

Q Oh, then you recollect that, before the struggle commenced, you had been talking in Italian? A Yes, sir.

Q With the deceased? But, after the struggle commenced, that it was nothing but English? A He started talking --

Q Now, please, will you answer that question? A Now, we had a talk in both languages.

Q Now, don't you understand my question? A Yes.

Q Then please answer it, as I have asked it. A I don't understand.

(The question is repeated by the stenographer)

A Yes.

BY MR. ELY:

Q Now, you know Officer Stein; do you?

MR. ELY: Come up here, Officer Stein.

BY MR. ELY:

Q Do you know this officer (indicating)? A Yes, sir.

Q And when did you see that officer for the first time?

A When I seen him? Yes.

Q Yes? A I seen him on the same night this thing happened.

Q And where did you see him? A In my house, in my apartment.

Q What? A In my apartments.

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Q This officer (indicating as before), you saw this officer at your apartments? A I ain't quite sure, but I think so.

Q And what time did you see this officer at your apartments? A I don't recollect.

Q Did you see him anywhere else than at your apartments, on the night in question? A I think I saw him in the station house.

Q That is, on the 20th of July? A If I remember right, I think I saw him in the station house.

Q And now that you have thought the matter over, you still think that you saw this officer, Stein, on the night of the 20th, at your house? A I couldn't quite recollect. I think I saw him in my house, but I don't recollect after the things happened; I couldn't swear to it.

Q Well, now, you do recollect, though, that you saw him at the Police Station? A I think I did; yes.

Q Well, now, you had some conversation with him there; didn't you? A I don't recollect, sir.

Q Well don't you remember that this officer said to you, asked you, what was the trouble, and you answered, "My brother-in-law came to my house, drunk. He came into the bed room to fight me. I was in my underclothes. I am a cripple, and I took the pistol in the fight, and it went off"? A I don't

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recollect any of that conversation, sir.

Q You don't recollect a thing of that conversation?

A No, sir.

Q What? A No, sir.

Q And do you recollect -- will you swear that that conversation didn't take place? A I wouldn't swear one way or the other.

Q Now was this conversation held by you with this officer, "I says," that is, the officer says, "to the defendant, 'well, was there a woman in the case?'" And you said, "No, family trouble." "And I said to the defendant, 'you may as well tell me,'" and you said, "Well, I won't speak no more until I see my counsel." Did you have that conversation with the officer? A I don't recollect, sir.

Q You won't swear that you didn't have it then?

A I won't swear one way or the other.

Q Now isn't it a fact that at any time you refused to answer the questions about this case, until you had the benefit of a conference with counsel?

MR. LE BARBIER: I object to that; that that is a collateral matter, and the District Attorney must be bound by the answer.

THE COURT: He may answer. Objection overruled.

This is cross examination.

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MR. LE BARBIER: Exception.

BY MR. ELY:

Q Go on and answer that question. A Well, I remember that I went out on bail.

MR. ELY: I object to that, and ask to have it stricken out.

THE COURT: Strike it out.

(The question is repeated by the stenographer)

A I did refuse to answer to Assistant District Attorney Cardozo.

Q Well, is he the only persons to whose questions you refused to answer?

MR. LE BARBIER: Objected to, as immaterial, irrelevant and incompetent.

BY MR. ELY:

Q Did you ever refuse to answer questions from any one else but Cardozo?

MR. LE BARBIER: Objected to, as incompetent.

And on the further ground that the witness has a perfect right to state that he will not talk, except by advice of counsel.

THE COURT: Objection overruled.

MR. LE BARBIER: I except. And I further object that this is collateral matter, and that the

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District Attorney must be bound by the answer.

THE COURT: Well, that has not arisen yet.

MR. LE BARBIER: But you held me very close, may it please your Honor, on the examination in chief.

THE COURT: But this is the distinction, that this is not new matter.

MR. LE BARBIER: But it wasn't developed in my direct examination, your Honor; and your Honor held me very close to that.

THE COURT: I will overrule the objection.

MR. LE BARBIER: Exception.

BY MR. ELY:

Q (Question repeated) A The Magistrate asked me, the next day that I was arrested, and I waived examination.

MR. LE BARBIER: I move to strike out the answer, as immaterial, irrelevant and incompetent, and no part of the cross examination or the examination in chief, and because it is collateral matter.

THE COURT: He may answer.

MR. LE BARBIER: Exception.

BY MR. ELY:

Q Did you ever refuse to answer anybody else?

MR. LE BARBIER: Objected to, as before, and as collateral matter.

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THE COURT: He may answer.

MR. LE BARBIER: Exception.

A I don't recollect.

MR. LE BARBIER: I now move to strike out the answer, as incompetent, immaterial and irrelevant.

THE COURT: Is that consented to, Mr. Ely?

MR. ELY: Why, no, sir.

THE COURT: Then I will deny the motion.

MR. LE BARBIER: Exception.

BY MR. ELY:

Q Now, did you ever before the 22nd day of July, 1906, tell either officers Stein or Tarpey that the deceased had attempted to bite you, had bitten your wrist? A I don't recollect if I ever did.

Q Now you told me, and you told your counsel that, you knew on the night of the 20th, during this struggle, that the deceased had attempted to bite your wrist? A He did bite my wrist.

Q Now, excuse me. Answer that question. A He did bite my wrist.

Q Well you did tell me that, and you did tell your counsel didn't you, that, on the night of the 20th, the deceased had attempted to bite your wrist? A He did bite my wrist, yes.

Q No, no. I am not asking you that. You have said that.

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I am asking you if you haven't told both me and your counsel that? A Yes, sir.

Q And you knew that this attempt had been made, on the 20th; didn't you? A Yes.

Q And you were perfectly well aware of that before, as you say, your head got in a swirl, and you got relaxed, and you sank into a chair? A I wasn't aware, at the time, that my head was in a swirl.

Q No. But I ask you before that, before that, you knew, before that, during the struggle you knew -- A Yes; during the struggle.

Q And you don't remember when you first told either officer Tarpey or officer Stein that this attempt had been made to bite you by the deceased? A I don't recollect whether I told him. I recollect my lawyer called my attention to it, Mr. Baker, next day.

Q Where? A In the Yorkville Police Court.

Q So it was your lawyer that ~~he~~ suggested it, was it?

A My lawyer called my attention to it.

Q Was your lawyer there when the occurrence happened?

A No, sir. Mr. Baker, next day --

Q That's all. I didn't ask you any more. Now he wasn't there when the occurrence happened, is all that I asked you.

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A Very well, sir.

RE-DIRECT EXAMINATION BY MR. LE BARBIER:

Q What kind of a bed was that, Calandra? A The bed?

Q Yes, the bed? A A brass bed, with the bars.

Q Just bars? A Large bars in brass.

Q Did the light also show through the sash window?

A Yes.

MR. ELY: I object to that, and I ask to have the answer stricken out, and the witness again cautioned not to answer questions when the objection is made.

THE COURT: I will caution the witness not to answer questions when objections are made. Don't be too swift to answer, when objections are interposed. Go on.

MR. ELY: The answer is stricken out?

THE COURT: Yes.

BY MR. LE BARBIER:

Q Was there anything on the bureau?

MR. ELY: Objected to.

THE COURT: Allowed.

A Yes, sir.

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BY MR. LE BARBIER:

Q Well, what?

MR. ELY: Objected to.

THE COURT: Allowed.

A Well, articles of toilet, of white porcelain, crockery.

Q What did you say? White what? What did you say?

A White crockery vessels, for the toilet; what they use on the bureau. You understand what I mean? I am trying to explain.

BY THE COURT:

Q White toilet articles, you say? A Yes, sir.

Q Were they made of silverware or earthenware?

A Of crockery.

Q (Question repeated) A Earthenware.

BY MR. LE BARBIER:

Q Was there a covering on the bureau? A Yes.

Q What was the color of it? A White.

Q What kind of a revolver is that? A A black revolver.

Q Is it a self-acting, hammerless revolver?

MR. ELY: Objected to, as the revolver speaks for itself, and it is in evidence.

MR. LE BARBIER: I want it for the record; I want it on the record.

THE COURT: I will sustain the objection. The

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révolver being in evidence, the jury can judge for themselves what the nature of it is.

MR. LE BARBIER: Exception.

BY MR. LE BARBIER:

Q After your arrest, when was it you first saw Mr. Vreeland? A On Monday, I think.

Q Did he see your wrist, at that time?

MR. ELY: I object.

BY MR. LE BARBIER:

Q Did he see your wrist, that Monday?

MR. ELY: I object.

BY THE COURT:

Q Do you know whether or not he saw it?

MR. LE BARBIER: Yes, I will withdraw the question, under your Honor's suggestion.

BY MR. LE BARBIER:

Q Do you know whether he saw your wrist, that morning?

A Yes.

BY THE COURT:

Q How do you know it? A He saw it.

Q How do you know it?

MR. ELY: I object. There has been no testimony as to Vreeland, at all. It is Baker that the defendant spoke about.

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THE COURT: Then I will withdraw my question,
and allow you to proceed, Mr. Le Barbier.

BY MR. LE BARBIER:

Q How do you know?

MR. ELY: I object.

MR. LE BARBIER: This is as to the fact of
knowledge, your Honor.

THE COURT: I understand. This is new matter,
and I will allow it.

MR. ELY: I object to it, as not proper re-direct

BY MR. LE BARBIER:

Q How do you know that Mr. Vreeland saw it? A He took
my wrist, and looked at it, (illustrating).

WALLACE N. VREELAND, a witness called on
behalf of the defense, being duly sworn, testified as
follows:

DIRECT EXAMINATION BY MR. LE BARBIER:

Q How old are you? A 41.

MR. ELY: Now, will you kindly caution the
witness to wait until I have had an opportunity to
object?

THE COURT: Mr. Vreeland, be somewhat slow to
answer the questions, so that objections may be inter-

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posed, and ruled on.

THE WITNESS: yes, sir.

BY MR. LE BARBIER:

Q What is your business? A Attorney and counsellor at law.

Q Where? A In this borough, at No. 31 Nassau Street.

Q How long have you been in business? A I have been practicing law for 17 years, and upwards.

Q Yes. Are you with any firm, Mr. Vreeland? A I am associated with the firm of Baldwin & Blackmar.

Q With offices where? A 31 Nassau Street.

Q Do you know the defendant? A I do.

Q How long have you known him? A Four or five years.

Q Did you see him after this occurrence, on 90th Street?

A I did.

Q Were you present at the shooting? A I was not.

Q How long after the shooting did you see him?

A The Monday following, July 23rd.

Q Where? A At the prison in 121st Street, the counsel-room.

Q Did you observe his physical condition? A I did.

Q More particularly with reference to his wrists?

A Yes.

Q What did you observe? A His wrist showed a succession

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of wounds (illustrating), on the outer side of his right wrist, the side nearest the little finger, and arranged in circular fashion, one being on the upper side of his wrist, and another on the other side. Those wounds appear to me to have been --

MR. ELY: I object. I object.

THE COURT: I sustain the objection to appearances.

MR. LE BARBIER: Exception.

BY MR. LE BARBIER:

Q Extending over a distance of about how much?

A Oh, I should say about two inches in length.

Q What kinds of wounds were they?

MR. ELY: Objected to.

BY MR. LE BARBIER:

Q If you know. A They were. --

MR. ELY: I object.

THE COURT: He may describe them, and tell us anything of which he has personal knowledge concerning them.

A They were in process of healing. Each had a scab; each, in size, was approximately an eighth of an inch. To the best of my judgment they were --

MR. ELY: No; I object.

THE COURT: No; we don't want that.

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BY MR. LE BARBIER:

Q Well, did you see them after that again? A I did.

Q How long after? A I saw them on the Wednesday following, when I made an application --

MR. ELY: Objected to.

A (Answer continued) Before Magistrate Walsh --

MR. ELY: I object to any application that he made. This witness must know that this testimony isn't competent. The Wednesday following, is proper, but the rest of the answer is improper; and I ask that it be stricken out, and the witness cautioned.

THE COURT: It may be stricken out.

BY MR. LE BARBIER:

Q Now you say you saw them on Monday? A Yes.

Q And you saw them again on Wednesday? A Yes.

Q Now, had they gone from that wrist to the other wrist?

MR. ELY: I object to that.

THE COURT: The question is not altogether clear to my mind.

MR. ELY: The question is improper, any way.

THE COURT: Change the form of it.

MR. LE BARBIER: He is your witness, Mr. Ely.

CROSS EXAMINATION BY MR. ELY:

Q How long have you been counsel for this defendant?

A Ever since I first knew him.

Q Well, I don't know about that. (Question repeated)

How long, Mr. Vreeland? A About four years.

Q And you have had frequent business with him, during the four years? A No; I have had some.

Q Well, you have had some business with him every one of the four years that you have known him; haven't you?

A I have seen him every year during the years that I have known him.

Q I didn't ask you that.

MR. ELY: And I ask to have it stricken out, and ask to have my question repeated.

THE COURT: Strike it out. It seems not to be directly responsive.

MR. LE BARBIER: Exception.

(The question is repeated by the stenographer)

A I couldn't say positively. I doubt it.

Q You are interested in this case; aren't you?

A I certainly am.

RE-DIRECT EXAMINATION BY MR. LE BARBIER:

Q Are you one of the counsel in this action? A I am.

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THE COURT: Oh, he has stated that, Mr. Le Barbier.

MR. LE BARBIER: That's all, sir.

LUIGI RUSSO, a witness called on behalf of the defense, being duly sworn and examined through the Official Interpreter, Benedetto Morrossi, testified as follows:

DIRECT EXAMINATION BY MR. LE BARBIER:

Q How old are you? A 66.

Q What is your business? A Grocery store.

Q Did you know Joseph Ciofalo, in his lifetime? A Yes.

Q Was he any relation of yours? A He was my son-in-law.

Q Do you know other people who knew him? A A sufficient number of persons.

MR. ELY: He said "many people".

MR. LE BARBIER: I will agree that he said, "many people".

BY MR. LE BARBIER:

Q Do you know what his reputation was for peace and quiet?

MR. ELY: yes or no, that calls for.

A Of an habitual drunkard.

BY MR. LE BARBIER:

Q What was his reputation for peace and quiet?

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MR. ELY: I object to that answer, and I ask to have it stricken out.

THE COURT: Strike it out.

MR. LE BARBIER: Exception.

BY MR. LE BARBIER:

Q Now, I will put this question: Do you know what was his reputation as to sobriety? A That he was a continual drinker, and a drunkard.

MR. ELY: I object to that. He was asked for his reputation. And I ask to have the answer stricken out.

THE COURT: Strike out the answer, and repeat the question. That is the simplest way.

BY MR. LE BARBIER:

Q Do you know what the reputation of the deceased for sobriety was? Yes or no?

THE INTERPRETER: Well, it is, practically, yes.

MR. ELY: Well what did he say?

THE INTERPRETER: "As an habitual drunkard".

MR. ELY: I ask to have that stricken out.

THE COURT: Strike it out.

(The question is repeated by the stenographer)

A Yes.

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BY MR. LE BARBIER:

Q Well, what was it? Good or bad? A Bad, bad.

MR. ELY: Well, now, he understands English, and says, "bad, bad" in English.

BY MR. LE BARBIER:

Q Now do you know what his reputation for peace and quiet was?

MR. ELY: we said no, just now; he answered no to the interpreter's question, and then the interpreter put another question, and he has said, "Si, si, si," several times.

THE COURT: Yes, he has said, "si" "yes", several times, but I will let the interpreter give the answer.

A Yes.

BY MR. LE BARBIER:

Q What was it? Good or bad? A Bad.

CROSS EXAMINATION BY MR. ELY:

Q Now, you say you are the father-in-law of Ciofolo?

A Yes; my son-in-law.

Q And how long ago did your daughter die? Look at me. Wait a minute. Look at me. How long ago did your daughter die? — Answer me in English. A About nine years.

Q About nine years ago? A Yes.

MR. ELY: We don't need you, Mr. Morrossi.

Thank you so much.

BY MR. ELY:

Q Now where have you been living, for the last five years?

A Well, I speak very bad English.

Q No, you speak fine. A No.

Q Well, go ahead. Where do you live now? A 64 Oliver Street.

Q Oliver Street? A Yes.

Q And how long have you lived at 64 Oliver Street?

A About eight years.

Q Eight years? A Yes, sir.

Q And you haven't lived with Joseph Ciofalo since your daughter died, have you? A Yes.

Q Have you lived with him since your daughter died?

A No, sir, no, sir.

Q And he has been living in Washington Street, hasn't he? A (No answer)

Q Do you know where he has been living for the last five or six years? A Him?

Q Ciofalo? A Well some market; I don't know the place.

Q And you haven't seen anything of him for the last five or six years; have you? A I don't understand that.

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Q Now, since you have been living in Oliver Street --

A Yes.

Q You understand that? A Yes.

Q Have you seen much of your son-in-law, Joseph Ciofalo; have you seen him often? A Oh, about sometimes I see him.

Q Once in a while? A Well, a couple of months or three or four months. I see him when I come in from my business, sometimes, two months.

Q Yes. A And I pass there, I see him.

Q When you passed 282 Washington Street, you saw him? A No, I don't see him in Washington Street. I see him in Oliver Street, and sometime in some other place.

Q That is, you see him passing in Oliver Street, or some other street? A Yes.

Q But, practically, you have had no intercourse with him since your daughter died, have you? A I don't understand.

(The question is repeated through the interpreter)

A Yes, we had some business together.

Q Well, I know, but I say that, practically -- well, all right. How long ago did you have some business together?

A Three years or four years ago, or two years ago.

Q Well you really don't remember whether it is one year,

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two years, three years or four or five or six years ago; do you? A No; no, sir.

THE INTERPRETER: we wants to say something to the District Attorney.

MR. ELY: Oh, I don't want that; no.

RE-DIRECT EXAMINATION BY MR. LE BARBIER:

Q What were you going to say?

MR. ELY: I object to that.

THE COURT: No; you must proceed with questions and answers. The witness must not volunteer any information, because we can't tell whether it is competent or not.

MR. LE BARBIER: Exception.

BY MR. LE BARBIER:

Q When you say that you don't recollect the times that you saw him, what do you mean?

MR. ELY: I object, if your Honor please.

THE COURT: I sustain the objection.

MR. LE BARBIER: Exception.

BY MR. LE BARBIER:

Q When did you last see your son-in-law?

MR. ELY: I object. He has told us that he couldn't say whether it was anywhere from one to five

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years.

THE COURT: Sustained.

MR. LE BARBIER: That's just one side, your Honor. We have the right to cross examine on that, on matters brought out. I submit that the rule goes for the defense as well as for the prosecution.

THE COURT: I sustain the objection.

MR. LE BARBIER: Exception.

MR. ELY: Well, if they think that it will do any good, I will withdraw the objection.

MR. LE BARBIER: The objection is withdrawn.

THE COURT: It may be answered, by consent.

MR. LE BARBIER: Please repeat the last question.

(The question is repeated by the stenographer)

A Some five or six months before.

BY MR. LE BARBIER:

Q Before what? A Before seeing him the last time.

Q Well, when was it you saw him the last time? A I can't remember exactly.

Q Can you approximate it? A About some six months from now.

MR. LE BARBIER: The defendant rests.

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R E B U T T A L.

A L L E N G. K E N I S C H, a witness called on behalf of the People, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. ELY:

Q Now, Mr. Kenisch, what is your business or occupation?

A Stenographer.

Q And are you attached to any court? A Coroner's Court, Borough of Manhattan.

Q And were you attached to the Coroner's Court of the Borough of Manhattan as a stenographer, on the 6th day of August, 1906? A Yes, sir.

Q And did you take the minutes before the Coroner, Peter P. Acritelli, in the matter of the inquest into the death of Joseph Ciofalo? A Yes.

Q And did a witness by the name of Angelina Calandra testify at that inquest? A Yes, sir.

Q Now, have you read over your stenographic minutes of the testimony of Angelina Calandra? A Yes, sir.

Q And have you read over the whole of her testimony, the minutes of her testimony? A Yes.

THE COURT: What particular testimony are you seeking to contradict, Mr. Ely? Let me have the page of the minutes here, in this trial.

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MR. ELY: Well, sir, page 270 of the minutes of the present trial.

BY MR. ELY:

Q Now, referring to the testimony: "Q --"

MR. LE BARBIER: Well I object, may it please your Honor.

MR. ELY: Well, I haven't asked the question yet, and I object to the counsel interrupting and objecting now.

THE COURT: Yes. If you will possess yourself in patience, Mr. Le Barbier, I will instruct the witness not to answer this question at all, until it is finished.

MR. LE BARBIER: Permit me to address your Honor.

THE COURT: I will not. I want Mr. Ely to put the question, and then I will hear you.

MR. LE BARBIER: And we except to your Honor's remarks and we object to the question.

THE COURT: Go on, Mr. Ely.

BY MR. ELY:

Q Now did the witness, Angelina Calandra, at any time state, as a witness before the Coroner, at the time that she testified about her brother's coming to the door, and saying, "Open, open, Angelina," testify "My husband said, 'No, no,' but

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I was in a state of embarrassment between what my husband said, and between my brother, who was outside"?

MR. LE BARBIER: Objected to, as immaterial, irrelevant and incompetent; first, on the ground that Mrs. Calandra, the witness, has been a witness on behalf of the People, and is now in court. Secondly, that in no way, and under no authority, as we submit, can the District Attorney seek in any way now to impeach the testimony of that witness.

MR. ELY: Now, just one minute --

MR. LE BARBIER: And, third, he can't ask her whether she testified to something that she wasn't asked directly; and, fourth, that the proper foundation of facts hasn't been laid for the purpose of this testimony.

MR. ELY: Now, if your Honor please, in regard to the first -- in regard to these objections, I have simply to say this: That it is perfectly proper to show that the witness, or a witness, is laboring under a misapprehension or a mistake of fact, to correct the fact; and it is perfectly proper to show that, at a certain time, a witness took a different view than the view that that witness took, at a subsequent time, for the purpose of showing that her recollec-

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tion was not reliable; and it isn't with the view of attacking the incredibility of the witness that the People put on the stand, in the person --

THE COURT: I have already ruled on that point so many times, in the case, that you have the right to contradict your own witness on a specific point, that it is unnecessary to argue it further.

Whether or not this particular matter contradicts, and is germane and proper, is another question.

MR. ELY: Very well, sir. Well, I will withdraw all that, except the words, "no, no."

THE COURT: Now, the testimony in this case is: "Q. When he said these words, 'open, open, Angelina,' what did your husband say to you, if anything?

A. My husband said, 'No, no,' but I was in a state of embarrassment between what my husband said and between my brother, who was outside." You have, therefore, the precise testimony which you are seeking to elicit from this witness.

MR. ELY: Sir?

THE COURT: You have the very question that you are seeking to elicit from the witness.

MR. ELY: But I am asking whether or not she made any statement, at that time, that her husband

said, "No, no," in her testimony before the Coroner's hearing.

THE COURT: very well. I will allow the answer.

MR. LE BARBIER: Exception.

A There is no such testimony in my minutes, and I, therefore, say no.

MR. LE BARBIER: I move to strike out the answer.

THE COURT: No; let it stand.

MR. LE BARBIER: As incompetent, immaterial and irrelevant, and not proper, and not in rebuttal, and no foundation of facts having been laid for this. Exception.

BY MR. ELY:

Q Now, did the witness, Madam Calandra, at any time state at the hearing before the Coroner that her husband said, during the struggle -- or that the deceased said during the struggle -- "This night will end it; and, if you don't stop, I am not afraid of you, and I'll take the revolver"?

MR. LE BARBIER: Objected to, as incompetent, and not in rebuttal, and on all the former objections raised.

THE COURT: Now, what does that contradict, Mr. Ely?

MR. ELY: I have asked her on that point, whether

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she testified on that subject before the Coroner.

MR. LE BARBIER: And on the further ground that it doesn't appear that the question was asked of the witness.

THE COURT: And what was the answer, Mr. Ely?

MR. ELY: I'll have it in a moment, sir.

THE COURT: I think it is page 272, in the middle of the page. Well, answer the question.

A No, sir.

MR. LE BARBIER: I move to strike out the answer, as incompetent, immaterial and irrelevant; and, with your Honor's permission, in support of the motion, I respectfully call your Honor's attention to the fact that, in the Coroner's Court, the witness wasn't asked those questions.

THE COURT: Well, it doesn't appear that she was.

MR. LE BARBIER: May I ask that of the stenographer?

THE COURT: Oh, yes, you may, in due course. But the fact that she didn't give the testimony is all that these questions seek to elicit.

MR. ELY: That's all.

THE COURT: And you may show, in due course,

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that she wasn't asked about it; and it is for the jury to say whether it is of any importance, or not.

BY MR. ELY:

Q Now, did Madam Calandra, at the Coroner's Court, testify: "If you don't stop that, to-night, I am apt to make an end of it, to-night, even with thine own revolver. I am not afraid of thee"?

MR. LE BARBIER: Objected to, as incompetent.

THE COURT: He may answer.

A No, sir.

MR. LE BARBIER: Exception.

BY MR. ELY:

Q Now, referring to page 24 of the Coroner's minutes, was this question asked of Madam Calandra, and did she make this answer: "Q Now I ask you where your husband was at that time? A He came out from the bed room into the kitchen"?

MR. LE BARBIER: Objected to, as incompetent.

THE COURT: Overruled.

MR. LE BARBIER: Exception.

A With this exception. I have it, "He come out from the bed room into the kitchen."

Q You have it, "He come out from the bed room into the kitchen"? A Yes, sir.

Q Well, that's the way you have written it out, too?

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A Yes, sir.

Q Was this question and answer -- was this question propounded to Madam Calandra, in the Coroner's Court, and did she make this answer, just prior to the last question and answer that you have testified to? "Q Where was your husband at the time your brother came back into the room from the hallway? A My brother came into the kitchen as soon as I opened the door"?

MR. LE BARBIER: I object to it, as incompetent.

THE COURT: Allowed.

MR. LE BARBIER: Exception.

A Yes; with the same exception, "My brother come in the kitchen as soon as I opened the door."

Q And the next question and answer follow: "Q Now, I ask you where your husband was at that time? A He came out from the bed room into the kitchen"? A Yes, sir.

CROSS EXAMINATION BY MR. LE BARBIER:

Q Was there any cross examination of the witness in the Coroner's Court? A Well, it is pretty difficult for me to answer that, Mr. Le Barbier. It's a long time ago and I can't answer that, except from my recollection.

BY THE COURT:

Q Well, your record shows every question and answer that

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was asked? A Yes, sir.

Q Now does your record show whether the questions that Mr. Le Barbier inquires about were asked? A Well, I don't recollect that he has asked me any particular question, your Honor.

Q Oh, I thought he had. A No; he simply asked me whether the witness had been cross-examined.

BY MR. LE BARBIER:

Q You don't remember? A The question was, whether there was any cross-examination of the witness?

MR. LE BARBIER: Yes; any cross examination at all.

A Well, it is rather difficult for me to answer it. I don't think I understand the question.

Q Do you remember my being there, at the time?

A Yes; I remember that you did ask questions.

Q But do you remember my asking questions of Mrs. Calandra? A Yes; I remember that.

Q Are you positive of that? A Well, I remember going over my minutes, and seeing that you have.

Q Well, I don't want to mislead you, at all, but don't you remember, as matter of fact, that, when Mr. Cardozo asked questions, and, when he finished, neither Mr. Vreeland or myself asked a single question? I want to be perfectly fair

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with you. A Well, I wouldn't state anything positively from my recollection; only as to what my minutes show.

Q Well, can't you skim down your minutes, and find out whether she was cross examined? A Oh, you are referring only to this one witness?

Q Yes, this particular witness. A Well, I can answer that, in a minute or two, if you will just allow me to look over her testimony.

Q Yes. Do that, please. I think she was the last witness, just before Bauer. A I find by looking over my minutes, that no question was asked of Mrs. Calandra by the counsel for the defendant.

Q Do you remember whether this question was put to the witness --

MR. ELY: Where, Mr. Le Barbier, please?

MR. LE BARBIER: On page 29 of the minutes.

BY MR. LE BARBIER:

Q Was this question asked, and this answer given:

"Q Do you know whether he was addicted to drinking very heavily? A Well, he was in the habit of drinking, yes; but, when he came to my house, he wasn't heavily drinking at all?"

MR. ELY: I object to that. That is not a proper subject of examination by this counsel of this witness. There is no testimony on that subject

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at all.

MR. LE BARBIER: Well, that's the very rule that we contend for. There is no testimony on the other subject, in the Coroner's Court; no questions were asked in the Coroner's Court that were asked here; and we are invoking the same rule.

THE COURT: You may answer the question.

A I can't answer that question, your Honor, without being informed a little further. I don't understand whether the counsellor asks whether this testimony occurred in Mrs. Calandra's testimony, while she was on the stand, in the first place. Am I to so understand?

BY MR. LE BARBIER:

Q Yes. A While she was on the stand?

Q Yes; while she was on the stand, and the question put by the Coroner? A Well, I would have to --

Q Just toward the very last. A Toward the last of Mrs. Calandra's testimony?

MR. LE BARBIER: Yes; toward the last of Mrs. Calandra's testimony.

A That question was asked; yes.

Q And then was the answer given. "A Well, he was in the habit of drinking, yes; but, when he came to my house, he wasn't heavily drinking, at all"? A That's correct.

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RE-DIRECT EXAMINATION BY MR. ELY:

Q Now was this question asked by the Coroner of Mrs. Calandra, and did she make this answer: "Q When your brother first came in, that night, had he been drinking? A No, sir"? A Correct.

Q And was this question asked by the Coroner of Mrs. Calandra, and did Mrs. Calandra make this answer: "Q How much did he drink up there? A Half a glass of beer"? A Correct.

MR. ELY: Now, the next answer is what counsel has asked about:

MR. LE BARBIER: Now, I move, may it please the Court, to strike out all the testimony of this witness, on the ground that it is incompetent.

THE COURT: I will deny your motion, at this time.

MR. LE BARBIER: Exception.

THE COURT: Call your next witness.

JOSEPH RUSSO, a witness called on behalf of the People, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. ELY:

Q Russo, what is your business? A Police officer.

Q And connected with the Municipal Police force of the City of New York? A Yes, sir.

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Q And how long have you been connected with it?

A Four years and seven months.

Q And what is your first name, Russo? A Joseph.

Q Joseph Russo? A Yes, sir.

Q And how are you detailed now? A I am attached to the Third Precinct, and detailed to the District Attorney's office.

Q Well, you are assigned to the Third Precinct, and detailed to the District Attorney's office? A Yes, sir.

Q And how long have you been detailed to the District Attorney's office, about? A One year and nine months.

Q And were you detailed to the District Attorney's office, on the 1st day of August, 1906? A Yes, sir.

Q Now, Russo, what is your nationality? A Italian.

Q And do you know Mrs. Calandra? A Yes, sir.

Q Angelina Calandra? A Yes, sir.

Q And did you see her at the District Attorney's office, on the 1st of August, 1906? A I did.

Q And did you see her put her mark to any paper?

A I did; yes.

Q And, before she put her mark to any paper, do you know of your own knowledge whether she was sworn to it, whether she swore to it? A Yes.

Q And what, if anything, had you to do with taking the testimony of Mrs. Calandra, or with the statement that she

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made, at that time? A I only read the statement over to her.

Q Well, in what language? A In the Italian language.

Q And, after the statement had been read to her in the Italian language, was it then that she made her mark, and swore to it? A Yes, sir.

Q And you correctly interpreted that statement to her?

A To the best of my ability, yes.

Q In the Italian language? A Yes, sir.

Q Now, in that statement did Mrs. Calandra say --

MR. LE BARBIER: Objected to, on the ground that the defendant wasn't present. This is a statement made in the absence of the defendant.

THE COURT: Finish your question, Mr. Ely, and then I will determine.

MR. LE BARBIER: Exception.

THE COURT: I have not ruled at all. There is nothing for me to rule upon. Your objection preceded the question.

BY MR. ELY:

Q Did Mrs. Calandra say: "A knock was at the kitchen door, and I heard my brother's voice say, 'Open. I will tell him I'm not drunk. I only came to reason with him.' I then opened the door, and my brother came in. My husband then left

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the bed room, and came into the kitchen"?

THE COURT: Now, Mr. Le Barbier, make your objection.

MR. LE BARBIER: Objected to, as immaterial, irrelevant and incompetent, and directed simply to impeaching his own witness, and not in rebuttal.

THE COURT: No. Impeaching is where you attack character, not statements. This seems to be an effort on the part of the District Attorney to show, that, at another time and place, the witness made a somewhat different statement. Now, Mr. District Attorney, did you direct the witness' attention to that fact?

MR. ELY: Page 235. "Q Now do you remember -- for the purpose of refreshing -- did you state on the 1st of August, 1906, at the District Attorney's office, 'A knock was at the kitchen door, and I heard my brother's voice say, 'Open. I'll tell him I'm not drunk. I only came to reason with him. I then opened the door, and my brother came in. My husband then left the bed room, and came into the kitchen'."

THE COURT: And what was her answer to that?

MR. ELY: "A. No, he didn't say anything about reasoning."

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THE COURT: Answer the question, Mr. Witness.

MR. LE BARBIER: Exception.

A Yes.

MR. LE BARBIER: I move to strike out the testimony of this witness.

THE COURT: Denied.

MR. LE BARBIER: On the ground that it is incompetent.

THE COURT: denied.

MR. LE BARBIER: Exception.

CROSS EXAMINATION: None.

THE WITNESS: Your Honor, may I make one -- correct one answer?

THE COURT: Yes.

THE WITNESS: I said I was four years and seven months on the police force, where I was four years and five monthson the police force.

RE-DIRECT EXAMINATION BY MR. FLY:

Q Four years and five monthson the police force, instead of four years and seven months? A Yes, sir.

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THOMAS F. PARK, a witness called on behalf of the People, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. FLY:

Q Mr. Park, what is your business? A Commission merchant.

Q And what is your firm, or the corporation with which you are connected? A T. F. Park & Company.

Q And where is your business address? A 344 Washington Street.

Q And how long have you been there? A About three years.

Q And did you know Joseph Ciofalo in his lifetime?

A Yes, sir.

Q And for how long a time did you know him? A Five or six years.

Q And do you know other people who knew him? A Yes.

Q And did you know his reputation for peace and quiet?

A No, I didn't; I only knew him in a business way.

Q Well did you know his reputation -- you didn't know anything about his reputation for peace and quiet, even in a business way? A Only in a business way.

Q What was his reputation for truth and veracity and for peace and quiet, in a business way? A Very good, as far as I know, sir.

CROSS EXAMINATION: None.

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MR. FLY: The People rest.

MR. LE BARBIER: I now move, may it please your Honor, to strike out the testimony of the stenographer for the Coroner, renewing my motion, after your Honor's ruling, solely upon the ground that I understand now that the objection is not pressed upon the part of the District Attorney.

MR. FLY: If the counsel will state, sir, what special part of the testimony given by the Coroner's stenographer that he desires to have stricken out, why, then, I will reply as to whether or not I object. I certainly do object to striking out any of the testimony that the Coroner's stenographer has read from the Coroner's minutes.

But, as to the questions that have been asked the stenographer as to whether or not certain statements were made -- as to whether certain testimony was given at the Coroner's Inquest, and he then stated that he had examined his notes, and he didn't find that testimony, it is specifically a reply -- and I will -- I am willing to state what I am willing to have stricken out. As to whether the defendant said, "No, no," and as to whether the witness said, at the Coroner's inquest, that her brother on the

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night in question said, "This night will end it, if you don't stop. I am not afraid of you, and I'll take the revolver, if you don't stop that. I am apt to make an end of it, to-night, even with thine own revolver. I am not afraid of thee." If that is the objection of the counsel, if that is what he refers to, I am willing to make my statement. Otherwise I am not; because it is part of the cross examination of the Coroner's stenographer -- I am willing to make the statement that these questions were not distinctly asked, or no question was propounded which called, perhaps, distinctly for this testimony.

THE COURT: Well, Mr. Le Barbier?

MR. LE BARBIER: Well, in so far as this specific consent --

MR. NIX: I haven't consented.

MR. LE BARBIER: In regard to that particular testimony. I move in regard to that particular testimony.

MR. NIX: I don't object to that, as far as that is concerned.

MR. LE BARBIER: Well, then, my objection is overruled as to the other testimony, as I understand

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it?

THE COURT: Yes. The point, as I understand it, being where it is sought to show that she didn't give such testimony, and it was shown that she was asked for such testimony? That's stricken out?

MR. JLY: Yes.

MR. LE BARBIER: Exception.

MR. JLY: And there was a motion made by counsel for the defendant to strike out the testimony of Celia Manjanara. And all that she testified to was that she was a bookkeeper, etc., and had written and addressed a certain envelope.

THE COURT: And that was marked for identification?

MR. JLY: Yes, sir. And wasn't admitted to the case. And I am perfectly willing to let that testimony fall, and be stricken out.

THE COURT: Yes, and it was my intention to do so, if not connected, and I so announced. Very well, strike it out. The witness was called to identify a paper, and the paper, not having been offered, it is not a part of the testimony, and I hereby strike it out from the record.

MR. LE BARBIER: And now I move that all the testimony taken subject to a motion to strike out, referring to the minutes of the stenographer, be now stricken out.

THE COURT: Mr. Le Barbier, I cannot rule on a motion made in that broad and general way. Any specific matter that you have in mind, I will then determine whether it has been connected, and, if not, I will strike it out.

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MR. LE BARBIER: Any testimony in any way purporting--
THE COURT: No; you must let me know what

the particular testimony is.

MR. LE BARBIER: Now, then I move to strike out any testimony in any way, or kind or description purporting to make the so-called connection, on the part of Celia Manjanara, in regard to that envelope.

THE COURT: I think I have already stricken out that testimony.

MR. LE BARBIER: From any witness.

THE COURT: Oh, I don't know as to any other witness but herself.

MR. ELY: I suppose he is referring to the doctor's testimony.

MR. LE BARBIER: And that was stricken out.

MR. ELY: No. As to the conversations between the doctor and the defendant, the conversation at which the deceased was present, has been stricken out. There is no question about that. But the facts that the doctor did go and see the defendant, that the doctor then went and saw the defendant's wife; that the doctor saw the defendant again; and that the doctor saw the defendant again at Bensonhurst, in company with Ciofalo, as I understand, remained.

THE COURT: Yes; I think so.

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MR. ELY: And I am not confident whether another part of the testimony remains or not, and therefore, I will not state it, until I look at the minutes here. My best recollection is that it went out, on consent. I remember, it did go out on consent.

MR. LE BARBIER: Yes.

MR. ELY: And that's just exactly what is in the case.

THE COURT: And now any other motion?

MR. LE BARBIER: I now renew my motion, on the whole case, your Honor, that the charge of manslaughter in the first degree be withdrawn from the consideration of the jury, on the ground that the Prosecution has not made out facts sufficient to establish the crime of manslaughter in the first degree.

THE COURT: Denied. You may note your exception.

MR. LE BARBIER: Exception. And I also make the same motion with regard to manslaughter in the second degree.

THE COURT: Note your exception. Denied.

And, of course, the degrees of assault are possible,

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under the crime charged. You desire to make a motion as to that, under the indictment for murder?

MR. LE BARBIER: As to assault?

THE COURT: Yes.

MR. LE BARBIER: No, sir. I don't desire to move as to those matters.

THE COURT: Very well.

MR. LE BARBIER: And I now ask your Honor to advise the jury to acquit, on the ground that the People have not established facts sufficient to establish the crime charged in the indictment, or any crime whatever.

THE COURT: Motion denied.

MR. LE BARBIER: Exception.

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THE COURT'S CHARGE.

Gentlemen of the Jury,

I am requested by the defendant to charge you as follows:

First -- That it is the duty and obligation and the burden of the People, throughout the entire trial, to establish the crime charged beyond a reasonable doubt.

Second -- That the defendant is not required to satisfy the jury as to his innocence, but the People must prove, beyond a reasonable doubt, that the defendant is guilty of the crime charged.

Third -- I decline to charge this request, except as hereinafter I shall charge it, in substance.

Fourth -- That the burden of proof never shifts in a criminal trial.

Fifth -- The rule is that, where there is a reasonable doubt in each of several degrees of crime, if defendant is guilty, he must be convicted of the lowest degree.

Sixth -- If, upon a consideration of the whole case, the jury forms a reasonable doubt, then it is

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their duty to acquit.

Seventh -- That the presumption of innocence attaches to the defendant, and such presumption of innocence is carried by the jury into their final deliberations.

Eighth -- I decline to charge this request, except as hereinafter I may charge it.

And now follow a considerable number of requests touching character. I shall, in my own way, bring this subject to your attention, and, if I do not cover the subject of character fully enough to satisfy the learned counsel for the defendant, I ask that he will repeat to me such as he may desire charged.

Nineteenth -- The rule is that the evidence must to a moral certainty, or beyond a reasonable doubt, exclude or remove every other hypothesis than that of the defendant's guilt.

Twentieth -- That where a reasonable doubt upon the whole case arises from this kind of testimony, the defendant is entitled to the benefit of it, and to an acquittal.

I so charge.

Twenty-first -- I decline to charge this request, except as hereinafter I shall charge it. And so as

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to the twenty-second and twenty-third.

Now, gentlemen of the jury, suffering as I am from a cold, which is apt to attack me in my voice, I hope I shall be able to complete my charge without interruption. But, if I have to stop for a few moments, you will pardon me.

This case is one of homicide, one of the most serious known to the law. The charge of the indictment against the defendant is that of murder in its first degree, the only crime which, under our law, is punishable by death.

With the approval and consent of the District Attorney, I have withdrawn from your consideration the charge of murder; and shall leave it to you to determine whether or not this defendant is guilty of manslaughter in its first degree. I shall not submit any other crime, or degree of crime, unless I am requested so to do by counsel.

Homicide is manslaughter in the first degree, when committed without a design to effect death, in the heat of passion, but in a cruel or unusual manner, or by means of a dangerous weapon.

Now, the primary distinction between murder and manslaughter is this: In murder there is a design

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to effect death; in manslaughter there is no such design. In both murder and manslaughter, there must be a killing, before the crime can be completed.

There is no substantial dispute here, I take it, that Joseph Ciofalo came to his death from a pistol shot wound from a pistol in the hands of the defendant, Biaggio Calanadra, which injuries were inflicted on or about the 20th of July last. And the question for you to determine is, whether or not this crime amounts to manslaughter in its first degree, or, if not, whether it is justifiable or excusable homicide.

I will repeat, therefore, what acts the law says constitute the crime of manslaughter in its first degree. There must be, first of all, the killing of the deceased, and it must be effected without any design to effect his death, but in the heat of passion, and in a cruel or unusual manner, or by means of a dangerous weapon.

If, therefore, all these elements have been proven against the defendant, you may find him guilty of manslaughter in its first degree, unless, under the law as I shall bring it to your attention, in a moment, it is excusable or justifiable.

Homicide is excusable, when committed by acci-

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dent and misfortune, in doing any lawful act, by lawful means, with ordinary caution, and without any unlawful intent.

It sometimes happens to us that, be as careful as we will, our conduct results in serious injury to others, and the law, we seek to punish the depraved mind, as evidenced by evil acts, excuses such accidents and misfortunes which happen when a person is doing what he lawfully may, with ordinary caution, and without unlawful intent.

But the defense here, I take it, is not so much that this homicide was excusable, though I have been requested to bring that to your attention, as that it was justifiable.

Now, justifiable homicide is defined in the law 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 to do some great personal injury to the slayer, and there is imminent danger of such design being accomplished".

Did this defendant at the bar, in his own lawful defense, kill Ciofolo? And, if so, was there reasonable ground to apprehend a design on Ciofolo's

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part to do some great personal injury to the defendant; and, if there was reasonable ground to apprehend, was there, also, imminent danger of this design being accomplished? If so, the homicide alleged to have been committed by the defendant is justifiable, under the law.

Now, in common parlance, gentlemen, that is what is called self defense. It does not mean that, when a person is assailed, he has a right to kill his assailant, that he has the right to visit punishment upon the aggressor; because that must be left to the law. But, if there is imminent danger of grievous personal injury being done to one, and there is reasonable ground to apprehend a design to effect such injury, then a person may act upon appearances, and do whatever is necessary to save himself harmless.

And, before one can justify the taking of life, in self defense, he must show that there were reasonable grounds 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.

I shall not advert to the facts in the case, gentlemen. I shall not review the evidence for your

benefit. My personal feeling and view of that is that, by iterating and reiterating some portions of the evidence, I might, unconsciously and unintentionally impress upon your mind my own view of the case. I am here as a Judge to declare the law, and to leave you to determine the case. Whatsoever I may think is of no consequence. I am not charged with the responsibility of deciding; you are. And, as you are charged with this responsibility, you ought to have, in the fullest measure, the widest discretion in deciding it. I shall not, therefore, advert at all to the facts. You have heard the evidence, and you must depend upon your own recollection of it, not upon the statements made by counsel as to the evidence, at all. It is right and proper for counsel, in summing up the case, to marshal the facts, as they understand them, and claim they are proven, in such a manner as to compel your minds to the conclusion for which they strive.

But you are charged, not with a duty to aid the People in proving the defendant's guilt, nor with the duty of aiding the defense in securing an acquittal, if possible; but to determine, rather, wherein lies the truth; and whether or not, beyond

a reasonable doubt, the facts which constitute guilt have been proven against the defendant.

And, since that is so, you must depend upon your recollection of the evidence; and should there be any failure of recollection on your part, it is right and proper for you to have your memory refreshed by a review of the stenographer's minutes.

Now, I have defined to you the acts which the law says constitute the crime charged against the defendant. I have defined to you what the law says constitutes excusable homicide, and what acts the law says constitute justifiable homicide; and so, in substance, the case is with you.

But there are two matters of testimony that I must, in brief, bring to your attention the law concerning. There is evidence, pro and contra, touching the reputation of the deceased for sobriety and peacefulness.

This evidence was received by consent, and, since it is in the case, it is right and proper for you to consider it.

Now, the bad character of a person slain is of no importance whatever. The law does not give it to any human being to determine whether or not another

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shall be put away, as unworthy to live; and it is as grave a crime before the law to kill the most unworthy of beings, as to kill the best and the noblest of all. But this evidence touching the bad character for peacefulness and sobriety of the deceased has been received as bearing upon the probability or the improbability, if you will, of the defense which the defendant interposed here, that he acted in self defense, and was justified in doing what he did; because, if you believe that the deceased was a man of a drunken disposition, and quarrelsome when in his cups, it may be that you may believe more readily the defense interposed by the defendant; and it is for that purpose, and that purpose alone, that I received the evidence touching the alleged bad character of the deceased. Whether he was so quarrelsome is one of the many questions of fact that it is your duty to determine.

Then we have, also, evidence tending to show that the defendant himself has enjoyed amongst his neighbors a good reputation for peacefulness, and for quietness, and for uprightness of conduct.

You will take this evidence into consideration, gentlemen, and give it the weight and credence that

you think it ought to have.

Evidence of good character, or good character itself, in no way excuses or palliates the commission of crime.

If you are convinced, beyond a reasonable doubt, first of all, that the defendant is a man of the most unblemished and best of good character, and as an independent fact, secondly, that the homicide committed by him was neither excusable nor justifiable, and that it amounted to manslaughter in its first degree, your plain duty will be to so find, disregarding altogether the evidence as to his character. But, when you come to consider whether or not he is guilty, then consider the evidence touching character.

Evidence of good character is sometimes sufficient to create a reasonable doubt, when, without it, there would be no reasonable doubt whatever. It is for you to determine, and it is for you to give the weight and credence that you think it ought to have.

Now, gentlemen, the law is charitable in all things. It requires nothing impossible, and nothing unusual. It presumes the defendant innocent, and

that presumption should accompany you into the jury-room; and it remains the property of the defendant until, by your verdict, you shall pronounce him guilty.

And the People are not only required to prove his guilt, and overcome and rebut this presumption of innocence, but they must satisfy your minds, beyond a reasonable doubt, of his guilt. Having done that, your plain duty is to convict. The law requires nothing more.

If any hypothesis remain, indicating to your mind that it is as likely as not that the defendant is innocent, give him the full benefit of it; and do not convict, if any hypothesis except that of guilt remain.

I said, a moment ago, that the People must prove beyond any reasonable doubt the defendant's guilt.

The term reasonable doubt is one easily understood, but difficult of definition. I can only say to you that you are expected to receive the evidence in this case as reasonable men, and to give it the same careful consideration and honest determination that you would give to the important affairs that daily confront you in your life. If there, you

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were confronted with a situation of doubt, you would know at once whether the doubt was a reasonable one or not. If there be reasonable doubt, the defendant is entitled to the benefit of that. More than that, I cannot say.

The charge, then, that I submit to you for your determination, against the defendant, is whether or not he is guilty of manslaughter in its first degree.

You may retire, gentlemen.

MR. ELY: If the jury want any exhibits, I suppose they will ask for them?

THE COURT: Is it consented that the jury may take with them any exhibits?

MR. LE BARBIER: Yes; they may have them, if they desire them.

THE FOREMAN: We would like to have the pistol and the chart.

THE COURT: Then you may have them, as counsel consent.

The jury returned to the court-room at 5 p.m.

THE COURT: Mr. Foreman, I have a communication from the jury, stating that they would like to know what evidence given by Mrs. Calandra, at the Coroner's inquest, may be considered by them.

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THE FOREMAN: Yes, sir.

THE COURT: You will recall that Mrs. Calandra herself was on the stand, and that, in her cross examination, certain questions were asked, touching her testimony before the Coroner's jury. Whatever was elicited upon her cross examination, you may consider. It is in evidence before you. And then you will recall that the stenographer of the Coroner's court was called, in rebuttal, and that much of his testimony was subsequently stricken out.

I take it that your question, then, relates more particularly to the testimony given by the stenographer, and I will ask the official stenographer to read to you the portions of testimony that still remain in the case.

(The stenographer reads the portions of the testimony required).

MR. LE BARBIER: May I ask your honor about the gentleman's cross examination; what your honor says as to that?

THE COURT: Whatever testimony there is in the record they may consider. You may require, gentlemen.

THE THIRD JUROR: Could I hear the testimony of

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Mrs. Calandra, that she gave, that Officer Tarpey, when he first went there, on cross examination; what Mrs. Calandra testified, on the stand, as to the conversation that was held between officer Tarpey and herself?

MR. ELY: You mean from Mrs. Calandra's testimony?

THE JUROR: Yes, that's what I mean.

(The stenographer reads the testimony)

THE COURT: Does that answer the question of the third juror?

THE THIRD JUROR: Yes, sir.

THE NINTH JUROR: I simply wish the Court to advise us whether we are to consider any of the testimony of Mrs. Calandra, given before the Coroner's jury, as direct evidence in this case.

THE COURT: You may consider whatever testimony remains in the record. I have been trying to have the stenographer read what remains in the record. Her testimony here is the evidence in this case; and it is claimed that she has been some contradictory statements elsewhere, and you may consider her evidence here and the evidence touching her statements elsewhere, and, from all the evidence,

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to determine the truth. You must use your own good sense and judgment, and determine that for yourselves.

MR. LE BARBIER: --

THE COURT: Step forward to the bench, and make any statement that you may desire to make to the Court, in private.

Of course, any testimony that has been heard by you, gentlemen, and subsequently stricken out, by consent, or otherwise, is not before you. Whatever testimony is stricken out must be disregarded and forgotten by you, just as though you had never heard it. But, whatever evidence remains in the case, or whatever testimony remains in the case, is evidence for you to consider. Now, is there any further question?

THE SECOND JUROR: May it please your Honor, may we have the cross examination by Mr. Le Barbier of Mrs. Calandra, following the direct examination by Mr. Ely?

THE COURT: Yes.

MR. HOWE: The complete cross examination?

THE JUROR: Yes.

THE COURT: Yes.

(The cross examination is read by the stenographer)

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THE JUROR: That will be sufficient, if your Honor please.

THE COURT: Now, is there any further question of law that you desire to be informed upon?

THE FOREMAN: No, sir.

THE COURT: Then you may retire.

(The jury again retired, at 5:30 p.m.)

(The jury returned to the court-room, at 6:30 p.m., finding the defendant not guilty).

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DEFENDANT'S REQUEST TO CHARGE.

The defendant respectfully prays this Court to charge the following requests to the jury:-

1.

That it is the duty and obligation and the burden of the people, throughout the entire trial, to establish the crime charged beyond a reasonable doubt.

2.

That the defendant is not required to satisfy the jury as to his innocence, but the people must prove, beyond a reasonable doubt, that the defendant is guilty of the crime charged.

3.

That even assuming, the defendant's story does not satisfy the jury, nevertheless that is not sufficient, but the jury must determine from the People's case, whether or not on the People's case, the people have proved the case beyond a reasonable doubt.

4.

That the burden of proof never shifts in a criminal trial.

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5.

The rule is that where there is a reasonable doubt in each of several degrees of crime, if defendant is guilty he must be convicted of the lowest degree.

6.

If upon a consideration of the whole case the jury forms a reasonable doubt, then it is their duty to acquit.

7.

That the presumption of innocence attaches to the defendant, and such presumption of innocence is carried by the jury into their final deliberations.

8.

That homicide is excusable when committed by accident and misfortune and without any unlawful intent, and that homicide is also justifiable under the statute.

9.

That there is testimony in this case, and that if the jury believe it, believe the testimony of these witnesses upon the subject of the defendant's char-

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acter, there is proof conclusive of good character.

10.

That the presumption of good character which arises as to the defendant's good character, both from the failure to attack it, and from the testimony given, may of itself be sufficient to raise a reasonable doubt as to the defendant's guilt.

Peo. v. Bonier, 179 N. Y. 318.

11.

That no matter how conclusive the testimony may appear to be, the character of the accused may be such as to create a doubt in the minds of the jury, and lead them to believe, in view of the improbabilities, that such a person of such character would not be guilty of the offense charged; that the other evidence in the case is false, or the witnesses mistaken.

Peo. v. Remsen, 43 N. Y. 6.

12.

That evidence of good character may in and of itself raise a reasonable doubt which would warrant a jury in acquitting a defendant, no matter how strong

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the evidence against him may be.

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Peo. v. Seldner, 62 App. Div. 357-363.
Citing many cases; also that of Peo. v.
Remsen 43 N. Y. 6.
Peo. v. Goldberg, 20 App. Div. 444.

13.

That evidence of good character is not only of value in doubtful cases and in prosecution of minor offenses, but is entitled to be considered when the crime charged is atrocious, and also when the evidence tends very strongly to establish the guilt of the accused. It will sometimes of itself create a doubt when without it, none would exist.

Remsen v. Peo. 43 N. Y. 6.
Re-affirmed Peo. v. Bonier, 179 N.Y. 320.

14.

That evidence of good character in the exercise of the sound judgment of the jury may be sufficient to warrant an acquittal, even if the rest of the evidence should otherwise appear conclusive.

Peo. v. Bonier, 179 N. Y. 322.

15.

That proof of good character is of peculiar value in case of this kind, "because the deliberate

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perpetration of the gravest of crimes is so inconsistent with an upright and orderly life as to cause the mind to hesitate and to examine and re-examine the circumstances with the utmost care before accepting them as conclusive proof."

Id. p. 322.

16.

An innocent person may be so surrounded by adverse circumstances that the only reliance is the naked denial, which ordinarily has but little weight, and proof of good character which may have great weight.

Peo. v. Bonier, p. 322.

17.

That from the testimony given by the defendant as to his character and the failure of the People to give any evidence on the subject, a reasonable doubt might arise.

Id. p. 323.

18.

Where the evidence is nearly balanced, but slightly prepondering against the defendant, the pre-

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sumption from proof of good character is entitled to great weight, and will often be sufficient to turn the scale and produce an acquittal.

Peo. v. Bonier, 179 N. Y. 319.

19.

The rule is that the evidence must to a moral certainty, or beyond a reasonable doubt, exclude or remove every other hypothesis than that of the defendant's guilt.

Peo. v. Smith, 162 N. Y. 529.

Citing Ruloff v. People, 18 N. Y., 194.

Peo. v. FitzGerald, 156 N. Y., 253.

20.

That where a reasonable doubt upon the whole case arises from this kind of testimony, the defendant is entitled to the benefit of it, and to an acquittal.

21.

Evidence that he had reason to apprehend some great bodily harm from the acts and motions of the deceased is sufficient under the statute to justify defendant in his action.

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22.

That the reason why such threats are admissible is to show an attempt to execute them when an opportunity occurred and the more ready belief of the accused would be justified to the precise extent of the probability.

23.

For the use of force or violence upon or toward the person of another is not unlawful when committed by the party about to be injured, if the force and violence used is not more than sufficient to prevent such an offense.